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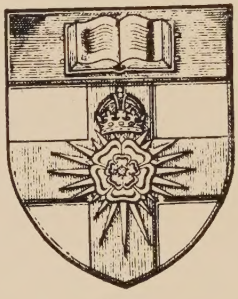

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LAW REPORTS

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THE ALL ENGLAND LAW REPORTS REPRINT

Being a selection from the
LAW TIMES REPORTS
1843—1935

REVISED AND ANNOTATED

1920

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1961

Made and printed in Great Britain by
R. J. Acford Ltd., Industrial Estate, Chichester, Sussex

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O'ROURKE *v.* DARBISHIRE AND OTHERS

[House of Lords (Viscount Finlay, Lord Sumner, Lord Parmoor and Lord Wrenbury), January 20, 22, 23, 26, 27, 29, February 26, 1920]

[Reported [1920] A.C. 581; 89 L.J.Ch. 162; 123 L.T. 68; 36 T.L.R. 350; 64 Sol. Jo. 322]

Discovery—Privilege—Production of document—Legal professional privilege—Solicitor co-trustee of client—Advice on affairs of trust—Displacement of privilege—Advice sought by client for purpose of carrying out fraud—Need to prove primâ facie case of fraud—Document relating solely to case of one party—Need to be admissible in evidence.

The protection from discovery afforded to communications between a solicitor and his client for the purpose of obtaining legal advice exists where the solicitor is a co-trustee of the client and advice is sought regarding the affairs of the trust. Trustees are entitled to consult a solicitor with reference to those affairs, and from the point of view of privilege from discovery there is no valid distinction between their communications with a solicitor who is a co-trustee and a solicitor who is outside the trust altogether. The privilege is confined to communications genuinely for the purpose of getting legal advice and would not extend to mere business communications relating to the trust.

Re Postlethwaite (1) (1887), 35 Ch.D. 726, explained and distinguished.

No privilege from discovery can exist with regard to communications by a client to a solicitor to get advice for the purpose of carrying out a fraud. If such a guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. To get rid of the privilege, however, it is not enough to allege fraud. More is required than a mere charge, or surmise, or conjecture; a primâ facie case resting on solid grounds must be made out by, e.g., admissions on the pleadings of facts which go to show fraud, affidavits in some interlocutory proceedings which also do so, possibly allegations of facts which, if not disputed or met with other facts, would lead a reasonable person to see at any rate a strong probability that there was fraud, but the fact that a motion to strike out the pleadings of the party attacking the privilege has failed does not establish that he has made out a sufficient primâ facie case of fraud for this purpose.

Privilege from discovery on the ground that documents of which disclosure is sought relates solely to the case of one party is not confined to documents which are admissible in evidence. To exempt from inspection only documents which are admissible in evidence would leave open to inspection many documents which might reveal what the case of the opponent is and the evidence by which it is proposed to establish it. The affidavit for discovery of documents includes all documents in the possession and power of the deponent which relate to the matter in question and is not limited to documents admissible in evidence, and it is difficult to suggest any reason why the claim of privilege against production should not cover the same documents.

Trust—Cestui que trust—Right to see all trust documents—Proprietary right—Documents containing professional advice—Displacement of right—Competition between persons all claiming under testator.

A beneficiary is entitled to see all trust documents because they are trust documents and he is a beneficiary. They are in that sense his own, and, apart from any question of discovery, he is entitled to access to them. The right to discovery is a right to see someone else's documents; the proprietary right is a right to access to documents which are your own. Documents containing professional advice taken by executors as trustees contain advice taken by trustees for their cestui que trust, and the beneficiaries are entitled to see them because they are beneficiaries. But it is otherwise in the case of a testamentary disposition by a client. There the privilege does not exist in the case of competition between persons all claiming under the testator. The rule as to the right of a cestui que trust to the production of trust documents does not apply when the question to be tried is whether or not the party is a cestui que trust.

Russell v. *Jackson* (2) (1851), 9 Hare 387, applied.

Discovery—Production of document—Judge asked to inspect document and decide whether privileged—Appealibility of decision.

Where a judge was asked to look at certain documents and decide summarily, as a matter of fairness and not merely on legal considerations, whether they were privileged from discovery,

Held: no appeal lay from his decision (see note infra), but the circumstances in which documents are so submitted must depend on the facts of each case and the language of counsel in making the request.

Bustros v. *White* (3) (1876), 1 Q.B.D. 423, applied.

Decision of Court of Appeal, [1919] 1 Ch. 320, affirmed.

Notes. It has been said that the rule that no appeal lies from the decision of a judge asked to inspect documents and decide on a matter of privilege from disclosure does not apply where inspection takes place by virtue of R.S.C. Ord. 31, r. 19A (2): see 12 HALSBURY'S LAWS (3rd Edn.) 38, para. 54, and *Infields, Ltd.* v. *Rosen & Son*, [1938] 3 All E.R. 591, a decision of the Court of Appeal.

Followed: *Brookes* v. *Prescott*, [1948] 1 All E.R. 907. Referred to: *Minter* v. *Priest*, [1930] All E.R. Rep. 431; *Infields, Ltd.* v. *Rosen & Son*, [1938] 3 All E.R. 591.

As to legal professional privilege see 12 HALSBURY'S LAWS (3rd Edn.) 39–49, and for cases see 18 DIGEST (Repl.), 48–51, 90 et seq.

Cases referred to:

(1) *Re Postlethwaite, Re Rickman, Postlethwaite* v. *Rickman* (1887), 35 Ch.D. 722; 56 L.J.Ch. 1077; 56 L.T. 733; 35 W.R. 563; 3 T.L.R. 604; 18 Digest (Repl.) 118, *1005*.

(2) *Russell* v. *Jackson* (1851), 9 Hare, 387; 21 L.J.Ch. 146; 18 L.T.O.S. 166; 15 Jur. 1117; 68 E.R. 558; 18 Digest (Repl.) 116, *976*.

(3) *Bustros* v. *White* (1876), 1 Q.B.D. 423; 45 L.J.Q.B. 642; 34 L.T. 835; 24 W.R. 721; 3 Char. Pr. Cas. 229, C.A.; 18 Digest (Repl.) 63, *501*.

(4) *R.* v. *Bullivant*, [1900] 2 Q.B. 163; 69 L.J.Q.B. 657; 82 L.T. 493; 16 16 T.L.R. 342; reversed sub nom. *Bullivant* v. *A.-G. for Victoria*, [1901] A.C. 196; 70 L.J.K.B. 645; 84 L.T. 737; 50 W.R. 1; 17 T.L.R. 457; 45 Sol. Jo. 483, H.L.; 18 Digest (Repl.) 116, *988*.

(5) *Russell* v. *Jackson* (1852), 10 Hare, 204; 68 E.R. 900; 8 Digest (Repl.) 385, *778*.

(6) *Knight* v. *Marquess of Waterford* (1836), 2 Y. & C. Ex. 22; 160 E.R. 296; 18 Digest (Repl.) 99, *826*.

(7) *Hey* v. *De la Hey*, [1886] W.N. 101, C.A.; 18 Digest (Repl.) 114, *959*.

(8) *Wynne* v. *Humberston* (1858), 27 Beav. 421; 28 L.J.Ch. 281; 32 L.T.O.S. 268; 5 Jur. N.S. 5; 54 E.R. 165; 18 Digest (Repl.) 119, *1022*.

(9) *Compton* v. *Earl Grey* (1826), 1 Y. & J. 154; 18 Digest (Repl.) 13, *83*.

(10) *R.* v. *Cox and Railton* (1884), 14 Q.B.D. 153; 54 L.J.M.C. 41; 52 L.T. 25; 49 J.P. 374; 33 W.R. 396; 1 T.L.R. 181; 15 Cox, C.C. 611, C.C.R.; 18 Digest (Repl.) 116, *980*.

(11) *Bewicke* v. *Graham* (1881), 7 Q.B.D. 400; 50 L.J.Q.B. 396; 44 L.T. 371; 29 W.R. 436, C.A.; 18 Digest (Repl.) 47, *376*.

(12) *Budden* v. *Wilkinson*, [1893] 2 Q.B. 432; 63 L.J.Q.B. 32; 69 L.T. 427; 41 W.R. 657; 37 Sol. Jo. 649; 4 R. 525, C.A.; 18 Digest (Repl.) 46, *375*.

(13) *Roberts* v. *Oppenheim* (1884), 26 Ch.D. 724; 53 L.J.Ch. 1148; 50 L.T. 729; 32 W.R. 654, C.A.; 18 Digest (Repl.) 53, *405*.

(14) *Talbot* v. *Marshfield* (1865), 2 Drew & Sm. 549; 6 New Rep. 288; 13 L.T. 424; 13 W.R. 885; 62 E.R. 728; 18 Digest (Repl.) 119, *1017*.

(15) *Greenhough* v. *Gaskell* (1833), 1 My. & K. 98; Coop. temp. Brough, 96; 39 E.R. 618, L.C.; 18 Digest (Repl.) 95, *782*.

Also referred to in argument:

Hamilton v. *Nott* (1873), L.R. 16 Eq. 112; 42 L.J.Ch. 512; 18 Digest (Repl.) 46, *368*.

Thomas v. *Rawlings* (1859), 27 Beav. 140; 28 L.J.Ch. 829; 5 Jur. N.S. 667; 54 E.R. 54; 22 Digest (Repl.) 400, *4292*.

Lewis v. *Pennington* (1860), 29 L.J.Ch. 670; 2 L.T. 344; 6 Jur. N.S. 478; 8 W.R. 465; 18 Digest (Repl.) 229, *1956*.

Minet v. *Morgan* (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 21 W.R. 467, L.C. & L.J.; 18 Digest (Repl.) 96, *793*.

Appeal by the plaintiff in the action from an order of the Court of Appeal (reported [1919] 1 Ch. 320), reversing an order of PETERSON, J., for the production of certain documents. The Court of Appeal held that the documents were privileged.

Hughes, K.C., J. B. Matthews, K.C. and *Beddall* for the appellant.

Tomlin, K.C., Douglas Hogg, K.C. and *Dighton Pollock* for the respondents.

The House took time for consideration.

Feb. 26. The following opinions were read.

VISCOUNT FINLAY.—This case raises some important questions with regard to the right to require production of documents. The order made by PETERSON, J., for production was reversed by the Court of Appeal, from whose judgment the present appeal has been brought. The writ in the action was issued on Feb. 11, 1915. The plaintiff's claim is to the estate of the late Sir Joseph Whitworth, who died on Jan. 22, 1887, leaving property real and personal said to be of the value of £1,000,000 or more. The plaintiff claims as representing the heiress-at-law and one of the two next-of-kin of the testator. The representatives of the executors of Sir Joseph Whitworth are defendants. The defendants, Ellen McGowan and Elise Jenkins, are the executrices of the other next-of-kin of the testator. The amended statement of claim was delivered on April 12, 1916, and the defence in June of the same year. The affidavit of documents was filed

on May 1, 1917, and a further affidavit on May 3, 1918. In this last affidavit the defendants claimed that they were not bound to produce a number of documents on the ground of professional privilege, and on the further ground that the documents relate solely to the defendants' case and not to the plaintiff's case, and do not in any way tend to support the plaintiff's case or to impeach that of the defendants'.

The statement of claim alleges that the deceased, Sir Joseph Whitworth, left a will dated Dec. 3, 1884, and four codicils, the effect of which is stated, and that the widow, Lady Whitworth, Mr. Christie, and Mr. Darbishire were the trustees and executors. By the will and the first three codicils it is alleged that provision was made for educational purposes and various legacies were given, the fourth codicil being in the following terms:

> " I declare that the gift in my first codicil of all other property if any not effectually disposed of beneficially by my said will or by that codicil to my wife and Richard Copley Christie and Robert Dukinfield Darbishire for their own absolute benefit in equal shares which gift I have augmented by the provisions of my second codicil shall include all the real and personal estate belonging to me and not otherwise disposed of by my will or any codicil thereto. And I accordingly give to them such real and personal estates in equal shares for their own benefit having full confidence that they will respectively desire to carry out my wishes to the utmost of their power but nothing in this codicil or in my will or my first three codicils contained shall be construed so as to impose any trust upon my residuary legatees and devisees or any of them or in any manner to abridge or qualify their absolute ownership or rights. And subject to the provisions herein contained I hereby confirm my said will and first three codicils."

The statement of claim charges that the trustees and executors took the residuary estate upon a secret trust which was never defined or was invalid by reason of the Mortmain Acts or otherwise (so that there would be a resulting trust for the heir-at-law and next-of-kin), and further that, if the trustees and executors took for their own use and benefit, the dispositions had been obtained by them from the testator by fraud. Particulars were delivered under these two paragraphs stating that the fraud was in devising and carrying out the scheme embodied in the will and codicils whereby the testator was left in the belief that his wishes as to the disposal of the residue of his estate for educational purposes would be carried out by the executors, whereas they intended to appropriate the greater part of the testator's estate for their own use. The statement of claim further alleges that a deed of release dated Dec. 31, 1889, was made between Fanny Uniacke, of the first part, Ellen McGowan, of the second part, the defendant, Joseph Whitworth McGowan, of the third part, and Whitworth's executors, of the fourth part. This deed recited that the parties of the first, second and third parts (the heiress and next of kin of the testator) had expressed their intention to take proceedings for the recall of the probate of Sir Joseph Whitworth's will and codicils, and that a compromise had been arranged on the terms that Whitworth's executors were to pay £75,000 to be divided in the proportion specified between Fanny Uniacke and her children, and Ellen McGowan and Joseph McGowan. By this deed the first, second, and third parties released to Whitworth's executors all the real and personal estate of the testator discharged from all claims. The statement of claim alleges that the execution of this release was procured by fraud of Whitworth's executors in concealing from the other parties to the deed the facts as to the testator's wills and codicils, as alleged earlier in the statement of claim, and that the executors appropriated to their own use a considerable part of the testator's estate. The claim made in the action is that Whitworth's executors should be declared to be trustees for the heir-at-law and next-of-kin of the testator, and that the deed of release should be cancelled or declared not to be binding.

A The application for production of documents was heard in the first instance by PETERSON, J., and he made the order of July 3, 1918, for the production of the documents described in the schedule to that order. The Court of Appeal, consisting of BANKES, WARRINGTON, and SCRUTTON, L.JJ., reversed this order, holding that the documents in question were covered by professional privilege. On the present appeal it was urged on behalf of the plaintiff: (a) That the professional B privilege did not exist, the solicitor being himself one of the trustees and executors; (b) that the plaintiff had what was called a "proprietary right" as one of the cestuis que trust to see all documents relating to the trust; (c) that no privilege exists where the communication has been made for the purpose of carrying out a fraud, and that this was the case with regard to the documents in question.

I shall take these points in order. (a) Mr. Darbishire, one of the three trustees, C acted as solicitor for the trust. The privilege is claimed in respect of communications between him as such solicitor and his co-trustees with reference to the trust. PETERSON, J., held, on the authority of *Postlethwaite's Case* (1) that there could be no privilege where the solicitor consulted was himself one of the trustees. In my opinion, any such proposition is erroneous in point of law, and I think that no such proposition is involved in the decision of NORTH, J., in that case. D Trustees are entitled to consult a solicitor with reference to the affairs of the trust, and the communications between them and their legal adviser are privileged if for the purpose of obtaining legal advice. Why should such communications be less privileged because the solicitor is himself one of the trustees? There is no valid distinction between such communications with the solicitor who is himself a trustee, and such communications with a solicitor who is outside the trust E altogether. Of course, the privilege is confined to communications genuinely for the purpose of getting legal advice. It would not extend to mere business communications with reference to the trust, nor for the purpose of getting legal advice. In the present case the affidavit of May 3, 1918, states that the communications were for the purpose of getting legal advice. No sufficient reason has been shown for discrediting this affidavit as untrue or as made under some misconception of F fact or law. The statement is not inherently incredible, as was suggested on behalf of the appellant, and I think that the Court of Appeal was right in giving effect to it. When the decision in *Postlethwaite's Case* (1) is examined, it will be found that it does not really support the proposition contended for. The judgment must be read with reference to the facts of the case. The plaintiffs were admittedly cestuis que trust of the testator's property. They averred that one G of the trustees had himself secretly purchased part of the trust property and made a profit out of it. As cestuis que trust they had a right to see all the documents relating to the trust passing between the trustees, and this right could not be got rid of by the employment by the one trustee of the other as his solicitor.

(b) It was further urged that the plaintiff, as representing the heir and one of the next-of-kin of the testator, has a right to see any documents relating to the H trust as being one of the cestuis que trust. I assume that the plaintiff is the representative of the heir and next-of-kin, but it does not follow that he is a cestui que trust. By the will and codicils the property is expressed to be given to the trustees and executors absolutely, free from any trust. The plaintiff's case is put in the alternative. The first alternative is that the trustees and executors took I the property on the terms of a secret trust, and that as such trust has failed owing to its not having been sufficiently defined or by reason of the Statutes of Mortmain, the representatives of the heir and next-of-kin of the testator are entitled to the property as on a resulting trust. Whether there was such a secret trust, which has failed, is a matter in dispute in the action, and at present there is not even a primâ facie case that the plaintiff is a cestui que trust on this ground. The second alternative put forward by the plaintiff is that the trustees and executors induced the testator to leave the property to them by fraudulently leading him to believe they would apply it for educational purposes in accordance with his

wishes, while, in fact, they from the first intended to appropriate it to themselves, as it is alleged they have done. No more serious charge could well be put forward. It cannot be assumed to be true for the purpose of obtaining inspection of documents, and it is putting the case with great moderation to say that the appellant has not made out any primâ facie case of the truth of these charges. There is a complete absence of evidence to show that the appellant is in a position to claim inspection on this ground, and there is nothing to show that the "proprietary right," on which the appellant relies, in fact exists. To establish any such right it would further be necessary for the appellant to get rid of the deed of release of Dec. 21, 1889. The release was given so long ago as 1889 and the fraud alleged has yet to be proved. There is certainly no primâ facie case that it can be set aside, and so long as the deed stands the appellant cannot be a cestui que trust.

(c) The appellant also relied on the proposition that no privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud. This is clear law, and if such guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some primâ facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The court will exercise its discretion not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purposes of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a primâ facie case as would make right to treat the claim of professional privilege as unfounded.

A great many cases were cited to your Lordships on the question of professional privilege, but I do not think it is necessary to go through them. *Bullivant's Case* (4) was cited by the respondents. The question there arose, not on application for discovery, but with regard to a witness who was being examined under a commission from the Courts of New Zealand, and who claimed professional privilege. The House of Lords decided that, in the absence of a definite allegation of fraud, the privilege prevailed. The question, what more is necessary to get rid of the privilege, was not discussed. For these reasons I agree with the Court of Appeal in thinking that inspection should, in this case, be refused on the ground of professional privilege, subject to what I shall say as to item 434 later in the judgment.

The Court of Appeal thought that professional privilege was sufficient to dispose of the case, and gave no judgment on the second ground, which was thus stated in the further affidavit:

> "To the best of our knowledge information and belief the said documents numbered 434 and 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action or in so far as they do relate to the same relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff and do not in any way tend to support the plaintiff's case or impeach our own."

This claim was rejected by PETERSON, J., on the ground that on perusal by consent of the documents in item 434 for which, among others, this privilege had been

A claimed, he thought that they might tend to support the plaintiff's case to some extent. He therefore declined to give effect to this claim with respect to any documents, as, in his opinion, the defendants' affidavit must have been made under a misconception of the law applicable to this head of privilege or a misapprehension of the effect of the documents. I agree with the Court of Appeal in thinking that this mistake as to item 434 was not a sufficient reason for treating B this claim as unfounded in all cases. This ground of privilege has been elaborately argued before us, and I propose to state the conclusions at which I have arrived.

The grounds on which privilege under this head was denied were: (i) That such privilege is confined to documents which are admissible in evidence; (ii) that it sufficiently appears in this case that the affidavit in which this privilege is claimed is untrustworthy. There is no case confining privilege of this kind to C documents which are admissible in evidence, and such a limitation would be inconsistent with the principle on which it rests. A great many passages were cited from WIGRAM ON DISCOVERY (2nd Edn.) 1840, in which the documents, which are the subject of this privilege, are described as "evidences," and it was urged that this showed that the privilege could not be claimed in respect of any document not admissible in evidence. It is, however, a mistake to suppose D that "evidences" (an old phrase in English law) necessarily denotes only documents which are admissible in evidence. The principle laid down by WIGRAM ON DISCOVERY (p. 264, para. 346), is that a plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case or to the evidence by means of which that case is to be established. It is obvious that to exempt from inspection only documents which are admissible in evidence would leave open E to inspection many documents which might reveal what the case of the opponent is and the evidence by means of which it is proposed to establish it. A party is entitled to get inspection of any documents relating to his own case. He is not entitled to see documents relating exclusively to his opponent's case in order that he may prepare means of meeting it or try to discover flaws in it. The whole of the plaintiff's argument on this head seems to me to rest on a misconception F of the meaning of the terms "evidences" as used in this connection. Of course, in a very great number of cases the documents which have come into question have been title deeds or other documents which are admissible in evidence, but there is an entire absence of authority to show that the privilege is confined to such documents, and if it were so confined the value of the privilege would be greatly lessened. The affidavit in the present case is in the form which has G been in use for a great many years and your Lordships are now, in effect, asked to say that judges, counsel and solicitors have failed to appreciate the law on a matter of every-day practice, and that every affidavit which has been made claiming such privilege within the memory of man has been erroneous and insufficient. The proposition put forward on behalf of the appellant on this head seems to me to be entirely novel, erroneous on principle, and destitute of authority. I think H the affidavit in the present case is sufficient, and that if it were necessary to rely on this head of privilege, the defendants have properly claimed it.

Some questions of a special nature have arisen with regard to documents under item 434. These documents consist of : (i) A case and opinion of counsel taken on behalf of the testator; (ii) a case and opinion of counsel taken by the trustees I documents should not have been entertained by the Court of Appeal; the decision of PETERSON, J., with regard to them was not appealable. The learned judge was invited by the defendants' counsel to inspect these documents and to say whether they should be produced. He did so and decided that the plaintiff should see them. An order made in the circumstances was in the nature of an award, not a judgment. The statement of PETERSON, J., as to what took place is set out in the appendix. He begins by touching on certain legal considerations and points out that the plaintiff could not claim to inspect the documents under the second and executors after the testator's death. In my opinion, the appeal as to these

head of item 434. He then says that the plaintiff also rested his claim to inspect on the ground that fraud was charged and proceeds thus : A

"Whether this is correct or not I need not consider for the purpose of this part of the case, as in both cases comprised in item 434 counsel for the defendants invited me to peruse the two cases and opinions and say whether, in my judgment, they ought to be produced. I have done so, and although I do not say that the plaintiff will derive much comfort and support from them, in my opinion he ought to have the opportunity of seeing them." B

There are, of course, many cases in which documents are shown to the judge to give him materials for his judgment and to form an element for his appreciation of the case as a judge. PETERSON, J., in the passage which I have quoted above expressly states that he considers it unnecessary to determine a legal point which was raised as he had been invited to say on perusing the documents whether they should be produced. This seems to me to show that he understood that he was invited to decide summarily what should be done as a matter of fairness and not to decide merely on legal considerations. In other words—that he was to arbitrate. His language is quite unequivocal and his decision would be appealable only if it appeared that he had misunderstood the effect of what passed before him. A reference to the proceedings as set out in the supplemental index shows, I think, that he was quite right. At the beginning of the discussion as to this item the counsel for the respondents said : C D

"So far as item 434 is concerned, although our views are that we have good grounds for resisting the production of those [two opinions], we are quite content that your Lordship should see those, and if your Lordship thinks that they ought to be produced then they shall be produced, so that I need not trouble about the principle concerned there." E

This, to my mind, is a clear statement that the respondents would produce the documents if the learned judge on seeing them thought they ought to be produced, and on this basis the parties dispensed with discussion of principle. The undertaking that the documents should be produced if the judge on seeing them thought that they ought to be produced is quite inconsistent with there being any right of appeal from his decision on this point. Later in the argument respondents' counsel said : F

"If the views I put before your Lordship are sound, I submit that this application must fail except so far as your Lordship thinks it is proper that they should succeed on those two cases. Perhaps I may hand those up. [Same handed to his Lordship.] Those are item 434, and if your Lordship thinks that the notes and memoranda in item 435 are not sufficiently claimed we do not mind their seeing those, but with regard to all the rest I submit that the claim must fail." G

Then followed a discussion in which counsel on both sides took part as to whether it was desirable that the judge should have the drafts as well as the cases themselves, and in answer to an observation from the other side as to the case submitted to Mr. Theobald the respondents' counsel said : H

"My friend must not take it in that way. If it is going to be disputed I submit there is great dispute about the first. I invite your Lordship to look at them. As a matter of fact your Lordship will see that that was a case to advise, among others, the executors nominated personally. Even if my friend relies upon *Russell* v. *Jackson* (2) that would not necessarily avail him. It would apply to the right which they might have with regard to advice they had taken for themselves personally. I am leaving it in your Lordship's hands. I do not in the least admit that the first case is a clear case." I

These passages appear to me to show clearly that the matter was left in his Lordship's hands to determine summarily and not in the ordinary way as a

A judge, and they are in conformity with the view which he himself took of his functions under the consent of the parties.

At the close of the judgment PETERSON, J., went through the documents with counsel stating that the documents to be produced included both cases in item 434. The defendants' counsel then asked for leave to appeal "in regard to such parts of your decision as are against us," which PETERSON, J., granted, nothing B being said by anyone as to excepting from the appeal the decision as to item 434. But I do not think that this can alter the effect of what had taken place before the decision. The leave to appeal can operate only on what is appealable. The question is not whether the parties entered into an express agreement that there should be no appeal, but whether they took a course which is inconsistent with the existence of a right to appeal. The fact that general leave to appeal was given C may have been due to inadvertence or to the fact that the parties had not present to their minds at the moment the effect in this respect of the course which had been adopted. I should add that the perfect good faith of counsel in this matter is beyond question. The only point raised is as to the legal effect on the right to appeal of what passed.

In *Bustros* v. *White* (3) (1 Q.B. at p. 427), SIR GEORGE JESSEL, M.R., delivering D the judgment of the Court of Appeal said that where to avoid further affidavits the judge at the desire of both parties has looked into the documents himself and decided whether they should be produced, it is not competent to either party to appeal. The view so expressed by an exceptionally strong Court of Appeal, consisting of eight judges (JESSEL, M.R., KELLY, C.B., JAMES and MELLISH, L.JJ., BAGGALAY, J.A., LUSH and DENMAN, JJ., and POLLOCK, B.), has never—so far as E I am aware—been dissented from, and, in my opinion, it is right. It appears to me to be directly applicable to the facts of the present case in which this course was taken to avoid a legal argument. I cannot agree with the view expressed by BANKES, L.J., that PETERSON, J., was asked to look at the documents merely in order that he might see whether the claim of privilege, on the ground that they related only to the defendants' case, was justified. Such a view is in conflict with F what took place on the argument, and is contradicted by the terms in which PETERSON, J., in his judgment gave his view on what had taken place.

If the right to inspection of the documents 434 had to be determined by legal considerations applicable in cases where the parties have not consented to cut the knot in the fashion adopted here. I think that as to the documents under head (i) the appellant would succeed and that he would fail as to those under G head (ii). As to (i) the case was submitted to counsel and his opinion taken in the lifetime of the testator. Both the plaintiff and the defendants claim under the testator, the plaintiff as representing the heir and the next-of-kin; the defendants as representing his trustees and executors under his will. The foundation of the law of professional privilege is that it is necessary in order that a person may be able without danger to make full disclosure to his professional advisers. H It follows that as between him or his representatives and third persons claiming, not under the testator but adversely to him, the privilege exists, but, as was pointed out by TURNER, V.C., in *Russell* v. *Jackson* (2) (9 Hare, at p. 392), the reason of the privilege does not exist in the case of competition between persons all claiming under the testator, as the disclosure in the latter case can affect no I right or interest of the client. The bill in that case was filed by the next-of-kin against the executors of the deceased, who were also his residuary legatees, and alleged that the gift of the property was made upon a secret trust for the foundation of a school and that the defendants were trustees for the heir-at-law and next-of-kin : see judgment in *Russell* v. *Jackson* (5) (10 Hare, at pp. 207, 208). The solicitor to the testator, who after his death became solicitor to the executors, was examined under commission, and a motion was made to suppress parts of his deposition on the ground of professional confidence. It was held that the communications between the testator and his solicitor might be read, but that the communications

between the executors and the solicitor, after the death of the testator, were privileged. The Vice-Chancellor gives his reasons at length in *Russell* v. *Jackson* (2) (9 Hare, at p. 391–3). BANKES, L.J., in his judgment, says:

> "With reference to the case and opinion in the lifetime of the testator, in my opinion that first case is covered by the conclusion which PETERSON, J., arrived at in another part of his judgment—namely, that a person who claims a document under a proprietary right must first of all establish the existence of that right, and that not having been done in this case it appears to me that the plaintiff must fail in his claim with reference to that first case."

This rule has no application to the point under discussion. As was explained by TURNER, V.C., in the case just cited, it is not by "proprietary right" that the privilege is negatived, but by the fact that as both claim under the testator the ground of this kind of privilege fails. The production of the documents under head (i) could not be resisted on the second ground put forward by the defendants—namely, that they relate only to the defendants' case. PETERSON, J., himself inspected these documents and came to the conclusion that they related in part to the plaintiff's case. With regard to head (ii) under 234 professional privilege would have prevented any right to inspect. The parties have, however, taken a course which makes it unnecessary to consider these legal questions. The Court of Appeal reversed the order of PETERSON, J., in toto. By some inadvertence it was not realised that this order would exempt from inspection in item 435 "memoranda and notes of evidence in actions," and in item 437 "draft and fair copies, bill of costs July, 1882, to December, 1886, and diaries before Jan. 22, 1887," for which protection had not been claimed. These matters should be set right and for the reasons I have given I think that the appeal ought to be allowed under item 434 as regards the cases and opinions both in the lifetime of the testator and after his death; otherwise the appeal should be dismissed.

LORD SUMNER.—This appeal has raised three questions which, as they were copiously and earnestly argued and go to the root of long settled practice, require a reasoned solution, though I do not imagine that the answer to them could ever have been in doubt. These questions are: (i) Does a pleaded charge of fraud strip those, against whom it is made, of the ordinary right to rely on professional privilege as a ground for resisting production of documents? (ii) Is that privilege taken away because the relation of solicitor and client, on which it rests, arises between persons who are trustees and executors, and are in effect parties to the action? (iii) Is the claim to refuse production of documents on the ground that they do not support his opponent's case but only his own, a claim which is available solely for such documents as the claimant could give in evidence in support of his own case?

(i) No one doubts that the claim for professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud, to which both solicitor and client are parties. To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute or stifle an actual fraud. No one doubts again that you can neither try out the issue in the action on a mere interlocutory proceeding, nor require the claimant to carry the issue raised to a successful trial before he can obtain production of documents, which are only relevant to that issue and only sought for the purpose of proving it. I am, however, sure that it is equally clear in principle that no mere allegation of fraud, even though made in the most approved form of pleading, will suffice in itself to overcome a claim of professional privilege, properly formulated. NORTH, J., in the first of the grounds of decision in *Re Postlethwaite* (1) seems to have otherwise held. I think that he

overlooked the fact that, in one of the cases which he relied upon, no fraud appeared on the pleadings at all, and that in the other numerous facts had already been admitted or ascertained. So far, I think that his decision was wrong. If the dicta in *Bullivant's Case* (4) of ROMER, L.J. ([1900] 2 Q.B. at p. 169), and of LORD DAVEY ([1901] A.C. at p. 203), are to be read as supporting such a view, I think they ought not to be followed. As I read the opinion of LORD HALSBURY, he clearly holds that a primâ facie case must be "made out" without purporting to define in what "mode" this is to be done, and without sanctioning a mere pleaded allegation as sufficient. The right of the one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection, are parallel rights; in itself neither is paramount over the other. It is, therefore, the business of the party claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach, because it is being asserted for documents, which were brought into existence in furtherance of a fraud, and he can only do this by establishing a primâ facie case of fraud in fact. Evidence, admission, inference, from circumstances which are common ground, or " what not," as LORD HALSBURY says, may serve for this purpose. I do not pretend to define what material may and what may not be used. The imperfections of his pleadings or the dubious character of his procedure in the action may militate against the claimant's case. The fact that a motion to strike out his pleadings has been made and has failed, does not establish that he has a sufficient primâ facie case for this purpose. The stage in this action is only an interlocutory one and the materials must be weighed, such as they are, without the apparatus of a formal trial of an issue. On such materials the court must judge whether the claim of privilege is displaced or not. This is, as I understand it, the view taken by the Court of Appeal, though expressed in somewhat different language. It is not my business even to form any opinion now as to the plaintiff's prospects at the trial, but I see no ground for thinking that on the material before it the Court of Appeal was not justified in holding that no sufficient foundation had been laid for setting aside the respondent's claim of professional privilege.

(ii) The necessity, which has sometimes been said to be the foundation for the claim of professional privilege, is not the necessity for confiding in the particular solicitor consulted, but the necessity for letting a litigant confide in some solicitor. It is equally obvious that this principle involves allowing the litigant to choose his own solicitor and to consult the person in whom he feels confidence. To limit the persons among whom he can choose might be to deny him a choice. To say that, if he chooses to consult a co-executor, he does so on the terms that their written communications will be open to his opponent, so penalises that particular choice that in effect it is a prohibition. For reasons stated later, I say nothing of the special case when solicitor and client are executors of a will, under which the party claiming production is a beneficiary, but I do not wish to be understood as accepting the appellant's argument, which I think it irrelevant at present to discuss.

(iii) No case has been cited which decides that the right to refuse production of relevant documents, on the ground that they only support the possessor's case, is limited to "evidence" of his case, in the sense that they are such as could be put in evidence by him and form part of his title. Before the Judicature Acts many cases were decided on claims to refuse production of documents, which their possessor might have put in evidence, and none is forthcoming, it seems, in which the documents could not have been so used. The two cases, which were said to have decided the point (*Knight* v. *Marquess of Waterford* (6), and *Hey* v. *De la Hey* (7)), turn out on examination to be decisions on other grounds. Very little can be inferred from such a condition of the reported authorities. It may be accidental. In any case the point turns on different considerations. The orders and rules, made under the statutory authority of the Judicature Acts, are the code which is paramount in matters which they regulate. The same word "relate" is used in them in connection with the obligation to make discovery by affidavit, and

with the right to refuse production on the specified ground in question. In terms neither is limited; and relevancy and that alone is the test. In substance, that must be so as to discovery; and no reason has been suggested why it should not equally be so as to privilege from production, and for many years this has been regarded as settled practice. The contrary would work injustice. I think the appellant's contention fails. A

As to the questions arising upon item 434, the two cases for the opinion of counsel and the opinions of counsel thereon, I am not disposed to allow the appeal. If the documents were submitted to the learned judge in order that he might decide once for all whether they should be produced or not, his decision could not be appealed (*Bustros* v. *White* (3) (1 Q.B.D. at p. 427)), but the reason for this must be that both parties have so intended. The joint request of both parties, that the learned judge should inspect the documents for himself, would in itself raise a presumption that the intention was to submit them for his final decision, but the special language used may negative that. Contrary to the respondents' contention, I think in the present case the language used would not in itself negative that presumption, though it is true that, after the judgment of PETERSON, J., was given, counsel for the present respondents said, "Will your Lordship give us leave to appeal in regard to such parts of your decision as are against us?", which included these particular documents, and leave was given, and at the request of the other side was made "mutual." The case, however, goes further. If the learned judge's decision is unappealable, it is because the parties have agreed that it should be so, and here this is in dispute. Counsel for the respondents says that whatever words he used, this never was his meaning. The agreement, whatever it was, never was reduced into writing and signed, and in themselves the words are susceptible of more than one interpretation. It has not been contended for the appellant that, by accepting counsel's language in the wider sense, his position has in any way been changed on the faith of the words being so intended and understood, and the question, therefore, is whether there was any consensus animorum between counsel if the decision asked for was meant to be appealable and the decision counsel for the appellant assented to take was understood to be unappealable. This controversy has been raised before the Court of Appeal, and in substance decided. Such a case must be exceptional and I think must be rare and must depend mainly upon the statements of counsel. It is hardly a matter suitable for appeal to your Lordships' House, and I see no sufficient reason for interfering with the determination of it, at which the Court of Appeal arrived. B C D E F G

There is a further point as to the opinion of counsel, No. 1 of No. 434. It was taken in the lifetime of the testator and, though the defendants' first affidavit covers it by the description: "Cases and instructions to counsel to advise the executors of Sir Joseph Whitworth as to his will and codicils and counsel's opinion and notes thereon," their second affidavit shows that it consisted of communications "between the testator and his counsel," and only the second is said to have been between counsel and the executors. The lords justices examined the documents in the first item, as PETERSON, J., had done. They agree with PETERSON, J., that they might be used to support the plaintiff's case, and one of the grounds on which protection was claimed, fails accordingly, but they go on to say that the claim of professional privilege covers them. This is the claim of the client, and, if the testator alone was the client, I do not quite see how the defendants could set up professional privilege. It may be, however, that the proposed executors and legatees joined in taking this opinion. I have not seen the papers. PETERSON, J., rejected the claim to refuse production, partly on what has been called the "proprietary" ground, partly because he thought that no professional privilege can be claimed between co-executors. He does not negative the possibility that the proposed executors were also Mr. Theobald's clients in the matter, and, if so, the view of BANKES and WARRINGTON, L.JJ., would be explained. I am not satisfied that your Lordships should interfere. It is a question of particular documents, H I

A not of general principle. The remaining matters relate to the application of well-settled rules to the particular facts of this case in a mere interlocutory proceeding. I agree that the appellant has no claim to see these documents, including the first of the two cases for opinion in No. 434, except under the law relating to discovery, because, while the releases obtained by "Whitworth's executors" stand, to say nothing of the fourth codicil, he cannot claim to see them as being his B documents in any sense. I agree that the appeal should be dismissed with costs.

LORD PARMOOR.—Sir Joseph Whitworth died in January, 1887, seized or possessed of real or personal estate of great value. The appellant is the legal personal representative of Fanny Uniacke, who was the heiress-at-law, and one of the two next-of-kin of the testator. The respondents are the respective legal C personal representatives of the executors of Sir Josph Whitworth. The action related to the estate and testamentary disposition of Sir Joseph Whitworth, and the plaintiff charged that there was either a secret trust or that the executors took the residuary real personal estate for their own absolute use and benefit, and that the form in which the testamentary disposition was arranged or settled was a mere fraudulent device, or scheme, for appropriating to the use of the execu- D tors a very large portion of the estate of the testator. It is not necessary to determine how far the action is well constituted, so long as the probate of the will and codicils of the testator have not been recalled. The appeal must be determined on the pleadings as they stand.

The question is whether an order for production of the documents contained in the second part of the schedule of documents should be made. These documents E relate to the matters in question in the action; but their production is refused, on the ground that they are privileged either as being documents which consist solely of professional communications of a confidential nature, which for the purpose of obtaining legal advice have passed between the executors and their solicitors, or on the ground that the documents either do not in any way relate to the matters in issue in this action, or, in so far as they do relate, relate solely to the case of F the defendants, and not to the case of the plaintiff, and do not in any way tender a support to the plaintiff's case, or impeach that of the defendants. In form, this privilege is sufficiently claimed, but it was urged on behalf of the appellants, that over a long period of years the meaning of the claim for privilege, on the ground that the documents related exclusively to the case of the defendants, had been misunderstood, and that the privilege only extended to such documents as might G be admissible in evidence to support the defendant's case. The claim for privilege was disputed by the appellant on various grounds, and the question for determination is whether, and how far, these objections raised on behalf of the appellant can be maintained.

A cestui que trust, in an action against his trustees, is generally entitled to the H production for inspection of all documents relating to the affairs of the trust. It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust, or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission or the establishment of the status on which the right is based. I agree in the view expressed by PETERSON, J., that the rule as to the right of a cestui I que trust to the production of trust documents for inspection does not apply when the question to be tried in the action is whether the plaintiff is a cestui que trust or not. In the present case not only is the status of the appellant as a cestui que trust disputed, but in addition a release was executed, which, unless it can be set aside, is a bar to his claim. It is not necessary to consider on what grounds the release is attacked, but it is obvious that there may be formidable difficulties in the way of the appellant under this head. The attention of your Lordships is directed to various authorities, but it is sufficient to refer to *Wynne* v. *Humberston* (8), and to *Compton* v. *Earl Grey* (9).

The second point raised, on behalf of the appellant, was based on the proposition that professional privilege does not apply to a case in which a solicitor, who is a trustee, has acted as professional adviser to himself and his co-trustees, who are co-defendants in the action. It was not contended that this principle would apply where professional advice was taken on a personal matter affecting one of the trustees; but in the present case the affidavit of documents shows that the privilege is claimed in respect of documents which do relate to the trust matters in question. It is notorious that, in many cases, solicitors are appointed as co-trustees, with full power to act as solicitors in their professional capacity, in relation to trust matters and to make, in respect thereof, ordinary professional charges. As a matter of principle, it is difficult to understand why confidential communications made to a solicitor, in his professional capacity, should cease to be privileged because such solicitor has been appointed as a co-trustee by the testator with a power to act as solicitor in the affairs of the trust. There is no less necessity in such a case to protect, in the interests of justice, such a disclosure of the facts and conditions as is required to obtain professional and confidential advice. To hold otherwise would deprive a lay trustee of a privilege which would attach to communications made to an outside solicitor, with the result that it might be necessary for him to take such advice in preference to that of the solicitor especially cognizant of the trust affairs. It is not a relevant consideration that communications between co-defendants, none of whom is a solicitor, are not privileged. In the argument on behalf of the appellant, reliance was placed on *Re Postlethwaite* (1). In that case the plaintiff, who sought the production of documents, was undoubtedly a beneficiary. Further, a charge was made in the statement of claim that the purchase in the name of a third person was a fraudulent device, intended to cover up a real purchase by one of the two trustees. As to this it is not necessary to say more since the decision turned on the special circumstances of the case. I agree with WARRINGTON, L.J., that the claim to have the documents produced was placed on the proprietary right of the plaintiff, and not on the ground that the claim of privilege was destroyed owing to the fact that the solicitor consulted was also a co-trustee. If, however, the judgment of NORTH, J., can be extended to cover the claim made by the plaintiff in this case the principle is stated in too wide terms, and cannot be maintained.

The third point relied on by the appellant, as an answer to the claim of professional privilege, is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor, in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle, there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud, or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. Such a case must be differentiated from a case in which after the commission of a crime, or in order to meet a charge of fraud made against him in a civil action, a client consults a solicitor in his professional capacity employing him to obtain the benefit of his confidential advice and assistance. The appellant does make in his pleadings a charge that a fraud has been concocted between the solicitor and client; and the question which arises is, whether such a primâ facie case of a definite character has in some way been brought to the notice of the court as to justify the court in holding that the appellant has the ordinary right of production of documents relating to his case, the defendants in respect of such production not bringing themselves within the protection of professional privilege. It may be that the allegations in the statement of claim, apart from any other source of information, are sufficiently explicit to negative the claim of professional privilege, but the proposition that the mere pleading of fraud is in itself sufficient necessarily to defeat the claim of professional

A privilege cannot be maintained. To admit this proposition would be equivalent to saying that the claim to protection for professional privilege, a claim founded in the interest of the proper administration of justice, could be defeated by the skill of a pleader and the use of technical language, whenever it was desired to obtain an inspection of documents, otherwise privileged, in the expectation of the discovery by this means of information to support a charge of fraud. On the other hand, in B order to obtain the production of documents, it is certainly not necessary to prove the existence of fraud, and such an obligation might result in the non-production of documents, which in a particular instance might constitute the only evidence on which the plaintiff relied to establish his case. In *Bullivant* v. *A.-G. for Victoria* (4), LORD HALSBURY, in advising the House, says:

C "The line which the courts have hitherto taken, and I hope will persevere in, is this—that in order to displace the primâ facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge, either by way of allegation, affidavit, or what not."

This passage relates to the giving of evidence before commissioners, but there D is no difference in the principle applicable in such a case, and to the principle applicable to the production of documents on an interlocutory application. Whether the circumstances brought to the notice of the court in a particular case are sufficiently explicit to establish a primâ facie case of definite fraud, either by allegation, affidavit, or in some other way, will depend on special facts in each case: *R.* v. *Cox and Railton* (10). But something more is required than mere E pleading, or than mere surmise and conjecture. If in the present appeal there is disclosed a real primâ facie case of definite fraud, this must be found in the allegations contained in the pleadings and particulars, seeing that there has been no affidavit, and no information from any other source. In the statement of claim, fraud is alleged, as an alternative to a secret trust, on the ground that the form in which the testamentary disposition of the testator was settled or arranged by F Christie and Darbishire was a mere fraudulent device or scheme for appropriating to the use of Whitworth's executors a very large portion of the testator's estate. This allegation is not supported by the statement of any facts which might give positiveness or distinctness to the charge, but rests on nothing more than pleading, or mere surmise and conjecture. In my opinion, this is insufficient, either to support the right of the appellant to inspection or to defeat the claim of G the defendant to the protection of professional privilege, and I agree with the decision arrived at by the Court of Appeal under this head. I desire to add that the refusal of the court to strike out the statement of claim on the application of the defendants does not of itself establish any case of primâ facie fraud, or make the case other than one of mere surmise and conjecture.

The next question for consideration is whether the claim of privilege has been H sufficiently made in the statement that the documents relate solely to the case of the defendants, and not the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach that of the defendants. It was argued on behalf of the plaintiff that to support the claim for privilege the documents must be such as might be admissible in evidence to support the case of the defendants. I think that this is an impossible contention, and that to assent to it would be to I admit a proposition which is not supportable, either in principle or by authority. The affidavit for discovery of documents includes all documents in the position and power of the deponent which relate to the matter in question and clearly is not limited only to such documents as may be admissible in evidence. Such a limitation would destroy in great part the value of discovery; but if documents must be disclosed in the affidavit of documents independently of whether they are admissible in evidence or not, it is difficult to suggest any reason why the claim of privilege against production should not cover the same documents. For instance,

the copy of a document, although not in itself admissible in evidence, comes within the same category as the original document in so far as concerns the privilege of production, but if there were an obligation to produce, it would give the same information as the document itself, though such a document would itself be protected on the ground that it is admissible in evidence. This novel doctrine assumes that the word "relate" can be read as synonymous with admissible in evidence, an assumption for which there is no warrant. The attention of your Lordships was called to a number of passages in the works of HARE and SIR J. WIGRAM. It is not necessary to consider these passages in detail, but I can find none which supports the proposition that there is no privilege attaching to documents which relate exclusively to the case of one party to an action, unless such documents may be admissible in evidence in support of his case. To quote one passage to the contrary from SIR J. WIGRAM'S book, p. 264, "A plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case, or of the evidence by means of which that case is to be established." Numerous authorities were quoted to your Lordships, in the argument on behalf of the plaintiff, but there is no case which holds that a document, not admissible in evidence, is outside the claim of privilege, although such document relates solely to the opponent's case and not to the case of the party seeking production. *Bewicke* v. *Graham* (11) is a direct authority that the claim of privilege is sufficiently made in the form similar to that used in the present case. Cf. *Budden* v. *Wilkinson* (12). The only cases which could present any difficulty are *Knight* v. *Marquess of Waterford* (6), and *Hey* v. *De la Hey* (7). I have had the advantage of reading the opinion expressed by LORD WRENBURY on these cases, and desire to express my entire concurrence. It was further argued that the affidavit filed on behalf of the defendants was on its face untrustworthy. This argument raises no question of principle, but there appears to be no adequate reason for displacing the oath of Mr. Darbishire. The test to be applied is well stated in *Roberts* v. *Oppenheim* (13) by COTTON, L.J.:

> "We ought not to speculate in order to get rid of the protection claimed, and we ought to accept the affidavit as conclusive unless the court can see distinctly that the oath of the party cannot be relied upon."

In the course of his exhaustive argument counsel for the appellant handed in for the convenience of your Lordships a chart of the documents. Documents 434 (1), if privileged from production, are only so privileged as documents which relate entirely to the case of the defendants: documents 434 (2) may be privileged either under the claim of professional privilege or as documents which relate entirely to the case of the defendants. These documents were inspected by the learned judge, and it was argued that he acted as arbitrator between the parties, with their consent, and that no appeal would lie against the order for production. The matter is not free from doubt, and there was a difference in the understanding of the two counsel, both of whom, with evident sincerity referred to what passed before the learned judge at the trial. It is sufficient to say that I am not prepared to differ from the conclusion of the Court of Appeal. The order of the Court of Appeal includes documents, to the production of which the counsel for the defendants agreed in the hearing before PETERSON, J., and on which no appeal was opened in the Court of Appeal, and documents for which no privilege was claimed in the affidavit of Mr. Darbishire. The order should be that, the respondents undertaking to produce these documents, the appeal should be dismissed with costs.

LORD WRENBURY.—As legal personal representative of the heiress-at-law and one of the next-of-kin of the testator, the plaintiff claims to be entitled to certain part of the testator's estate. His claim is made, not under the will, but upon the footing of an intestacy as regards so much of the estate as upon the face of the will was given to the three executors absolutely in equal third shares. If he is right, the executors are trustees for him and none the less by reason of the fact

A that he claims, not under a gift contained in the will, but by reason of there being, as he says, no effectual beneficial gift there contained. The executors are trustees for whomsoever is beneficially entitled to the testator's property. If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this B case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such C a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries. The first case in *Talbot* v. *Marshfield* (14) is an instance. But this plaintiff cannot, as matters stand, say that he is a beneficiary. That is the very question to be determined in the litigation. Before he can establish that he is a cestui que trust D he has two difficulties to surmount. The one is that he must establish that there is property undisposed of by the will. The will on its face purports to dispose absolutely of the whole. He says there was a secret trust, that this trust failed, and that the funds in the hands of the executors are, as between them and him, bound by a trust which he can enforce, viz., a trust for those who would be entitled if the secret trust failed, as he says it did. One question at issue in the action is E whether there was any such secret trust or whether the executors are right in saying, as they do, that the property was given absolutely to them in equal third shares. The other difficulty is that Mrs. Uniacke (as whose legal personal representative he sues) executed on Dec. 21, 1889, a release which laid the above question at rest in a manner fatal to his claim, and unless and until he succeeds in setting that release aside he has no claim to any part of the estate. F That release is thirty years old; the parties to it are dead. Evidence has thus been lost, and there is no presumption that it will be and no primâ facie case made to lead to the belief that it will be set aside. In this state of facts the plaintiff cannot assert a proprietary right to the documents on the footing that they are his, and cannot enforce inspection on that ground. If authority be needed, *Wynne* v. *Humberston* (8) is clear authority upon the point. This being G so, the plaintiff must succeed, if at all, upon the ground that he has a right to discovery of the documents, a right to inspect them notwithstanding that they are not his, because they relate to the matters in question in the action. Primâ facie he is entitled to inspection on that ground. It is for the defendants to show valid grounds for protecting them from inspection. The grounds upon which they resist H inspection have to be considered under three heads.

The first is professional privilege. As to this the plaintiff says: There is no professional privilege, because the solicitor who was consulted was himself one of the trustees. In my opinion, this contention cannot be supported. Professional privilege is based upon public policy. It is considered that for purposes of justice a client ought to be in a position to go to his solicitor and be wholly untrammelled I in speaking to him without any reserve; that he ought to be in a position to obtain his advice, and that all this should be done under the veil of professional confidence. Lord Brougham in *Greenough* v. *Gaskell* (15) gives the true foundation of the doctrine. I see no ground of principle why this should be affected by the fact that the solicitor is a co-trustee with the client. The appellant says that the solicitor trustee is bound to answer the cestui que trust as to any matter relating to the trust. So he is, unless he is constrained by some superior duty. To say that professional confidence is not a superior duty is to beg the question. If the trustee who is not solicitor is asked the question he is entitled to claim privilege, for

otherwise public policy would be defeated in compelling him to answer. His privilege cannot lapse because the solicitor whom he consults owes a duty to another. And if the trustee who is solicitor is asked he is entitled to reply that he is constrained by the privilege of his client which he is not entitled to break. But, says the appellant, the trustee should have gone to some other solicitor. In the present case the testator in fact by his first codicil authorised the trustee solicitor to act as solicitor to the trust. But I do not rely on this as differentiating the case. There is nothing wrong in employing a co-trustee as solicitor. If privilege would have existed if the solicitor had not been trustee, I cannot see anything that will destroy privilege when he is. Other considerations would arise if the case made were that the trustees were conspiring to defraud the trust, for it is no part of a solicitor's duty to advise his client how to commit a fraud. This is a separate ground which I shall deal with presently. The appellant relies on *Re Postlethwaite* (1). The case differs from the present in material particulars. The plaintiff there was a cestui que trust, there was no question about that. He had a proprietary right, and had that right to see every document in the trustees' hands which had been obtained by them as trustees. Protection could only be claimed (and it was claimed) on the ground that the documents came into existence on an occasion when the lay trustee was consulting the solicitor trustee, not as solicitor to the trust, but as his private solicitor. The illustration given by NORTH, J., in *Re Postlethwaite* (1) (35 Ch.D. at pp. 726, 727) upon his second ground is far from convincing. Not everything that is said at a professional interview between solicitor and client is privileged any more than the whole of a letter, some part of which contains professional advice and another part bears no such character, is privileged. In my opinion this plaintiff, who cannot at present affirm that he is, or even say that he has established a primâ facie case that he is, a cestui que trust, cannot succeed on the ground of proprietary right and cannot, on the mere ground that the solicitor was a co-trustee, exclude the privilege if in other respects it is rightly claimed.

The second question for consideration is whether privilege has rightly been claimed by the defendants on the ground that the documents relate solely to the defendants' case and not to the case of the plaintiff, and do not tend to support the plaintiff's case, and do not contain anything impeaching the defendants' case. Upon this the plaintiff has advanced a contention which is startling to me, that privilege under those words can only be claimed for documents which the defendants could put in evidence at the trial. The words are to be understood, he says, as if they ran "relate solely to and could be used by the defendants in support of their case." My first observation upon this is that these are not the words, and it would have been easy to require these words if this were the meaning. The second observation is that this cannot be the meaning of the words, and for this reason. The verb used is "relate." The same word is used in defining the whole class of the documents as to which the affidavit of documents is to be made. They are all the documents which "relate" to the matters in question in the action, whether they be capable of being given in evidence or not. The documents to which the affidavit is to extend is not confined to documents which somebody could use in evidence. The same meaning must be attributed to the word in the language under consideration. Further, it is obvious that there are many documents which the defendants could not put in evidence which they would be entitled to protect from inspection. The defendant's private diary, which may be most useful to him in enabling him to determine and speak to a relevant date is a document which he cannot put in evidence, but the plaintiff could not get inspection of it. So if the defendant has made a copy of a deed relating only to his own title, or has made for his own use a translation of a document in Norman French, or has prepared for his own guidance a note or abstract of what he is in a position to say in evidence, he could not put the copy or translation or note in evidence (unless as regards the copy deed or the translation the original had been

A lost and he was entitled to use secondary evidence), but the plaintiff could not obtain discovery of such documents as those so as to acquaint himself with the contents of the deed or the nature of the proposed evidence. Numerous authorities have been cited by the appellant in which the word "evidences" has been used, and in which documents which were "evidences" in the sense that the defendant could use them as evidence have been protected. But no cases have been cited in which B an order has been made that documents which were not "evidences" be discovered on the ground that, although privilege was appropriately claimed in all other respects, the opposite party was entitled on that ground to inspect them, unless it be *Knight* v. *Marquess of Waterford* (6) and *Hey* v. *De la Hey* (7). Neither of these cases goes this length. In the former case the map, it was said, "may possibly be evidence of the extent of the manor, and may, therefore, throw some C light on the plaintiff's claims": see 2 Y. & C. Ex. at p. 41. The court rolls were a collection of court rolls which he holds for the benefit of others," and as to the answer and the letters reasons are assigned which support production on grounds of special matters, not grounds of general application. In *Hey* v. *De la Hey* (7), the defendants, by their affidavit, claimed that the documents "were intended to be or might be used by the defendants in evidence," and the court ordered production D on the ground that they could not be so used. They were letters between co-defendants, and the ground was obviously a good one. The documents were discoverable unless there were some other ground of privilege on which the affidavit and the report are alike silent. To found anything upon a report of this kind in the Weekly Notes is, in my opinion, impossible. Upon this point *Bewicke* v. *Graham* (11) is important and establishes, I think, the law as I understand it to E be: see Bray on Discovery (1885 Edn.), p. 485. The defendants' claim of privilege under this second head is, in my opinion, good.

Then the scene changes and the plaintiff says: "Granted all this, it remains that these documents are discoverable because I allege a case of fraud." Here he relies principally upon *Bullivant's Case* (4), and in particular upon the words F of Romer, L.J.:

> "The claim of privilege is unavailing in cases where fraud or illegality is alleged, and, the existence of that fraud or illegality being issued, the documents are relevant to that issue."

To cite these words and rely upon them as laying down a general principle apart from the context and the facts with reference to which they were uttered is, of G course, quite inadmissible. For instance, if the affidavit showed that the documents related to professional advice sought for and obtained by the party in anticipation of litigation or under the stress of litigation in respect of the alleged fraud, no one could dispute that they were protected. The lord justice's words must, of course, be qualified accordingly. Not all documents relevant to the issue of fraud, but documents which are not upon some other ground privileged, are exposed to H production. For the present purpose it is sufficiently accurate to say that documents relating to the conception and carrying out of the alleged fraud are not, but documents arising in professional confidence as to defence against the alleged fraud are, protected. Further, as regards documents which upon the principle above stated are open to inspection, the plaintiff must in asking for them go at any rate so far I as to satisfy the court that his allegations of fraud are not merely the bold assertions of a reckless pleader, but are such as to be regarded seriously as constituting primâ facie a case of fraud resting on solid grounds. Here again a sentence from Lord Davey's opinion in *Bullivant's Case* (4) is to be read carefully and its meaning to be ascertained from the circumstances in which it was uttered. He says:

> "I do not dissent from what was said by Mr. Haldane, that it must be assumed for the present purpose that the case stated in the pleadings is true for the purpose of testing the right to production."

In *Bullivant's Case* (4) an information had been filed in the Supreme Court of Victoria and a commission had been issued to take the evidence of a witness in this country. Upon this examination he was called upon to produce a certain book. The question in the action was whether the defendant was "evading" a statute. In the Court of Appeal the case was decided upon the footing that the allegations of intent to evade were allegations of fraud. The House of Lords reversed the Court of Appeal on the ground that evasion of a statute is not in one sense of the word a fraud and that there was no sufficient allegation of fraud. Upon this state of facts LORD DAVEY'S words obviously fell short far of the meaning that if fraud be alleged the court must assume that it is true. LORD HALSBURY'S words are that "before professional confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." If I may venture to express this in my own words, I should say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the court good ground for saying that primâ facie a state of things exist which, if not displaced at the trial, will support a charge of fraud. This may be done in various ways—admissions on the pleadings of facts which go to show fraud—affidavits in some interlocutory proceedings which go to show fraud—possibly even without admission or affidavit allegations of fact which, if not disputed or met by other facts, would lead a reasonable person to see at any rate a strong probability that there was fraud. may be taken by the court to be sufficient. Every case must be decided on its merits: *R.* v. *Cox and Railton* (10). The mere use of the word "fraud" or the prefix of the adverb "fraudulently" from time to time throughout the narrative will not suffice. The Court of Appeal found in the present case no sufficient allegation of a case of fraud. I agree. The statement of claim "charges" that the testator communicated to his executors a secret trust which was either too indefinite or was invalid by reason of the Mortmain Acts. Suppose he did. Who was defrauded by his doing so? Not the testator, for ex hypothesi it was he who made the communication; he was a party to it and intended it. The next paragraph "charges" that the form in which the testamentary dispositions was (sic) arranged or settled by two of the executors was a fraudulent device for appropriating to the executors a part of the testator's estate and that the third executor was a party to it. This is a "charge" of the existence of a "scheme," not the allegation of any facts which tend primâ facie to support a case of fraud. And there is nothing whatever in the way of admission or evidence or circumstances of suspicion to found a probability or a primâ facie case of fraud. This ground, therefore, in my judgment fails.

As regards the documents Nos. 434 (1) and (2), these were inspected by the judge with the consent of the parties. It is a matter of everyday occurrence that, to save time and dispute, the parties say: "Let the judge see the document," meaning that he is to look at it as further material upon which to base his judicial decision whether it is privileged or not. Not one in such a case intends to make the judge an arbitrator, and I am satisfied that the parties in the present case did not so intend. As to the right decision as regards those, the matter stands thus. No. 434 (1) is a case and opinion taken in the testator's lifetime. No. 434 (2) is a case and opinion taken after his death. In my opinion, both of these are protected, and the order under appeal is right. No. 434 (2) is protected by professional privilege—No. 434 (1) is not: *Russell* v. *Jackson* (2). No. 434 (1), however, is protected upon the grounds stated by LORD SUMNER in his judgment. The defendants giving an undertaking to produce the documents Nos. 435 (2) and 437 (1), this appeal should, in my judgment, be dismissed with costs.

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[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD

[House of Lords (Lord Birkenhead, L.C., Earl of Reading, C.J., Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Buckmaster and Lord Phillimore), December 16, 18, 19, 1919, March 5, 1920]

B [Reported [1920] A.C. 479; 89 L.J.K.B. 437; 122 L.T. 625; 84 J.P. 129; 36 T.L.R. 379; 64 Sol. Jo. 340; 26 Cox, C.C. 573; 14 Cr. App. Rep. 159]

Criminal Law—Murder—Intent—Effect of drunkenness—Incapacity to form intent required to constitute crime—Reduction to manslaughter.

Where a specific intent is an essential element in an offence (e.g., murder) evidence of a state of drunkenness rendering the accused incapable of forming C such an intent should be taken into consideration, with the other facts proved, to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required, he could not be convicted of a crime which was only committed if the intent was proved. This means not that the drunkenness is in itself an excuse for the crime, but that the state of drunkenness may D be incompatible with the actual crime charged, and may, therefore, negative the commission of that crime. On a charge of murder based on an intention to kill, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill, unlawful homicide with malice aforethought is not established, and he cannot be convicted of murder. But, nevertheless, unlawful homicide has been committed by the accused, and, E consequently, he is guilty of unlawful homicide without malice aforethought, namely, manslaughter. Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

F *Criminal Law—Insanity—Defence to criminal charge—Insanity produced by drunkenness—Temporary insanity.*

Insanity, even though only temporary, whether produced by drunkenness or otherwise, is a defence to the crime charged. The law takes no note of the cause of insanity. If actual insanity supervenes as the result of alcoholic G excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause.

Notes. With regard to the statement of the law approved by the Lord Chancellor, infra, that a killing in the course or in furtherance of the commission of a felony was murder, see now s. 1 (1) of the Homicide Act, 1957 (37 Halsbury's Statutes (2nd Edn.) 173, which provides: "Where a person kills another in the course or H furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

Considered: *R.* v. *Betts and Ridley* (1930), 144 L.T. 526; *R.* v. *Stone*, [1937] 3 All E.R. 920. Applied: *R.* v. *Jarmain*, [1945] 2 All E.R. 613. Considered: *R.* I v. *McCarthy*, [1954] 2 All E.R. 262. Referred to: *R.* v. *Canham* (1925), 18 Cr. App. Rep. 163; *Ruse* v. *Read*, [1949] 1 All E.R. 398; *White* v. *White*, [1949] 2 All E.R. 339; *Hill* v. *Baxter*, [1958] 1 All E.R. 193.

As to drunkenness and insanity as affecting criminal capacity see 10 Halsbury's Laws (3rd Edn.) 287–290, 713, and for cases see 14 Digest (Repl.) 69–74.

Cases referred to:

(1) *R. v. Meade*, [1909] 1 K.B. 895; 78 L.J.K.B. 476; 73 J.P. 239; 25 T.L.R. 359; 53 Sol. Jo. 378; 2 Cr. App. Rep. 54, C.C.A.; 14 Digest (Repl.) 71, *328*.

(2) *Reniger* v. *Fogossa* (1562), 1 Plowd. 1, Ex.Ch.
(3) *R.* v. *Grindley* (1819), 1 Russell on Crimes and Misdemeanours (7th Edn.) 88.
(4) *R.* v. *Carroll* (1835), 7 C. & P. 145; 14 Digest (Repl.) 71, *325.*
(5) *Burrow's Case* (1823), 1 Lew. C.C. 75; 14 Digest (Repl.) 69, *317.*
(6) *Rennie's Case* (1825), 1 Lew. C.C. 76; 14 Digest (Repl.) 69, *318.*
(7) *Marshall's Case* (1830), 1 Lew. C.C. 76; 14 Digest (Repl.) 74, *340.*
(8) *Goodier's Case* (1831), 1 Lew. C.C. 76, n; 14 Digest (Repl.) 74, *341.*
(9) *Pearson's Case* (1835), 2 Lew. C.C. 144; 14 Digest (Repl.) 70, *322.*
(10) *R.* v. *Thomas* (1837) 7 C. & P. 817; 14 Digest (Repl.) 74, *344.*
(11) *R.* v. *Meakin* (1836) 7 C. & P. 297; 14 Digest (Repl.) 69, *316.*
(12) *R.* v. *Cruse* (1838), 8 C. & P. 541; 2 Mood. C.C. 53; 14 Digest (Repl.) 71, *326.*
(13) *R.* v. *Monkhouse* (1849), 14 J.P. 115; 4 Cox, C.C. 55; 14 Digest (Repl.) 72, *337.*
(14) *R.* v. *Stopford* (1870), 11 Cox, C.C. 643; 15 Digest (Repl.) 989, *9699.*
(15) *R.* v. *Doherty* (1887), 16 Cox, C.C. 306; 14 Digest (Repl.) 71, *327.*
(16) *R.* v. *Serné* (1887), 16 Cox, C.C. 311; 15 Digest (Repl.) 951, *9191.*
(17) *Felstead* v. *R.*, [1914] A.C. 534; 83 L.J.K.B. 1132; 111 L.T. 218; 78 J.P. 3133; 30 T.L.R. 469; 58 Sol. Jo. 534; 24 Cox, C.C. 243; 10 Cr. App. Rep. 129, H.L.; 14 Digest (Repl.) 365, *3546.*
(18) *R.* v. *Davis* (1881), 14 Cox, C.C. 563; 14 Digest (Repl.) 70, *319.*
(19) *R.* v. *Baines* (1886), Times, Jan. 25; 14 Digest (Repl.) 70, *320.*
(20) *R.* v. *Moore* (1852), 3 Car. & Kir. 319; 16 Jur. 750; 14 Digest (Repl.) 72, *333.*
(21) *M'Naghten's Case* (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Town. St. Tr. 314; 1 Car. & Kir. 130, n; sub nom. *Insane Criminals*, 8 Scott, N.R. 595, H.L.; 14 Digest (Repl.) 60, *246.*

Also referred to in argument:

R. v. *Crisp* (1912), 76 J.P. 304; 28 T.L.R. 296; 7 Cr. App. Rep. 173, C.C.A.; 14 Digest (Repl.) 369, *3576.*
R. v. *Galbraith* (1912), 8 Cr. App. Rep. 101, C.C.A.; 14 Digest (Repl.) 70, *321.*
R. v. *Doody* (1854), 23 L.T.O.S. 12; 6 Cox, C.C. 463; 14 Digest (Repl.) 72, *334.*
R. v. *Horsey* (1862), 3 F. & F. 287; 15 Digest (Repl.) 951, *9185.*
R. v. *Scholey* (1909), 3 Cr. App. Rep. 183, C.C.A.; 14 Digest (Repl.) 330, *3201.*

Appeal by the Crown from an order of the Court of Criminal Appeal whereby the conviction before BAILHACHE, J., at Chester Assizes, of murder of the respondent, Arthur Beard, was quashed, a verdict of manslaughter substituted, and a sentence of twenty years' penal servitude imposed.

The case made at the trial against the respondent was that he attacked a girl aged thirteen years for the purpose of violating her, that the child resisted, that there was a violent struggle or a succession of struggles by the child to free herself from him, and that in the course thereof he placed his hand over her mouth with his thumb on her throat just over the larynx, exercised considerable pressure as was shown by the mark found on the throat, and so caused her death. The medical evidence established that the death of the child was caused by suffocation and violence. The sole defence put forward was that the respondent was so drunk that the jury should find a verdict of manslaughter and not murder.

During a discussion at the trial of the law applicable to the case BAILHACHE, J., said that if a man was violating a woman and she defended herself and the man did something, which killed her, to prevent her from screaming or struggling, he committed murder, and in his summing up he directed the jury to the same effect. On this point, the Court of Criminal Appeal held that BAILHACHE, J., was right. As to the defence of drunkenness the direction of the judge at the trial was that the defence could only prevail when it was proved that the accused person did

not know what he was doing or did not know that he was doing wrong. The Court of Criminal Appeal disagreed with the judge upon this point on the ground that the direction was less favourable to the accused than the test laid down in *R.* v. *Meade* (1), which distinguished between the law relating to insanity and that applicable to drunkenness, and established that the presumption that a man was taken to intend the natural consequences of his act might be rebutted in the case of a man who was drunk by showing that his mind was so affected by drink that he was incapable of knowing that what he was doing was dangerous. The court was, therefore, of opinion that the verdict must be reduced to one of manslaughter, and the Crown appealed and asked that the sentence of murder should be restored.

The Attorney-General (*Sir Gordon Hewart, K.C.*), *the Solicitor-General* (*Sir Ernest Pollock, K.C.*), *Sir Ellis Griffiths, K.C.*, *Sir Richard Muir*, *Branson*, and *Ralph Sutton* for the Crown.

Artemus Jones, K.C. (with him *Austin Jones* and *Dallas Waters*) for the respondent.

The House took time for consideration.

Mar. 5. **LORD BIRKENHEAD, L.C.,** read the following opinion of the House. —Arthur Beard was convicted of murder at Chester Assizes and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal servitude. The case is brought to your Lordships' House under s. 1 (6), of the Criminal Appeal Act, 1907, upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance.

The facts which are relevant may be shortly stated. About 6 p.m. or a little later, on July 25, 1919, a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in the discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and, when she struggled to escape from him, he placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation. There was some, but not much, evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. This evidence was of a character which is not unusual in crimes of violence, but in view of the legal problems, to which this case has given rise, it requires examination. A witness met the prisoner on July 25 at 2 p.m. at a public-house where they stayed together drinking for about twenty minutes. This witness states that the prisoner was then neither drunk nor sober. They proceeded together to a club where the prisoner purchased and brought away a bottle of whisky. Another witness, whose position was one of authority over the prisoner, saw him at 6.15 p.m. at the mill and found no indication that he was drunk. About twenty minutes to seven—that is, immediately after the offence had been committed—one Jones came to the mill to meet the prisoner. A few minutes before seven they went to another public-house and had some drink. The prisoner was then introduced for membership of a trade union; he answered not unintelligently certain questions which were put to him, and he was, upon the strength of such answers, accepted as a member. When the police came upon the scene in the early morning of July 26, they found him excited and under the influence of drink. The prisoner was not called at the trial, but statements made by him were put in evidence. His first statement to the police officers was admittedly untrue and was concocted by him to explain the finding of the body of the girl. In his later statements he said that he asked the girl to kiss him and that he had a struggle with her and then seemed "to lose his senses," that he would not have injured the girl if he had not been "sodden and mad with drink," and that "it was the whisky that put the finishing touch to it."

Counsel for the defence did not dispute the prisoner's criminal responsibility for the homicide of the girl. The only defence presented was that, in the circumstances proved, the verdict should be manslaughter and not murder on the ground that there was no intention on the part of the prisoner to cause the girl's death, and that he was in such a drunken condition that he was incapable of knowing that what he was doing was likely to inflict serious injury within the rule laid down by the Court of Criminal Appeal in *R.* v. *Meade* (1). BAILHACHE, J., carefully reviewed the evidence and gave the following direction of law to the jury:

> "It is no defence to say: 'I should not have done that wicked thing if I had not been so drunk.' But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this: supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says: 'I was mad, and turned into a brute by drink,' it is no defence, unless he satisfies you that he was so far out of his senses that he did not know what he was doing."

The jury after a very brief consideration returned a verdict of murder.

In the Court of Criminal Appeal two separate and independent points of misdirection were raised on behalf of the prisoner: (i) That the learned judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional, but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter; and (ii) that the learned judge wrongly directed the jury as to the defence of drunkenness, and gave a direction which was not in accordance with the decision in *R.* v. *Meade* (1) and was applicable only to the defence of insanity. The first objection failed, the court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt as to its soundness. With regard to the second objection of the Court of Criminal Appeal, holding itself bound, by previous decisions of its own, to the view that *R.* v. *Meade* (1) laid down a general code, came to the conclusion that the learned judge had given a direction which was calculated to mislead the jury by imposing a test applicable only to the defence of insanity instead of the test, imagined to be generally laid down in *Meade's Case* (1), for application to the defence of drunkenness. The court was not satisfied that the verdict would have been the same if the proper direction had been given and substituted a verdict of manslaughter for that of murder.

The appeal to your Lordships' House from this decision raised questions of undoubted importance in the administration of the criminal law. In crimes of violence resulting in death or serious injury it often occurs that the accused is proved to have been drunk, or under the influence of drink, when he committed the offence; and judges have frequently to direct juries as to the principle upon which they must approach the defence of drunkenness. The language used by judges has varied and different directions are not always easy to reconcile. In *Meade's Case* (1) the authorities were reviewed by the Court of Criminal Appeal, and a rule was laid down which has been treated as general and authoritative by judges of first instance, and by the Court of Criminal Appeal, both in earlier cases and in the present case. It has been contended before your Lordships that while the decision in *Meade's Case* (1) may have been right upon the facts there proved,

A it is an authority of limited and not of general application, that in its limited application *Meade's Case* (1) did not affect the present case, and that consequently there was no misdirection.

It becomes necessary in view of this contention to consider the state of the law before *Meade's Case* (1) and to examine the authority of this decision. Under the law of England as it prevailed until early in the nineteenth century voluntary B drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man. An early statement of the law is to be found in *Reniger* v. *Fogossa* (2) (1 Plowd. at p. 19):

C "If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby."

D In Hale's Pleas of the Crown, vol. 2, p. 32, the learned author says:

"This vice [drunkenness] doth deprive men of the use of reason and puts many men into a perfect but temporary frenzy; and therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby; so that yet the formal cause E of his punishment is rather the drunkenness than the crime committed in it; but by the laws of England such a person shall have no privilege by this voluntary contracted madness but shall have the same judgment as if he were in his right senses."

To the same effect is the passage in Hawkins' Pleas of the Crown, c. 1, s. 6:

F "He who is guilty of any crimes whatsoever through his voluntary drunkenness shall be punished for it as much as if he had been sober."

Coke upon Littleton, 247a, similarly treats drunkenness as an aggravation of the offence:

"As for a drunkard who is voluntarius daemon he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth G aggravate it."

Blackstone, in his Commentaries, vol. 4, c. 2, s. 111, p. 25:

"As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence, rather than as an H excuse for any criminal misbehaviour."

Judicial decisions extending over a period of nearly 100 years make it plain that the rigidity of this rule was gradually relaxed in the nineteenth century, though this mitigation cannot for a long time be affiliated upon a single or very intelligible principle. *R.* v. *Grindley* (3), which was tried at Worcester Assizes in the year 1819, was the first reported judicial decision "that drunkenness put I forward as a defence to a charge of crime was a circumstance proper" to be taken into consideration. It was there held by Holroyd, J., that, although voluntary drunkenness cannot excuse from the commission of a crime, yet where upon a charge of murder the material question is whether an act was premeditated or done only in the stress, heat or impulse of the moment, the fact of the party being intoxicated was a circumstance proper to be taken into consideration: Russell on Crimes (7th Edn.), vol. 1, p. 88, note b. But this case cannot now be regarded as an authority. Park, J., after referring to it in *R.* v. *Carroll* (4), said

that HOLROYD, J., had retracted the opinion expressed in that case and he added that there was no doubt that that case was not law. With this view LITTLEDALE, J., agreed. The language used by HOLROYD, J., as reported is capable of wide application and perhaps justified the observation made by PARK, J., that there would be no safety for human life if it were law.

In examining the language used in these and later cases it is extremely necessary to bear in mind that the judge when directing the jury with reference to the facts and circumstances of a particular case is not writing in abstracto a treatise upon the criminal law, and that his words must always be considered with regard to the special facts then before the jury. In *Burrow's Case* (5) and in *Rennie's Case* (6), HOLROYD, J., assumed that drunkenness could not be taken into consideration as a defence to a criminal charge unless the derangement which it caused became fixed and continuous because the drunkenness itself was habitual. The information in these cases both as to the facts and as to the defence is very meagre. In the one case the prisoner urged that he was in liquor, and in the other he pleaded in mitigation that he was drunk. Little can be derived from these reports save that the learned judge declared that only habitual drunkenness causing continuous insanity could be a defence. In *Marshall's Case* (7), PARK, J., was of opinion that upon an indictment for stabbing the jury might take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time in order to measure the apprehension of attack under which it was alleged that the prisoner acted. In 1831 the same learned judge is reported to have given a similar direction in *Goodier's Case* (8). In 1835 *Pearson's Case* (9) upon an indictment for murder, the defence was that the prisoner was drunk. He had beaten his wife to death with a rakeshank. PARK, J., said:

> "Voluntary drunkenness is no excuse for crime . . . drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation."

In these last mentioned cases PARK, J., treats the drunken condition of the accused as relevant in considering either the extent of the apprehension in the mind of the accused of attack, or the effect upon him of sudden provocation. This class of case was discussed more fully by PARKE, B., in *R.* v. *Thomas* (10) when he expressed a view of the circumstances in which the law as to provocation might justify a verdict of manslaughter instead of murder. The judgments, however, in these cases diverged into topics not specially helpful in the matter now under debate.

In *R.* v. *Meakin* (11), ALDERSON, B., directed the jury that in the case of stabbing with intent to murder, where the prisoner had used a deadly weapon, the fact that he was drunk could not alter the nature of the case. The learned baron expressed the opinion to the jury that "if a man use a stick you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon: but where a dangerous instrument is used, which, if used, would produce grievous bodily harm, drunkenness can have no effect in the consideration of the malicious intent of the party." The learned baron's view was that drunkenness might affect the jury's view of the intent, but that the use of the deadly weapon in that case showed the malicious intent so clearly that the drunkenness of the accused could not alter it.

In *R.* v. *Cruse* (12) on an indictment for assault with intent to murder, PATTERSON, J., directed the jury that although drunkenness is no excuse for crime, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet may be guilty of very great violence. This direction was examined in *R.* v. *Monkhouse* (13), by COLERIDGE, J., and ROLFE, B., on an indictment for wounding with intent to murder. COLERIDGE, J., agreed with the substance of PATTERSON, J.'s,

direction, but had some doubt as to the language. After stating that it is a general rule in criminal law that juries are to presume a man to do what is the natural consequence of his act, COLERIDGE, J., said:

> "If the defendant is proved to have been intoxicated the question becomes a more subtle one; but it is of the same kind—namely, was he rendered by intoxication entirely incapable of forming the intent charged? . . . drunkenness is ordinarily neither a defence nor an excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."

Here again the appropriate question seemed to be whether the prisoner was so intoxicated as to be entirely incapable of forming the intent charged—that is, the intent to murder. The words "unless the intoxication was such as to prevent his restraining himself from committing the act in question" are not to be found in any other judicial direction and cannot, in my view, be explained unless they were unscientifically used with the object of indicating the defence of insanity. In *R.* v. *Stopford* (14) on an indictment for wounding with intent to do grievous bodily harm, BRETT, J., said:

> "If he was merely so drunk as to put himself in a passion drunkenness would be no excuse; he must have been so drunk as to be incapable of knowing what he was doing."

The question was whether the prisoner had formed the intent to murder, and this was answered, in the opinion of the learned judge, if the jury thought that his drunken condition rendered him incapable of forming the intention.

Next in order we reach the important case of *R.* v. *Doherty* (15) tried by STEPHEN, J., on an indictment for murder, where the question was whether the verdict should be murder or manslaughter. This eminent authority on criminal law said:

> "Although you cannot take drunkenness as an excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."

The learned judge then pointed out that if a drunken man formed an intention to kill another or to do grievous bodily harm to him and killed him, his drunken intention made him as guilty of murder as if he had been sober. But if his drunkenness prevented his forming such an intention he would only be guilty of manslaughter. If he had not formed such an intention then he had not committed murder—that is, unlawful homicide with malice aforethought. The learned judge then explained that "aforethought" did not necessarily imply premeditation, but that it did imply an intention which must precede the act intended. "What then is the intention necessary to constitute murder? Several intentions would have this effect, but I need mention only two in this case—namely, an intention to kill and an intention to do grievous bodily harm. If the act which caused death, the firing of the pistol, was done with either of those intentions, Doherty's crime was murder." The same learned judge discussed the meaning of "malice aforethought" in *R.* v. *Serné* (16), and there pointed out that these words are technical and must be construed not according to the ordinary interpretation of language, but according to a long series of decided cases which have given to them a somewhat artificial sense.

Notwithstanding the difference in the language used I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should

be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required, he could not be convicted of a crime which was only committed if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime, but that the state of drunkenness may be incompatible with the actual crime charged, and may, therefore, negative the commission of that crime. On a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But, nevertheless, unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter: per STEPHEN, J., in *Doherty's Case* (15), 16 Cox, C.C. at p. 307. This reasoning may be sound or unsound, but, whether the principle be truly expressed in this view, or, whether its origin is traceable to that older view of the law held by some civilians (as expressed by HALE) that, in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself, the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.

The conclusions to be drawn from these cases may be stated under three heads. (i) That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention has been preserved throughout the cases. The insane person cannot be convicted of a crime (*Felstead* v. *R.* (17)), but, upon a verdict of insanity, is ordered to be detained during His Majesty's pleasure. The law takes no note of the cause of the insanity. If actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. In the early cases of *Burrows* (5) and *Rennie* (6), HOLROYD, J., refused to regard drunkenness as an excuse unless it had induced a continuing and lasting condition of insanity. But in *R.* v. *Davis* (18), where the prisoner was charged with wounding with intent to murder, STEPHEN, J., thought (and I agree with him) that insanity, even though temporary, was an answer. The defence was that the prisoner was of unsound mind at the time of the commission of the act, and the evidence established that he was suffering from delirium tremens resulting from over-indulgence in drink. STEPHEN, J., said:

> "But drunkenness is one thing and the diseases to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, as would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. . . . If you think there was a distinct disease caused by drinking, but differing from drunkenness and that by reason thereof he did not know that the act was wrong you will find a verdict of Not Guilty on the ground of insanity."

To the same effect is a decision of DAY, J., in *R.* v. *Baines* (19) (TAYLOR'S MEDICAL JURISPRUDENCE (6th Edn.), vol. 1, p. 898). The defence was that the prisoner was insane when the murder was committed. The evidence proved that the prisoner had on several occasions been under treatment for delirium tremens. He had one attack a week before, and another two days after, committing the crime. DAY, J., held that it was immaterial whether the insanity was permanent or temporary.

A The question was whether there was insanity or not; and the learned judge ruled that if a man were in such a state of intoxication that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity. (ii) That the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine B whether or not he had this intent. (iii) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.

I now come to *R.* v. *Meade* (1). The prisoner was charged with murder. He C brutally ill-treated the deceased woman during the night of her death, broke a broomstick over her, and struck her a violent blow with his fist, rupturing an intestine and causing her death. The defence was that he was drunk and did not intend to cause death or grievous bodily harm, and consequently that the verdict should be manslaughter. LORD COLERIDGE, J., directed the jury in the following terms:

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> "In the first place, every one is presumed to know the consequences of his acts. If he is insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive (meaning intent) shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is obscured by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, E it justifies the reduction of the charge from murder to manslaughter."

The objection raised in the Court of Criminal Appeal was that the summing-up led the jury to believe that to justify a verdict of manslaughter they must find that the prisoner was insane or in a state resembling insanity, whereas the direction should have been that, if there was absence of intention in fact, it was F manslaughter. DARLING, J., in delivering the judgment of the court, reviewed many of the authorities that were cited to your Lordships, and came to the conclusion that the judges by these decisions had attempted to express the doctrine that, where intent is of the essence of the crime charged, the intent may be disproved by showing that the prisoner was in a condition of drunkenness which made him incapable of forming the intent. The learned judge said:

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> "We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(i) in the case of a sober man, in many ways; (ii) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the H presumption that he intended to do grievous bodily harm is rebutted."

The learned judge then expressed the conclusion of the court that on a true construction, the language used by LORD COLERIDGE, J., did not differ from this rule. The language of the Court of Criminal Appeal contains a proposition of law which, regarded as a rule of general application, would mean that a person charged with I a crime of violence may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous. The Court of Criminal Appeal in the present case, notwithstanding the opinion it had expressed that an act of violence done in furtherance of rape was murder, held that it was bound to follow this decision, and that the jury should have been directed to consider whether Beard at the time of placing his hand on the child as described was incapable of knowing that what he was doing was dangerous—that is, likely to cause serious injury.

Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and I apprehend can have no doubt that the proposition in *Meade's Case* (1) in its wider interpretation is not and cannot be supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect the so-called rule differs from the direction of LORD COLERIDGE, J., which is more strictly in accordance with the earlier authorities. Consideration of the judgment, and particularly of DARLING, J.'s, observations that the court did not wish to extend the ambit of its decision beyond that laid down in the older cases, makes it clear that it was not intended to lay down a rule which should be applied to such a case as the present. In *Meade's Case* (1) the crime charged was that the death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's Case* (1), therefore, it was essential to prove the specific intent; in Beard's case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape. I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime, e.g., wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea. Drunkenness, rendering a person incapable of the intent, would be an answer, as it is for example in a charge of attempted suicide. In *R.* v. *Moore* (20), drunkenness was held to negative the intent in such a case, and JERVIS, C.J., said:

> "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?"

Drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is in other words to be explored in relation to the ravishment, and not in relation merely to the violent acts which gave effect to the ravishment.

Lastly, I come to the actual direction of BAILHACHE, J. It was not a satisfactory direction. The Court of Criminal Appeal held that the learned judge had misdirected the jury because he applied the test of insanity to a case of drunkenness which e concessis did not amount to insanity. This distinction, as already shown, has been preserved throughout the cases, and it ought to be so preserved, for the result of a verdict of insanity is not a conviction. That the test suggested by the learned judge is one that would properly be applied in a case of insanity is plain. The question put: Did the person know what he was doing, or, if not, did he know that he was doing wrong, or in accordance with the opinions expressed by the judges in *McNaghten's Case* (21), and in combination with the question whether the prisoner knew what he was doing, the very ambiguous illustration given by BAILHACHE, J., of the meaning that should be attributed to these questions would remove all doubt, if any existed, of the point at which his mind went astray.

A It is an illustration of a delusion assailing the mind of an insane person, and it is arguable that the impression conveyed to the jury may have been that they could only find a verdict of manslaughter if they found that Beard was the victim of such delusions. As this suggestion had never been made, the effect of such a direction may be made the subject of infinite conjecture. In *Meade's Case* (1) the Court of Criminal Appeal approved LORD COLERIDGE's direction because he had B sufficiently warned the jury that there was no plea of insanity, and that it was not the defence raised. This warning is absent from BAILHACHE, J.'s, direction, and the questions as framed might conceivably (so it is argued) have led the jury to think that insanity was the test. Neither should the learned judge, in my opinion, have introduced the question whether "the prisoner knew that he was doing wrong" in a defence of drunkenness, where insanity was not pleaded. It is a dangerous C and confusing question to put to a jury, for a drunken man's judgment upon such a question is very likely to be impaired, and it might well be perplexing to a jury to determine whether, if he knew what he was doing, he knew also that he was doing wrong. The general proposition that drunkenness is no excuse for crime may be seriously affected in its operation if such a question is to be a test by which the jury may determine whether the verdict should be murder or manslaughter. D It is noteworthy that, notwithstanding that the judges ever since *McNaghten's Case* (21) in 1843 have had these questions in mind as the test of insanity, there is no single case, known to me, where drunkenness has been the defence, in which the judge has directed the jury to consider whether the prisoner knew that he was doing wrong. Whenever this question has been put the defence has been that there E existed insanity caused by drink. I look upon the direction of BAILHACHE, J., as an innovation which is not supported by authority and which should not be repeated or imitated. But while I think that the summing-up was in some respects unhappily conceived, I am not prepared, reading it as a whole, to hold in this case that it amounted to, or should be treated as, a misdirection. The defence which is founded upon insanity is one thing. The defence which is founded upon drunkenness is F another. The relevant considerations are not identical. It is inconvenient to use the same language in charging juries in relation to different defences. But the portions of the summing-up, which I have criticised, were in fact unduly favourable to the prisoner. He cannot complain of them unless they so confused the jury as to prevent it from properly appreciating the true issue, and I am not prepared to lay it down—though I have felt some doubt upon the point—that the actual G direction given to the jury by BAILHACHE, J., disabled them from reaching a true conclusion upon the matters which required decision. On the contrary, I think that upon the whole, the matter was so presented to them, though unscientifically, that they have in fact formulated the answer, which is decisive even in a case where the defence is founded upon drunkenness.

In the present case I doubt, without reaching a conclusion, whether there was H any sufficient evidence to go to the jury that the prisoner was, in the only relevant sense, drunk at all. There was certainly no evidence that he was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder. I am, therefore, of opinion that the appeal should be allowed and the conviction of murder restored, and I move your Lordships accordingly.

Solicitors: *Treasury Solicitor; Haslam & Sanders*, for *Henry Bostock*, Hyde, Cheshire.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

WELD-BLUNDELL *v.* STEPHENS

[House of Lords (Viscount Finlay, Lord Dunedin, Lord Sumner, Lord Parmoor and Lord Wrenbury), February 19, 23, May 13, 1920]

[Reported [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529]

Negligence—Damages—Claim for damages payable by plaintiff to persons defamed brought owing to negligence of defendant—Libel—Disclosure by defendant to third party—Disclosure by third party to persons defamed—Reparation made by plaintiff for own wrongful act—Defence—Novus actus interveniens—Act of third party—Libellous document negligently left by defendant in room of third party—Communication by third party to persons defamed.

Libel—Re-publication—Unauthorised and voluntary re-publication by person over whom original publisher has no control—Liability of publisher to author of libel—Breach of duty.

The appellant employed the respondent, a chartered accountant, to investigate the financial position of a company in which he was financially interested. In a letter of instructions to the respondent, the appellant referred to a former manager and an auditor of the company in defamatory terms. The respondent handed the letter to his partner to carry out the investigation requested by the appellant, and the partner negligently left it at the company's office. The manager of the company found it, read it, and communicated its contents to the two persons defamed, who sued the appellant for libel and recovered damages against him on the ground that, while the occasion on which the letter was written was privileged, he had been actuated by malice. The appellant then sued the respondent for breach of duty in failing to use reasonable care to keep the contents of the letter secret, claiming as special damages the damages and costs which he had had to pay in the libel actions.

Held (by Lord Dunedin, Lord Sumner and Lord Wrenbury, Viscount Finlay and Lord Parmoor dissentiente): the appellant could not recover more than nominal damages because (i) the wrongful act for which he had had to make reparation was committed by himself independently of the breach by the respondent of the duty of care which he owed to the appellant; (ii) the actions for libel and the damages recovered from the appellant were not the natural and probable consequence of the respondent's negligence, but resulted from the voluntary act of the manager of the company, a free agent over whom the respondent had no control and for whose acts he was not responsible.

Decision of the Court of Appeal, [1919] 1 K.B. 520, affirmed.

Notes. Applied: *Bradstreets British, Ltd.* v. *Mitchell*, [1932] All E.R. Rep. 330. Considered: *Stansbie* v. *Troman*, [1948] 1 All E.R. 599. Referred to: *Proops* v. *W. H. Chaplin & Co., Ltd.* (1920), 37 T.L.R. 112; *Re Polemis and Furners, Withy & Co., Ltd.*, [1921] All E.R. Rep. 40; *A. and B. Taxis* v. *Secretary of State for Air*, [1922] 2 K.B. 328; *Elliott Steam Tug Co.* v. *Shipping Controller*, [1922] 1 K.B. 127; *The San Ofre*, [1922] All E.R. Rep. 720; *Adelaide Steamship Co.* v. *R.*, [1923] 1 K.B. 59; *Tournier* v. *National Provincial and Union Bank of England*, [1923] All E.R. Rep. 550; *Harnett* v. *Bond*, [1924] 2 K.B. 517; *Hambrook* v. *Stokes Bros.*, [1924] All E.R. Rep. 110; *The Paludina*, [1924] All E.R. Rep. 697; *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1925), 94 L.J.K.B. 858; *Singleton Abbey (Owners)* v. *Paludina (Owners)*, *The Paludina*, [1926] All E.R. Rep. 220; *The Edison* (1931), 147 L.T. 141; *Re Sims, Ex parte The Trustee* v. *William Simms, Ltd. and S. H. Gillett*, [1933] All E.R. Rep. 302; *Howard* v. *Odhams Press, Ltd.*, [1937] 2 All E.R. 509; *East Suffolk Rivers Catchment Board* v. *Kent*, [1940] All E.R. 527; *Duncan* v. *Cammell Laird, Ltd.*, *Craven* v. *Cammell*

Laird, Ltd. (1944), 171 L.T. 186; *Greenfield* v. *London and North Eastern Rail. Co.*, [1944] 2 All E.R. 438; *Royal Greek Government* v. *Minister of Transport* (1949), 66 (pt. 1) T.L.R. 504; *Philco Radio and Television Corpn. of Great Britain* v. *J. Spurling, Ltd.*, [1949] 2 All E.R. 882; *Mehmet Dogan Bey* v. *Abdeni & Co.*, [1951] 2 All E.R. 162; *Jones* v. *Manchester Corpn.*, [1952] 2 All E.R. 125; *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E.R. 206; *Martell* v. *Consett Iron Co.*, [1954] 3 All E.R. 339; *Romford Ice and Cold Storage Co.* v. *Lister*, [1955] 3 All E.R. 460.

As to the effective cause of damage by negligence see 28 HALSBURY'S LAWS (3rd Edn.) 27–33, and as to disclosure of a libel and re-publication see ibid., vol. 24, pp. 5, 38, 40, 41. For cases see 32 DIGEST 80 et seq., 36 DIGEST (Repl.) 33–45.

Cases referred to:

(1) *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816; 68 L.J.Q.B. 545; 80 L.T. 591; 63 J.P. 532; 48 W.R. 13; 15 T.L.R. 286; 43 Sol. Jo. 351, D.C.; 42 Digest 980, *112.*

(2) *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 35 T.L.R. 167; 63 Sol. Jo. 213, H.L.; Digest Supp.

(3) *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; 101 E.R. 1337; 42 Digest 979, *95.*

(4) *R. Leslie, Ltd.* v. *Reliable Advertising and Addressing Agency, Ltd.*, [1915] 1 K.B. 652; 84 L.J.K.B. 719; 112 L.T. 947; 31 T.L.R. 182; 17 Digest (Repl.) 141, *437.*

(5) *Cointat* v. *Myham & Son*, [1913] 2 K.B. 220; 82 L.J.K.B. 551; 108 L.T. 556; 77 J.P. 217; 29 T.L.R. 387; 11 L.G.R. 760; on appeal (1914), 84 L.J.K.B. 2253; 110 L.T. 749; 78 J.P. 193; 30 T.L.R. 282; 12 L.G.R. 274, C.A.; 17 Digest (Repl.) 118, *297.*

(6) *Colburn* v. *Patmore* (1834), 1 Cr. M. & R. 73; 4 Tyr. 677; 3 L.J.Ex. 317; 149 E.R. 999; 42 Digest 980, *111.*

(7) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q.B. 240; 66 L.J.Q.B. 122; 75 L.T. 617; 45 W.R. 179; 13 T.L.R. 81, C.A.; 36 Digest (Repl.) 33, *153.*

(8) *Clark* v. *Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 30, *135.*

(9) *Burrows* v. *March Gas and Coke Co.* (1872), L.R. 7 Exch. 96; 41 L.J.Ex. 46; 26 L.T. 318; 36 J.P. 517; 20 W.R. 493, Ex.Ch.; 25 Digest 484, *83.*

(10) *R.* v. *Moore* (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 36 Digest (Repl.) 345, *856.*

(11) *Scott's Trustees* v. *Moss* (1889), 17 R. (Ct. of Sess.) 32; 27 Sc.L.R. 30; 36 Digest (Repl.) 196, **1838.*

(12) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, *174.*

(13) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169.*

(14) *Ashby* v. *White* (1703), 1 Bro. Parl. Cas. 62; Holt, K.B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 14 State Tr. 695; 1 Smith, L.C., 12th Edn., 266; 1 E.R. 417; 1 Digest 23, *187.*

(15) *Vicars* v. *Wilcocks* (1806), 8 East, 1; 103 E.R. 244; 32 Digest 170, *2091.*

(16) *Scott* v. *Shepherd* (1773), 2 Wm. Bli. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, *100.*

(17) *Ward* v. *Weeks* (1830), 7 Bing. 211; 4 Moo. & P. 796; 9 L.J.O.S.C.P. 6; 131 E.R. 81; 32 Digest 174, *2136.*

(18) *Adamson* v. *Jarvis* (1827), 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 42 Digest 979, *103.*

(19) *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, [1894] A.C. 318; 7 L.T. 163; 10 T.L.R. 511; 6 R. 245, H.L.; 42 Digest 980, *105.*

(20) *Bowman* (*or M'Naughton*) v. *Caledonian Rail. Co.* (1858), 21 Dunl. (Ct. of Sess.) 160; 31 Sc. Jur. 94; 36 Digest (Repl.) 176, **1520.* A

(21) *Cobb* v. *Great Western Rail. Co.*, [1893] 1 Q.B. 459; 62 L.J.Q.B. 335; 68 L.T. 483; 57 J.P. 437; 41 W.R. 275; 9 T.L.R. 253; 37 Sol. Jo. 248; 4 R. 283, C.A.; affirmed [1894] A.C. 419; 63 L.J.Q.B. 629; 71 L.T. 161; 58 J.P. 636; 10 T.L.R. 508; 6 R. 203, H.L.; 36 Digest (Repl.) 35, *169.*

(22) *Hill* v. *New River Co.* (1868), 9 B. & S. 303; 18 L.T. 355; 36 Digest (Repl.) 39, *190.* B

(23) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur. N.S. 333; 4 W.R. 294; 156 E.R. 1047; 36 Digest (Repl.) 5, *1.*

(24) *Smith* v. *London and South Western Rail. Co.* (1870), L.R. 6 C.P. 14; 40 L.J.C.P. 21; 23 L.T. 678; 19 W.R. 230, Ex.Ch.; 36 Digest (Repl.) 37, *184.* C

(25) *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 36 Digest (Repl.) 36, *173.*

(26) *Elkins, Bly & Co.* v. *M'Kean* (1875), 79 Pennsylvania Rep. 493.

(27) *Jones* v. *Boyce* (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, *101.*

(28) *The Sister* (1876), 1 P.D. 117; 45 L.J.P. 39; 34 L.T. 338; 24 W.R. 412; 3 Asp. M.L.C. 122, C.A.; 41 Digest 769, *6233.* D

(29) *Halestrap* v. *Gregory*, [1895] 1 Q.B. 561; 64 L.J.Q.B. 415; 72 L.T. 292; 43 W.R. 507; 15 R. 306; 2 Digest (Repl.) 338, *273.*

(30) *Illidge* v. *Goodwin* (1831), 5 C. & P. 190, N.P.; 36 Digest (Repl.) 43, *224.*

(31) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150.* E

(32) *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243, C.A.; 36 Digest (Repl.) 9, *27.*

(33) *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q.B. 301; 64 L.J.Q.B. 207; 71 L.T. 771; 59 J.P. 70; 43 W.R. 366; 11 T.L.R. 57; 15 R. 267, D.C.; 36 Digest (Repl.) 255, *63.* F

(34) *The Bernina* (1886), 12 P.D. 36; 56 L.J.P. 38; 56 L.T. 450; 35 W.R. 214; 3 T.L.R. 175; 6 Asp. M.L.C. 112; 41 Digest 501, *3293.*

(35) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K.B. 331; 72 L.J.K.B. 652; 88 L.T. 825; 19 T.L.R. 552; 47 Sol. Jo. 603, C.A.; 36 Digest (Repl.) 40, *200.* G

(36) *De la Bere* v. *Pearson, Ltd.*, [1908] 1 K.B. 280; 77 L.J.K.B. 380; 98 L.T. 71; 24 T.L.R. 120, C.A.; 36 Digest (Repl.) 44, *235.*

(37) *Lynch* v. *Knight* (1861), 9 H.L. Cas. 577; 5 L.T. 291; 8 Jur. N.S. 724; 11 E.R. 854, H.L.; 32 Digest 171, *2093.*

(38) *Parkins* v. *Scott* (1862), 1 H. & C. 153; 31 L.J.Ex. 331; 6 L.T. 394; 8 Jur. N.S. 593; 10 W.R. 562; 158 E.R. 839; 32 Digest 87, *1174.* H

(39) *Bree* v. *Marescaux* (1881), 7 Q.B.D. 434; 50 L.J.Q.B. 676; 44 L.T. 765; 29 W.R. 858, C.A.; 32 Digest 88, *1177.*

(40) *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q.B. 413; 68 L.J.Q.B. 312; 80 L.T. 140; 47 W.R. 403, C.A.; 17 Digest (Repl.) 137, *412.*

(41) *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*, *Trinder, Anderson & Co.* v. *North Queensland Insurance Co.*, *Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, [1898] 2 Q.B. 114; 67 L.J.Q.B. 666; 78 L.T. 485; 46 W.R. 561; 14 T.L.R. 386; 8 Asp. M.L.C. 373; 3 Com. Cas. 123, C.A.; 29 Digest 196, *1562.* I

(42) *Shackell* v. *Rosier* (1836), 2 Bing. N.C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L.J.C.P. 193; 132 E.R. 245; 42 Digest 981, *116.*

(43) *Arnold* v. *Clifford* (1835), 2 Sumner's Circuit Court Rep. U.S. 238.

(44) *Martyn* v. *Blithman* (1611), Yelv. 197; 80 E.R. 130; sub nom. *Bithman* v. *Martin*, 2 Bulst. 213; sub nom. *Blithman and Martin's Case*, Godb. 250; 12 Digest (Repl.) 292, *2247*.

(45) *Riding* v. *Smith* (1876), 1 Ex.D. 91; 45 L.J.Q.B. 281; 34 L.T. 500; 24 W.R. 487; 32 Digest 171, *2094*.

(46) *Speight* v. *Gosnay* (1891), 60 L.J.Q.B. 231; 55 J.P. 501; 7 T.L.R. 239, C.A.; 32 Digest 88, *1188*.

(47) *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 32 Digest 170, *2086*.

Also referred to in argument:

Robb v. *Green*, [1895] 2 Q.B. 315; 64 L.J.Q.B. 593; 73 L.T. 15; 59 J.P. 695; 44 W.R. 25; 11 T.L.R. 517; 39 Sol. Jo. 653; 14 R. 580, C.A.; 34 Digest 121, *928*.

R. v. *Cox and Railton* (1884), 14 Q.B.D. 153; 54 L.J.M.C. 41; 52 L.T. 25; 49 J.P. 374; 33 W.R. 336; 1 T.L.R. 181; 15 Cox, C.C. 611, C.C.R.; 14 Digest (Repl.) 491, *4749*.

Saunders v. *Seyd and Kelly's Credit Index Co., Ltd., Seyd and Kelly's Credit Index Co., Ltd.* v. *Saunders and Chapman* (1896), 75 L.T. 193; 12 T.L.R. 546, C.A.; 1 Digest 35, *268*.

Scott v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 15 Digest (Repl.) 916, *8807*.

Holman v. *Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, *2404*.

Parkins v. *Scott* (1862), 1 H. & C. 153; 31 L.J.Ex. 331; 6 L.T. 394; 8 Jur. N.S. 593; 10 W.R. 562; 158 E.R. 839; 32 Digest 87, *1174*.

Appeal from an order of the Court of Appeal, reported [1919] 1 K.B. 520, setting aside a judgment of DARLING, J., in favour of the respondent in an action brought by the appellant against the respondent for damages for negligence, and giving judgment for the appellant for nominal damages.

Langdon, K.C., J. B. Matthews, K.C., E. F. Lever and *d'Albuquerque* for the appellant.

Hogg, K.C., and *Patrick Hastings, K.C.* for the respondent.

The House took time for consideration.

May 13. The following opinions were read.

VISCOUNT FINLAY.—The action in this case was brought to recover damages for negligence in the custody of a letter intrusted by the appellant (plaintiff) to the respondent (defendant) as his agent. It is alleged in the statement of claim that by reason of the respondent's breach of duty the document came to the knowledge of two persons, Comins and Lowe, who brought actions against the appellant and recovered damages in respect of defamatory statements made in the letter. The case was tried with a jury before DARLING, J. The jury found in favour of the plaintiff with £650 damages, but the learned judge, upon further consideration, entered judgment for the defendant. The Court of Appeal entered judgment for the plaintiff for 20*s*. without costs, and the present appeal to your Lordships' House has been brought asking that judgment should be entered for £650, the amount of the jury's verdict and costs.

The appellant had invested a considerable amount of money in a company called the Float Electric Co., Ltd., and was greatly dissatisfied with its management. On receiving a further request for advance of money for the undertaking, he determined to employ the respondent, who is a chartered accountant, and had acted for him before, to investigate the affairs of the company. He wrote to him a letter dated May 4, 1915, out of which these proceedings have arisen. In that letter he

complained of the mismanagement of the company, and made severe reflections upon the conduct of Mr. Hurst, the manager, and of Mr. Lowe and Mr. Comins, who had also taken part in its affairs. The letter requested the respondent to go to the bank and get an inspection of the ledger of the company, and then, if necessary, to go on and make inquiries of Mr. Hurst, the manager of the company's office. The respondent handed the letter to his partner, Mr. Swift, asking him to attend to the business. Mr. Swift went to the bank, taking the letter with him, and examined the ledger. He then went on to see Mr. Hurst and had some conversation with him. While in the office he unfortunately pulled out of his pocket, along with some other papers, the appellant's letter to him, and left it lying on the floor. On getting back to his own office he realised the loss of the letter and telephoned to Mr. Hurst to look for it and return it to him. Mr. Hurst found the letter, and before returning it to Mr. Swift had a copy taken and certified. This copy he showed to Mr. Lowe and Mr. Comins. Each of these gentlemen brought an action against the appellant. Mr. Lowe recovered a verdict for £1,000 damages, but by consent this was in the Court of Appeal reduced to £250. Mr. Comins recovered a verdict for £500. It was ruled in both cases that the letter was written on a privileged occasion, but the jury in each case found that there was express malice on the part of the present appellant. Judgment was entered for £250 and £500 accordingly with costs, and the appellant had to pay £1,769 in respect of these judgments.

The appellant then brought this action against Mr. Stephens, the respondent, to recover damages, alleging that these two actions had been brought in consequence of the negligence of Mr. Stephens and his partner in the custody of the libellous letter. The statement of claim was delivered on July 20, 1917, and claimed damages for the defendant's failure to take proper care of the letter. The defendant denied the negligence, and counter-claimed for £45 in respect of professional services rendered to the appellant. The following are the questions put by the learned judge to the jury, with their answers:—Was it the duty of the defendant to keep secret the letter of May 4 written by the plaintiff to the defendant?—A.: Yes. Did the defendant neglect his duty in regard to the said letter so that the contents thereof were disclosed or came to the knowledge of Mr. Hurst?—A.: Yes. Were the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them the natural and probable consequence of the proved negligence of the defendant?—A.: Yes. Damages £650. DARLING, J., then said to the jury: I understand, gentlemen, in not giving the full amount claimed you acted on what I suggested, that the conduct of the plaintiff himself was responsible to some extent for the damages which were awarded. The foreman of the jury: Quite so. On further consideration DARLING, J., entered judgment for the defendant on the ground that the liability of the plaintiff in damages was in respect of his own wrongful act in publishing the libel, and he rested his decision on two grounds: (i) He dealt first with the maxim which had been invoked by the defendant ex turpi causa non oritur actio, and the contention that the alleged contract of agency related to the custody of a malicious libel by the plaintiff himself. DARLING, J., said:

> "After much consideration I have, however, come to the conclusion that our law does not, and cannot, imply any such promise or term as that which the plaintiff alleges, and therefore no breach of contract or dereliction of duty was committed by the defendant."

(ii) The learned judge went on to say that, were the case otherwise, there would remain the question whether the plaintiff could recover against the defendant damages consequent on the action for libel against the plaintiff by Lowe and Comins. He said:

A "The question to be decided may, I think, fairly be put in these words: 'Can one recover damages against another because he has had to make reparation for a wrongful act committed by himself?' I think he cannot."

An appeal was brought to the Court of Appeal asking that judgment should be entered for the plaintiff, the present appellant for £650, the amount given by the jury. The Court of Appeal were divided in opinion. SCRUTTON, L.J., was in favour of the appellant, but BANKES, L.J., and WARRINGTON, L.J., were of another opinion. They disagreed, indeed, with DARLING, J.'s, view that the action was not maintainable. BANKES, L.J., said:

"Under these circumstances I do not myself see any objection to holding that the contract as found by the jury in the present case was neither an illegal contract nor contrary to public policy."

WARRINGTON, L.J., said:

"On the whole I can see no reason, founded on public policy or any other ground, why an agent should be at liberty to disclose evidence of a private wrong committed by his principal, and I come to the conclusion that the implied obligation of the defendant in reference to the plaintiff's documents in general extended to the letter of May 4, 1915."

The decision of the Court of Appeal on this point was obviously right, and no attempt was made on behalf of the respondent to impugn the correctness of this portion of the judgment. Indeed, any decision to the contrary would involve consequences at once extravagant and unreasonable. It would be startling if it were the law that an agent who is negligent in the custody of a letter handed to him in confidence by his principal, might plead in defence that the letter was libellous. There may, of course, be cases in which some higher duty is involved. Danger to the State or public duty may supersede the duty of the agent to his principal. But nothing of that nature arises in this case.

The majority of the Court of Appeal then proceeded to consider the question whether, assuming the appellant to have a right of action against the respondent, he was entitled to recover the special damages claimed in respect of the actions by Lowe and Comins for libel. They held that he was not so entitled, as the damages in these actions were given in respect of the plaintiff's own wrongful act in publishing a malicious libel. This part of the case has been elaborately argued before your Lordships, and there has been urged at the Bar of your Lordships' House a further objection to this head of damage which is not noticed in the judgments of the Court of Appeal, namely, that the actions were not the result of the respondent's negligence, but were caused by a novus actus interveniens on the part of Hurst, by whom the existence of the libel was made known to Lowe and Comins. I shall deal with these two grounds in the order in which I have mentioned them.

(i) The majority of the Court of Appeal held that, as the plaintiff's letter was a malicious libel, the actions against him with their damages and costs were the result of his own wrong, and that, therefore, he could not recover from the defendant in respect of them. In arriving at this conclusion the lord justices relied upon the law laid down by KENNEDY, J., in *Burrows* v. *Rhodes* (1). KENNEDY, J., in that case said:

"It has, I think, long been settled law that if an act is manifestly unlawful or the doer of it knows it to be unlawful as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom."

This passage has no application to a case like the present in which a letter written by a principal to his agent on the business of the agency contains reflections upon the character of other persons. It is the duty of the agent to treat such a document as confidential, and to take reasonable care to prevent its falling into the hands

of others. The case bears no analogy to the class of authorities, cited by KENNEDY, J., in which a man about to commit a crime or civil wrong takes an indemnity from another against the consequences. In the case of an agent, the fact that a letter contains libellous matter is really an additional reason for care in its custody, and a natural consequence, if such documents got abroad, would be an action for damages by the person libelled. In the present case, the agent, knowing what was in the letter, took upon himself the duty of safeguarding it, and he must be liable for any damage which directly and naturally results from his failure to do his duty in this respect.

Reliance was also placed by the lords justices on the decision of this House in *Neville* v. *London "Express" Newspaper, Ltd.* (2). That was an action for maintenance, and it was decided in this House that an action for damages for maintenance will not lie in the absence of proof of special damage. In that case the action maintained was one to compel the repayment of money which had been obtained by fraud. London Express, Ltd., were the maintainers and the special damage alleged in the action against them for maintenance was that the plaintiff had been compelled to refund the money so obtained. It was decided that this was not special damage which would support an action for maintenance. It would be obviously absurd that a debtor who had wrongfully resisted payment until he was compelled to pay by action should be entitled to recover in proceedings for maintenance the amount which he owed and which had been recovered from him in the action. The observations on which the respondent in the present case relied were made with reference to an action to recover damages for maintenance. It cannot be laid down as a general proposition that, if a wrongful act is done, the natural consequence of which is that the plaintiff's creditor proceeds to enforce his rights, this may not form a head of damage. This applies with special force with reference to a case in which, by the negligence of the agent, facts have been divulged which might support claims for damages for tort against his principal. Reference was made in argument to the leading case of *Merryweather* v. *Nixan* (3) and the more recent authorities in which the doctrine on that subject has been developed. I cannot think that cases under this head have any relevance to the present. What they decide is that there is no liability to contribution arising out of the mere fact that damages for a tort have been recovered against two persons; and further that if it appears that there was a combination to do an act manifestly wrongful no express contract by one of the parties to indemnify the other would be enforceable. This rests on broad considerations of policy, as it is obviously inexpedient that the law should encourage any combination to commit a tort. There was nothing of the kind in the present case. The facts which gave rise to the liability of Mr. Weld-Blundell to Mr. Comins and to Mr. Lowe occurred when he wrote and delivered the letter to Mr. Stephens, and Mr. Stephens was no party to that act. It is no part of the policy of the law that immunity should be extended to breaches of trust committed by an agent in revealing information which has been given to him in confidence as to facts on which possible claims for damages might be preferred against his principal.

It was sought by the respondent to assimilate the case to one of liability for debt, and it was said that in no circumstances can damages be recovered in respect of the fact that the plaintiff has been compelled to pay money which he owes. This doctrine cannot be of universal application. No such general deduction can be drawn from the doctrine laid down in *Neville's Case* (2) where the money had been obtained by fraud and where restitution was a duty and retention in itself dishonest. Actions for maintenance are of a very special nature, but even in them the doctrine in *Neville's Case* (2) is not always applicable. For instance, I do not think that *Neville's Case* (2) would govern a case in which the defendant in an action of maintenance had incited a lender to call in the loan and had maintained an action for the purpose. Payment might otherwise have been allowed to stand over for a long period, and it would be for a jury to appraise the chances of this. The amount

of the debt would not be recoverable, but the wrongful act of the maintainer might occasion inconvenience and damage calling for compensation. Similar considerations would apply where the defendant has been guilty of any actionable wrong. If in consequence of that wrong a creditor calls in his debt, why should not this form an item of damage in an action against the wrongdoer? The damages would, of course, not be measured by the whole amount of his debt, but regard might be had to the probability that, but for the defendant's wrong, the money might have been allowed to remain in the hands of the borrower till a more convenient season. The consequences might be serious to a mercantile firm even of the highest standing if all those who had legal claims against the firm were set in motion at once to enforce these claims. A third person who by malice or negligence in discharge of his duty to such a firm brings about such pressure by creditors would plead in vain that all that happened was the enforcement of legal debts. The fact that they would have been enforced at some time might prevent liability for the whole amount, but it would be startling if it afforded complete immunity to misconduct by an agent which might entail the ruin of his principal's business.

The extension of the supposed rule as to debts to cases of enforcement of liability for torts which results from the misconduct of an agent would lead to some remarkable results. Take the present case as an illustration. Mr. Weld-Blundell had written a confidential letter to his agent on a privileged occasion. That letter contained libellous matter for which Mr. Weld-Blundell might be made liable if the jury should find that he had been influenced by express malice. The question of damage in respect of the actions for libel brought in consequence of the defendant's misconduct must be determined on the same principle which would apply if the defendant had maliciously and for the purpose of inducing the persons libelled to bring their actions against Mr. Weld-Blundell communicated to them the fact that the libellous letter had been written. Mr. Weld-Blundell was under no sort of obligation to Mr. Comins or Mr. Lowe to reveal to them the existence of this letter in order that they might have the opportunity of bringing actions against him. He would indeed be bound to endeavour to remove any unfavourable impression which the letter might have created on the mind of his agent with regard to Mr. Comins and Mr. Lowe, but there is in such a case nothing that corresponds to the duty that is incumbent on a fraudulent person to make restitution, or on a debtor to pay his debts on demand. Somewhat similar considerations might apply if the agent's breach of confidence had led to an action for penalties. A man may without any moral delinquency have made himself liable to penalties to a considerable amount at the suit of any common informer [see now abolition of certain common informer actions by the Common Informers Act, 1951]. It could not be suggested that there would be any obligation upon him to make these facts generally known in order to give an opportunity to any person who might be so minded to play the part of the common informer. In such circumstances it may well be, as was suggested in *Neville's Case* (2), that any person who maintained an action for such penalties would be liable to substantial damages in respect of the penalties, the payment of which had been compelled by the maintained action. It might be no answer that there was a legal liability to pay the penalties, as that potential legal liability would never have become effective but for the wrongful act of the maintainer. The same observations might apply if the action for penalties was due to the betrayal by an agent of his principal's confidence.

It is not disputed that the defendant was guilty of a breach of duty as agent. A direct consequence of that breach of duty (subject only to the question of the effect of Hurst's intervention, with which I shall deal under another head) was that Mr. Comins and Mr. Lowe brought the actions for libel which, but for the defendant's breach of duty, would never have been brought. It must have been in the contemplation of the parties that if the letter were allowed to get abroad actions might very probably be the result, and indeed this probability was the great

reason which imposed the duty of precaution in the custody of such a document. The result of the defendant's negligence was that these actions were brought against his principal, Mr. Weld-Blundell. There is no legal principle to exclude the damages in such actions from being taken into account in estimating the damages payable by the agent. To hold that no such damages could be recovered would be to give practical immunity in many cases to agents who have allowed the secrets of their principal to become known. It is not necessary to consider the question on which ROWLATT, J., in *R. Leslie, Ltd.* v. *Reliable Advertising and Addressing Agency, Ltd.* (4) differed from LORD COLERIDGE, J., in *Cointat* v. *Myham & Son* (5) or the dictum of LORD LYNDHURST in *Colburn* v. *Patmore* (6). The ground on which ROWLATT, J., held that there can be no indemnity in respect of the result of a criminal prosecution is that it is against the policy of the law that the punishment for crime should be mitigated by any contribution in any form from another. No such question arises in the present case, where the question relates merely to civil liability. I cannot agree with the decision of the majority of the Court of Appeal that damages were not recoverable from the agent in respect of actions for libel resulting from his negligence in not taking care of the letter.

(ii) But at the hearing in your Lordships' House it was further contended that the actions for libel were not the result of the agent's negligence, but of the wrongful act of Hurst in making the letter known to Lowe and Comins. This point was not raised before DARLING, J. It appears from the transcript that it was raised in the Court of Appeal by the junior counsel for the respondent at the close of his argument. It was not received with favour by the court, and no notice was taken of it in the judgment. The point is not made in the respondent's Case either in the body of the Case or in the reasons. It has, however, been argued at the Bar of your Lordships' House and must be dealt with.

In answer to the second question put by the learned judge at the trial, the jury found that the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them were the natural and probable consequence of the proved negligence of the defendant. The jury did not give the full sum which the plaintiff had had to pay in these actions, no doubt because they thought that, if the plaintiff had acted reasonably the matter might have been settled on more favourable terms. The contention now raised is that in point of law the learned judge at the trial was bound to withdraw from the jury the consideration of these actions as an element in the damages, as they were really the result of what Hurst did and not of the respondent's negligence. It is urged by the respondent that the act of Hurst in supplying Comins with a copy of the letter was dishonourable, and so it was. By the negligence of the respondent the letter had been left on the floor of Hurst's office. It might have been picked up by any person who had access to the office. If the person who picked it up happened to be a gentleman, no mischief would in all probability have followed, as he would have returned it to the respondent or his partner Mr. Swift. But the person who negligently leaves a paper of this description lying on the floor can hardly say that its being picked up by someone who is not a gentleman is so remote a contingency that it may be disregarded in ascertaining what are the natural consequences of the negligence. It may be picked up by someone who is not sensible of the obligations of honour in such matters, and the divulgation of its contents may then follow. The necessity for special care with regard to documents of this kind arises from the very fact that there are a great many people about who are not very scrupulous. Such a letter may be picked up by someone who reads the letter, and then from a spirit of mischief or by way of amusement talks about it or shows it to some person concerned. Everyone knows that such an occurrence is very possible, nay probable. It appears to me that, if this point had been taken before DARLING, J., he would have been bound to say that the matter would not be withdrawn from the jury. I feel very little doubt that if this point had been raised by counsel for the defendant in his address to the jury they

would have said, and rightly said, among themselves that you must take human nature as it is, and that is precisely because there are mischievous and dishonourable people about that it is necessary to be very careful in the custody of such documents.

The fact that the damage was caused by the act of some third person does not prevent its being recoverable if such an act was a natural and probable consequence even though wrongful. I may refer in illustration to some of the cases which have been cited: *Engelhart* v. *Farrant & Co.* (7), *Clark* v. *Chambers* (8), *Burrows* v. *Marsh Gas and Coke Co.* (9), *R.* v. *Moore* (10), *Scott's Trustees* v. *Moss* (11) and *Bowen* v. *Hall* (12). In *Bowen* v. *Hall* (12), BRETT, L.J., with the concurrence of LORD SELBORNE, L.C., expressed himself as follows (6 Q.B.D. at pp. 337, 338):

> "The decision of the majority (in *Lumley* v. *Gye* (13)) will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby* v. *White* (14). If these conditions are satisfied, the action does not the less lie because the natural and probable consequences of the act complained of is an act done by a third person, or because such an act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will to do or not to do, is his own wilful act, and therefore, is not the natural or probable result of the defendants' act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognise that it is a natural or probable consequence of the defendants' act. Again, if that were so held in all cases, the law would, in some, refuse to recognise what is manifestly true in facts. If the judgment of LORD ELLENBOROUGH in *Vickars* v. *Wilcocks* (15) requires this doctrine for support, it is, in our opinion, wrong. We are of opinion that the propositions deduced above from *Ashby* v. *White* (14) are correct."

It must be borne in mind that the present is an action for breach of duty by an agent in failing to take proper care of a document intrusted to him. It is admitted that he failed to discharge that duty, and the very thing happened which it was his duty to guard against. The precise chain of circumstances which would ensue from negligence could not, of course, be foreseen. If the letter had been picked up by Lowe or Comins it would hardly be denied that the bringing of the actions would have been a natural and direct consequence. So if it had been picked up by a servant whose gossip about it came to the knowledge of Lowe and Comins, I am unable to discover any principle of law which would justify us in holding that this head of damage ought to have been withdrawn from the jury. It was eminently a question for them as to the natural consequence of the defendant's breach of duty. The jury very properly discounted the amount of damages as they appreciated the fact that the appellant's own conduct had probably aggravated his loss. In my opinion, the judgment of the Court of Appeal should be reversed, and judgment should be entered for the appellant for £650, the amount of the verdict, with costs in the courts below and in this House.

LORD DUNEDIN.—The noble and learned Lord on the Woolsack has stated so fully and accurately the facts out of which this case arises that I need say nothing as regards them. I am in accordance with him as to the first point which was raised before DARLING, J., and dealt with by the Court of Appeal. There

remain two reasons for which it is argued the plaintiff cannot recover the damages he asks for special damage.

My noble and learned friend states one of them as raising the question whether the damage suffered was the natural consequence of the negligence committed or was the result of a novus actus interveniens. Another way of stating what probably is, in the circumstances of this case, the same question, is to ask whether the damages alleged are not too remote. A variety of cases have been cited in support of the proposition that the result may be a natural and probable result although it was indirect. That may be so, I do not doubt. In addition to the authorities already cited I would add the well-known Squib case of *Scott* v. *Shepherd* (16), and another case which is probably not known here, decided, and I think rightly decided, in the Court of Session: *Scott's Trustees* v. *Moss* (11). In that case the occupant of a recreation ground in the vicinity of a large town advertised that a descent from a balloon would be made by parachute within the grounds at a certain time. The descent was made into a field of turnips on a farm adjoining the grounds, and a crowd which had assembled outside the grounds rushed in and injured the fences and the turnips. The farmer sued the occupant of the recreation grounds, the Lord Ordinary sustained a plea of irrelevancy, and dismissed the action, but the Inner House recalled that judgment and granted the issue to go to a jury, which asked the question whether what had happened was the natural and probable result of what the defendant had done. I have, however, come to the conclusion that there was here no evidence which entitled the jury to give the affirmative answer they did to the question as put to them that the actions for libel and the damages recovered were the natural and probable consequence of the proved negligence of the defendant. I think one may here repeat in terms with change of names, the words of TINDAL, C.J., in *Ward* v. *Weekes* (17) (7 Bing. at p. 215):

> "It was the repetition of the words by Hurst to Lowe and Comins, which was the voluntary act of a free agent over whom the defendant had no control and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage."

I now pass to the other point, and on this I am again constrained to differ from the opinion expressed by my noble and learned friend. The point, as it precisely arises, may be a new one—that is to say, we were not informed by counsel of any case which exactly covers the circumstances of this one, nor have I been able to find such a case for myself. This is what makes it possible to distinguish, as my noble and learned friend has done, between this case and such cases as *Burrows* v. *Rhodes* (1) and *Neville* v. *London "Express" Newspaper, Ltd.* (2). But though the cases are distinguishable upon the ground that the application of the principle is to be found in different circumstances, yet, in my opinion, the underlying principle is the same. To take first the case of contribution between wrongdoers, which is the first instance given by KENNEDY, L.J., in the passage cited, why is there no contribution among wrongdoers? Only, I think, because of the underlying proposition that no man can claim damages when the root of the damage which he claims is his own wrong, for in certain cases there may be contribution. The rule even in England, laid down in *Merryweather* v. *Nixan* (3) is not a universal rule, but is qualified by the necessity that the doer of the wrong who is suing his joint wrongdoer for contribution "must be presumed to have known that he was doing an unlawful act": *Adamson* v. *Jarvis* (18) (4 Bing. at p. 73) and LORD HERSCHEL in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (19) ([1894] A.C. at p. 329). In other words, if the underlying proposition is absent the rule does not apply. Then as regards *Neville's Case* (2), it was found by the majority in this House that the maintenance of the action was wrong against the plaintiff, although the maintained action was successful. Once it was successful the natural and probable consequence was that the plaintiff had, as a defendant in

A action, to pay the sums found due. Yet he was not entitled to recover the same as special damages. I confess I can see no ground on which such a result could be reached except the application of the principle for which I am contending. It does not seem to me in the least to explain the matter to say that the action of maintenance is a very peculiar action. I quite agree. If I may put aside for the moment my duty of considering English law alone in this, an English case, and B may look at it with eyes which are always open to consider the English law as a foreign system, I think it is a cumbersome curiosity of English law. Nevertheless, it exists and forms a liability. It appears to me that the liability which arose in *Neville's Case* (2) from it being successfully shown that the action was a maintained action differs, once it is established, no whit from the liability supposed ex hypothesi to be established in this case from negligence, and the result would, in C my judgment, have been clear to give as damages the peculiar loss to which the plaintiff was put as the necessary result of the success of the maintained action, were it not for the proposition that a man, as DARLING, J., puts it, cannot recover damages because he has had to make reparation for a wrongful act committed by himself. In *Bowman* (*or M'Naughton*) v. *Caledonian Rail. Co.* (20) (21 Dunl. (Ct. of Sess.) at p. 163), the late Lord President INGLIS, then Lord Justice Clerk, said D as follows:

> "Where an event is brought about directly by the culpa of two persons whether joint or several, when the culpa of each has contributed to produce the event and the event would not have been produced but for the culpa of both, there can be no claim as between these persons for reparation of injury flowing from the event."

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I am well aware that this was said in a case of accident where the point in question was what is ordinarily termed "contributory negligence," and it could easily be said that the proposition must be read secundum subjectam materiem. Nonetheless it is expressed as a general proposition, and, in my humble opinion, as a general proposition it is sound. A general proposition is not necessarily vitiated F as such because the subjecta materies will permit, though it does not enjoin, a limited application. For these reasons I am of opinion that the result reached by DARLING, J., and the majority of the Court of Appeal was right, and that the appeal should be dismissed with costs, and I move accordingly.

LORD SUMNER.—In this case neither the character nor the validity of the contract is now in dispute. The fact and the nature of the respondent's breach G of it are accepted, and the only issue is between substantial and nominal damages. The plaintiff pleaded an employment of the defendant as an accountant, alleging an implied obligation to keep his instructions secret. The case made was not a republication of the appellant's libel or an intentional or wilful disclosure of his letter, but a want of care in the custody of it, whereby its contents became known to the parties whom it defamed. Each member of the Court of Appeal expressly H states the obligation, which the defendant broke, to have been an obligation to use care, and one of the grounds given for the decision against the appellant is that his case is really a claim for indemnity and not for damages due to want of care. As WARRINGTON, L.J., puts it:

> "If the plaintiff is right, the obligation not to disclose is equivalent to an I obligation to indemnify the plaintiff against the liability to pay the amount recovered for damages and costs in an action brought as a consequence of the disclosure."

The appellant accepts this decision in the statement which he makes in his Case:

> "The present action was then commenced by the appellant against the respondent to recover damages for the respondent's breach of duty (charged as a breach of an implied term of his contract of employment) to use reasonable care to keep secret the contents of his said letter."

This view of the contract and the breach is, accordingly, the basis of the present debate, for so far there is no appeal from the decision below. That a man may in some cases contract to be indemnified against his own torts is obvious, but that is not the point. If I do not discuss the question whether a man can lawfully contract with another to repay to him what he is compellable to pay to those whom he libels, I do not wish it to be supposed that I affirm that he can. We have nothing to do here with any duty (which could only be contractual) to hold the appellant harmless from liability for what he had written or to save him from himself or to recoup to him even for self-inflicted losses, nor with any undertaking to insure against the risk of the contents of the letter becoming known or absolutely to keep them secret in all events and to guard against the letter's becoming known to anybody, for no such contract is before your Lordships. Again, this contract of employment contains no special term as to the extent or measure of damages, express or implied. BOWEN, L.J., said in *Cobb* v. *Great Western Rail. Co.* (21) (62 L.J.Q.B. at p. 337):

> "The damage must be such as would flow from the breach of duty in the ordinary and usual course of things. This is the general rule both in contract and in tort, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was made. Subject to that, only such damages can be recovered as were immediately and naturally caused by the contract."

This special application to contracts of the rule as to remoteness depends, like other matters, of contract, on mutuality and agreement on some communication between the parties at or before the time when the contract is made, some knowledge and acceptance by the one party of the purpose or intention of the other in entering into the contract. There is no evidence of anything of the kind here. It is true that the respondent said that he realised the letter was dangerous when he got it, but that answer did not purport to refer to actions brought upon it. There are plenty of other ways in which it might make mischief, and, indeed, when Mr. Stephens asked the counsel who was cross-examining him, "Do you mean dangerous in the sense that it was libellous?"—all the answer he got was: "A highly dangerous letter to the interests of Mr. Weld-Blundell unless it was kept from the knowledge of those whose names are referred to in it." To that it was that he replied that he realised it was dangerous. As a matter of fact, nothing passed between the parties on the subject and so far was any such special contemplation from the appellant's mind that, when Messrs. Comins & Co.'s solicitors asked him to apologise for his letter his answer was: "I suppose you will not venture to deny my right, even in this land of fools and rogues, to say or write what I please to my own servants, such as Comins, Hurst, Stephens, &c., more especially when, as in this case, I limit my remarks to what is and has been a subject of common knowledge to and among all of them or, as you put it, among the entire gang in my employment." Clearly, Mr. Weld-Blundell thought he could write to Mr. Stephens what he liked without being under any legal liability, whether the letter became known or not. There is no evidence that any such thing was in the contemplation of either party; certainly it was not in that of both. There is, therefore, no ground for applying to the defendant's breach of contract in this case any other measure of damages than such as would have applied, if it had been a breach of a non-contractual duty.

The only damages of which there was any evidence consisted of the damages and costs, both the successful plaintiffs and his own, which were recovered against the appellant or incurred by him in the libel actions. Obviously, there might have been other substantial damages recoverable against Mr. Stephens, if they could have been proved—for example, the cost of advertising for the lost document and getting it back—but how is the appellant to show that his payment of the above-mentioned damages and costs was the respondent's doing or the respondent's

A fault? Either the sums, which the appellant had to pay were the direct result of what he did himself and were self-inflicted injuries, or they were caused not by Mr. Stephens, but by Mr. Hurst. As to the costs, the appellant brought them on himself by electing to defend what in truth were undefended actions. If it be said that, until express malice was found by the jury, his liability might be only nominal, that it was reasonable for him to take his chance on this issue, and B that he was put in the position of having to elect by the respondent's want of care, the fact still remains that he was, in part at least, the author of his own wrong by publishing the libel at all. To say that Mr. Weld-Blundell gave Mr. Stephens the opportunity of making him liable and that Mr. Stephens took it and did so is, to my mind, a mere quibble. The appellant's liability did not depend on or spring from Mr. Stephens, unless a mere occasion is identified in law with C cause. The way in which the appellant must naturally and necessarily state his case seems to me to put this view in a nutshell. "True it is," he says, "that I libelled Messrs. Comins and Lowe to Mr. Stephens; but if Mr. Stephens had not lost my letter, they would have known nothing about it and I should have escaped the consequences of my own wrongdoing." What is this but saying in plainer language, "My own act was the causa causans of the judgments against D me and Mr. Stephens' omission to be careful was the causa sine quâ non?" From the moment when the libel was published the appellant was under legal liability, and the effect of the action was merely to ascertain its amount and to compel the appellant to discharge it. If he had been in possession of lost property belonging to Mr. Comins, and the letter had betrayed to the owner the secret of its where-abouts; if he had encroached on Mr. Lowe's land and the letter had apprised E that gentleman of the fact, just before a title accrued by lapse of time; if he had owed a debt to them and the letter had recalled it to their attention, I can hardly suppose that the several judgments recovered could be alleged to be caused by the respondent, even though it was by his fault that Messrs. Comins and Lowe got at the letter. As Bankes, L.J., says:

F > "The damages and costs in question are payable by reason of the plaintiff's own wrongdoing and were legally recoverable from him independently of the defendant's breach of his obligation."

As to *Neville* v. *London "Express" Newspaper, Ltd.* (2), I confess I should have thought from the report of that case that your Lordships had then laid down a G principle which would now be in point, but, in deference to the noble viscount, who was a party to that decision and whose opinion is to the contrary, I forbear to express any concluded judgment upon it.

If, however, the damages, of which evidence was given, were not simply caused by the appellant's publication of the libel, they arose in actions directly and immediately brought about by the intervention of Mr. Hurst. In my opinion, H the evidence on this point was all one way, and there was nothing to the contrary to be left to the jury. The point was taken in the Court of Appeal, and I am unable to understand why your Lordships are not to decide it now. It is a question of law. The responsibility of Mr. Stephens ended with Mr. Swift, his partner, who was careless but did not drop the letter intentionally. No authority was given by Mr. Stephens to Mr. Hurst in the matter. It was never intended that he should I read or make use of the letter. It was no part of his duty to do so. I may add, though I do not think it makes the respondent's irresponsibility any clearer, that Mr. Hurst appears to have involved himself in conversion and detinue of the document, and in sundry original publications of the rather complicated collection of libels which it contained. He was an independent actor and a mischief-maker. It is important to recall exactly what the evidence is as to Mr. Hurst. It is given by Mr. Swift, who was not contradicted, nor was his cross-examination directed to shaking his evidence on this point. He received the letter from the respondent

for the purpose of making the investigations desired by the appellant. So far there was no breach at all. He dropped it carelessly in Mr. Hurst's room. He discovered that he had lost the letter before Mr. Hurst found it, and he telephoned to him about it. Mr. Hurst looked about the room and replied, "There is a letter under the chair in my office where you were sitting." Mr. Swift replied: "Well, it is a private letter; do not read it! Just put it in an envelope and send it along to me," and Mr. Hurst said: "I will do that straight away." Next day he said, when asked why it had not arrived, "I could not catch the post, because I was detained; but you will get it by the second." This was only a half-truth. What really detained Mr. Hurst was that he was getting a certified copy of the letter made, which was ultimately the foundation of the plaintiffs' case in the actions brought against the appellant.

What canon is to be applied to such a case? It is argued that the respondent is liable for any damage which is "a natural consequence," or a natural and necessary consequence, of his breach of duty; that the conduct of Mr. Hurst was "in the circumstances probable," and that Mr. Stephens was, therefore, responsible for it; that his breach of duty was "the effective cause of the litigation"; and that Mr. Hurst's "intervening negligence does not affect" this result. What are "natural, probable, and necessary" consequences? Everything that happens, happens in the order of Nature, and is, therefore, "natural." Nothing that happens by the free choice of a thinking man is "necessary," except in the sense of predestination. To speak of "probable" consequences is to throw everything upon the jury. It is tautologous to speak of "effective" cause or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all; still, I venture to think that direct cause is the best of expressions. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in *Burrows* v. *March Gas and Coke Co.* (9) and *Hill* v. *New River Co.* (22).

As, however, these different epithets and formulæ are used almost indiscriminately, something more must be done than to choose an epithet which has been used in a decided case. It is necessary to consider whether the facts of the case cited raise a question of causation belonging to the same category as that under discussion. The crux of the present question is the intervention of Mr. Hurst between the respondent and Messrs. Comins & Co. Want of care has to be proved here against the respondent, for he accepts the decision that he broke his contract by his partner's omission to be careful, though not by any deliberate, intentional, or wanton breach. This at once makes it possible to lay aside large classes of authorities. Further, what a defendant ought to have anticipated as a reasonable man may be and is very material when the question is being discussed whether or not he was guilty of negligence—that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation: *Blyth* v. *Birmingham Waterworks Co.* (23); *Smith* v. *London and South Western Rail. Co.* (24), per BLACKBURN, J., L.R. 6 C.P. at p. 21. Again, what ordinarily happens or may reasonably be expected to happen is material, where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp* v. *Powell* (25), unless, indeed, it be regarded as a decision on negligence or no negligence. At any rate, it is not in this case. Again, between the negligence of a defendant and the infliction of hurt or loss on a plaintiff, the action of human beings may intervene in a great variety of ways—the action of children, or other irresponsible creatures, of persons in a state of excusable ignorance acting without any intention to injure others: *Elkins, Bly & Co.* v. *M'Kean* (26); of persons in a state of excusable alarm

produced by the wrongful acts of the defendant: *Scott* v. *Shepherd* (16); *Jones* v. *Boyce* (27); of persons acting in the exercise or the defence of their rights and without intention to injure others: *Clark* v. *Chambers* (8); *The Sisters* (28); *Halestrop* v. *Gregory* (29); of persons acting as the defendant meant them to act or acting as the defendant must have foreseen that they would act, in consequence of things done by him for his own purposes or in a state of indifference as to the result to others: *Scott's Trustees* v. *Moss* (11); *R.* v. *Moore* (10). Mr. Hurst's action is none of these. Equally we may lay aside the cases where dangerous things or things capable of being dangerous if left exposed to the interference of others have been treated as imposing special duties of care on those who are responsible for their being left where strangers can make them a source of danger to those brought into contact with them—such cases are *Illidge* v. *Goodwin* (30) and *Lynch* v. *Nurdin* (31). Darling, J., thought that this case might be treated as if the letter was an "explosive" dangerous in itself and concealing its real character from ordinary examination. The analogy was a false one. The letter could not "go off" of itself. If let alone, it was quite harmless, and Mr. Hurst's only motive for meddling with it must have been either its patent utility for mischief-making or his moral disapproval of Mr. Weld-Blundell's own wrong-doing. There is a special line of cases relating to things supposed to be dangerous in themselves, horses and guns, lamps and hair washes, railway trucks and railway turntables; but a document has been expressly held not to belong to this category: *Le Lievre* v. *Gould* (32).

As applied to the present circumstances, what principles and what decisions are in point? The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done, not to inflict punishment for duty disregarded. The trial of an action for damage is not a scientific inquest into a mixed sequence of phenomena, or an historical investigation of the chapter of events by which Mr. Weld-Blundell, the libeller of Messrs. Comins & Co. come to be their judgment debtor. It is a practical inquiry, the object of which is to settle the question whether the appellant's payment of damages and costs to these gentlemen was Mr. Stephens's doing, and whether it was Mr. Stephens who made Messrs. Comins & Co. go to law. If Mr. Weld-Blundell cannot prove that it was so, the loss lies where it fell. In general (apart from special contracts and relations and the maximum respondeat superior), even though A. is in fault he is not responsible for injury to C., which B., a stranger to him, deliberately chooses to do. Though A. may have given the occasion for B.'s mischievous activity, B. then becomes a new and independent cause: e.g., *Cobb* v. *Great Western Rail. Co.* (21); *A.-G.* v. *Conduit Colliery Co.* (33). It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B. snaps the chain of causation; he is no mere conduit pipe, through which consequences flow from A. to C., no mere moving part in a transmission gear set in motion by A.; in a word, he insulates A. from C. It is quite plain that when Mr. Swift dropped the letter and found out his loss, the matter would have ended there but for the idle hands of Mr. Hurst. He gave the letter a fresh start and on his original impulse it came to be sued on. Precisely the same result would have happened if the person who dropped the letter in Mr. Hurst's office had previously got it by picking Mr. Swift's pocket. Again, the matter cannot be worse for Mr. Stephens than if he had shown Mr. Hurst the letter himself, that is, had published to him Mr. Weld-Blundell's original libel. What then? Would the respondent have been liable if Mr. Hurst had re-published it (as, indeed, he did) without authority from him and not in accordance with any intention or desire on his part, actual or imputable? *Ward* v. *Weekes* (17) says " No." The case is ninety years old, and I see no reason to doubt it. The repetition, says Tindal, C.J., was

"the voluntary act of a free agent, over whom the defendant had no control,

and for whose acts he is not answerable, and this repetition was the immediate cause of the damage."

Yet, taking men as we find them, few things are more certain than the repetition of a calumny confidentially communicated, even on an honourable understanding of secrecy.

I gather that the appellant's real argument is this: Why was it the respondent's duty to take care of the letter? Because it contained not only his instructions, but several libels. What was the importance of taking care of it as a libel? Because in the hands of others an inconvenient use might be made of it, for example, the person whom the appellant had wronged might be enabled to make him right his wrong. Why should the respondent be concerned with that? Because he might expect that, if he lost the letter, something of the sort might happen. Why should he expect that such a use might be made of the letter by the finder? Because we must take men as we find them and we find them as often bad as good. Then Mr. Hurst's misbehaviour was the natural and probable consequence of Mr. Swift's carelessness. If there is any basis for this argument, I do not see why it stopped where it did. There can be no doubt that if Messrs. Comins & Co. had had the letter sent to them by a person who had stolen it, this action would have failed, even though the respondent had by his carelessness enabled the thief to get access to the letter. Why is the line drawn at Mr. Hurst's conduct? If an expectation that other people will do wrong, when they are given the chance, be the foundation of the respondent's responsibility for what Mr. Hurst did, it would equally extend to the conduct of a criminal. The importance of the point is this. It is said that the jury's third finding is conclusive, because there was evidence to go to the jury which would support it. This evidence is either the respondent's admission above quoted, that he realised that the letter was dangerous, or it is the general effect of the circumstances of the case as a jury would regard them. I cannot see that there is any evidence in law in either case, because I cannot see that the mere probability that actions might be brought for the libels can turn Mr. Hurst's act into the respondent's act. It might be material if the question of want of care were in dispute, but it is not. Remoteness of damage is a question of cause and effect, a different question. That a jury can finally make A. liable for B.'s acts merely because they think it was antecedently probable that B. would act as he did, apart from A.'s authority or intention, seems to me to be contrary to principle and unsupported by authority.

I turn to the cases cited by the appellants. They certainly do not determine the present question nor does it seem to me that *Clark* v. *Chambers* (8), at any rate, is a decision on the measure of damages or on the casual connection between the wrong act done and the wrong suffered at all. What the defendant Chambers there did was deliberately done for his own purposes in disregard of the rights of others generally, and what the intervening party did was in defence of his rights and not obviously dangerous to others. When the reasoning is summed up (3 Q.B.D. at p. 338) stress is laid on the fact that the defendant's act was a deliberate and unlawful obstruction of a right of way, and no less than three grounds are stated for the decision (i) that it is covered by *Scott* v. *Shepherd* (16), a case which has no bearing on the present appeal (ii) that the defendant, when he laid this trap, must have anticipated that someone entitled to use the road would abate the nuisance he had created, and took the risk of it; and (iii) that there was a duty upon him to safeguard others from the effects of anything that might lawfully be done in removing his obstruction, I think many persons have felt difficulty in fitting *Clark* v. *Chambers* (8) into any coherent relation with the rest of the law on this subject. Lindley, L.J., for example, in *The Bernina* (34), is fain to treat it as a case of joint concurrent negligence of the defendant, who should have provided a light, and of the person who moved the chevaux de frise

and left it in the dark. No difficulty need be felt now in saying that the case has no place in the present argument. *Bowen* v. *Hall* (12) is a case in which the third party's act, rightful or wrongful was precisely what the defendant intended to bring about. The point argued was that the third party's act was in itself wrongful and for that reason only was too remote, which is not the point here. *Engelhart* v. *Farrant & Co.* (7) should be read with *McDowall* v. *Great Western Rail. Co.* (35), for the latter purports to follow the principle, whatever it is, of the former. Both relate to responsibility for the intervention of irresponsible young persons. In the former, stress is laid on the zeal of the lad who officiously started the horse, thinking that he was doing his master a service, though in defiance of his orders. Even so, the case is said to be on the border line and LOPES, L.J., says the liability would have been the same if no one had been left with the horse and an entire stranger had started it, which clearly shows that he conceived the case to depend on the special responsibility of those who leave animals unattended in public places. Unless the decision really turns, as argued by counsel and held by LORD ESHER, on the continuing negligence of the man, who ought to have remained in charge of the horse all the time and whose omission was an effective cause concurrent with the boy's officious interference with the horse, and so follows *Illidge* v. *Goodwin* (30), I think the case was insufficiently considered and when necessary should be prepared to review it. In *McDowall* v. *Great Western Rail. Co.* (35), on the contrary, the railway company was exonerated from responsibility for what was held to have been due to the intervening action of others, though it had just as much reason to anticipate what happened as the present respondent had, and perhaps more, for the intervening agents were young boys. *De la Bere* v. *Pearson, Ltd.* (36) turns on the implications of the particular contract. It was more than a mere contract to use care; it approximated to a warranty of the fitness of an article supplied. What the defendant had agreed to do was to recommend an honest inside broker; he recommended an outside broker, who was a rogue, and the consequences of his roguery was held to be covered by the contract as construed.

Great stress was laid on LORD WENSLEYDALE's languages in *Lynch* v. *Knight* (37):

> "to make the words actionable by reason of special damage the consequences must be such as, taking human nature as it is with its infirmities, and having regard to the relationship of the parties concerned, might reasonably and fairly have been anticipated and feared would follow from the speaking of the words."

It must be remembered what *Lynch* v. *Knight* (37) was. The defendant had been guilty of making deliberate and continued accusations against his sister to her husband, obviously intending to produce some effect on him adverse to her. LORD CAMPBELL wrote of him:

> "He having intended the husband to believe that it was true and having intended the husband to act upon it."

Thus the first question was whether what the husband did was within the class of action he was intended to take or arose from some idiosyncrasy of the particular husband. If it was the former, the defendant's father's argument was, that, as the husband was not in law bound to put her away in consequence nor was warranted in doing so, this particular consequence was not special damage. One must read LORD WENSLEYDALE'S words with reference to this argument. I do not think he would have spoken of "human nature with its infirmities" in connection with Mr. Hurst, for that would be stretching charity into condonation, nor is there any evidence of any relationship between Mr. Hurst and Messrs. Comins & Co. beyond the fact that he knew who they were. LORD WENSLEYDALE'S view was that what Lynch intended Knight to do would extend to what any reasonable man would have feared that he would do, but this was not part of

the decision nor is it applicable to this case, for here the respondent had no such intention as Lynch had. Their Lordships all concurred in rejecting the argument that the husband's conduct could not be material unless it was his legal right or duty to act as he did, but they held that the defendant must succeed because it was not reasonable for the husband to have taken so serious a course on an imputation of mere "levity of manners," requiring only vigilance on his part. The passage in question is, therefore, no warrant for the proposition which the appellant founds on it. The contention is not raised here that Mr. Stephens escapes liability for Mr. Hurst's acts merely because they were tortious or that Mr. Hurst stood in any special relationship to Messrs. Comins & Co. The bare unqualified contention is that the defendant is liable, as for the consequences of his partner's carelessness, for anything done by Mr. Hurst, which, taking men as we find them, a jury might think it natural for Mr. Hurst to do. This proposition, if right, makes a clean sweep of a vast body of decided cases, as mere indications of which I need only mention *Parkins* v. *Scott* (38) and *Bree* v. *Marescaux* (39), for more than half of human kind are talebearers by nature, and a good many people "naturally" take advantage of any opportunity to be dishonest, if they see anything to be got by it. I think the appeal fails, and should be dismissed with costs and as the point, relating to the decision of the Court of Appeal to deprive the appellant of his costs of the action, has not been argued, I think the judgment of the Court of Appeal should be upheld.

LORD PARMOOR.—The appellant on May 4, 1915, wrote to the respondent a letter instructing him to investigate the affairs of the Float Electric Co. This letter contained libellous statements referring to Lowe, a previous manager of the company, and to Comins the auditor, which, on the subsequent trial on a libel action were held to be malicious. The respondent handed the letter to his partner, who dropped or left it, in the room of the manager, Hurst, at the offices of the Float Company. The manager found and read the letter and communicated its contents to Lowe & Comins, who brought actions of libel against the appellant, alleging as the publication, the publication to the respondent. The plaintiffs succeeded in both actions, the judge ruling that the occasion was privileged, but the jury finding that the appellant had acted maliciously. The sum paid by the appellant for damages and costs amounted to £1,769 14s. 8d. The appellant then commenced an action against the respondent, charging him that he had broken an implied term in his contract of employment, to use reasonable care to keep secret the contents of the said letter, and basing his claim for damages on the sums which he had had to pay for damages, and costs in the libel actions. The action was tried before Darling, J., and the jury found: (i) That it was the duty of the defendant to keep secret the letter of May 4, written by the plaintiff to the defendant. (ii) That the defendant had neglected his duty in regard to the said letter, so that the contents were disclosed or came to the knowledge of Mr. Hurst. (iii) Damages £650, on the ground that the plaintiff himself was responsible, to some extent, for the damages awarded in the libel actions. These findings are not questioned in the appeal, and, in my opinion, they are not open to discussion in this House. On further consideration, Darling, J., held that the injuries sustained by the appellant were traceable to his own unlawful act, and that the maxim ex turpi causa non oritur actio applied, and, further, that the plaintiff could not recover damages against another because he had had to make reparation for a wrongful act committed by himself. At the same time, the learned judge expressed his agreement with the finding of the jury that the bringing of the libel actions, and the resulting loss to the plaintiff, were the natural consequence of the defendant's negligent disclosures. The Court of Appeal were unanimous in deciding that the appellant had a good cause of action against the respondent, and held by a majority that only nominal damages were recoverable. The only question raised in debate before

A your Lordships is whether nominal damages are alone recoverable. The decision of the Court of Appeal affirms the proposition that there is in law no objection to an obligation undertaking not to disclose a libellous document, where the libellous document is not criminal in character, and the party who undertakes the obligation is not in the position of a joint tortfeasor. In my opinion, this carries the appellant a long way, and the question of damages must be carefully dissociated
B from the question of a right of action. If the respondent had been in the position of a joint tortfeasor, he would not have been liable in the action, and the question which arises in this appeal, whether more than nominal damages are recoverable, would not have arisen. This decision, however, leaves open the question whether an obligation to indemnify a plaintiff against a liability consequent on the disclosure of his own wrong, is an obligation which may be enforceable at law. This issue
C is directly raised where damages are claimed on the basis of the damages and costs incurred in any libel action or actions which have resulted from the disclosure by an agent of libellous documents intrusted to him for safe custody. On this point Scrutton, L.J., formed a different conclusion from Bankes and Warrington, L.JJ., and the case is one of great difficulty.

D The first matter for consideration is whether the obligation undertaken by the respondent was intended by the parties themselves to include such a liability for damages, in the event of the negligent disclosure of the libellous document. With some hesitation I have formed the opinion that this question should be answered in the affirmative. I agree with Darling, J., that, subject to the objection of law, which does not appear to me to have been present to the mind of either
E party when the contract was made, the damages claimed are, as found by the jury, to be the natural and probable result of the negligent disclosure. Apart from such damages, there was no suggestion during the course of the trial that loss and expense had been incurred by the appellant. I should further be prepared to find, if necessary, that the damages, as claimed, were within the contemplation of the parties when the contract was made. That there is no general objection to
F a contract in this form is evidenced by such a case of *Agius* v. *Great Western Colliery Co.* (40), where the unsuccessful defendant recovered, as damages for breach of contract, both the damages awarded against him in an action resulting from that breach and the costs of his unsuccessful defence, the judge at the trial finding that the course taken by the plaintiff in defending the action against him was reasonable. The objection, however, taken on behalf of the respondent is that
G it is not material that the damages awarded have been found to be the natural and probable result of the breach of the contract, or that they were within the contemplation of the parties at the time of entering into the contract, seeing that they are not legally recoverable on the principle stated by Darling, J.: "Can one recover damages against another because he has had to make reparation for
H the wrongful act committed by himself?" Or, to put the question in a different form, can damages, which would otherwise be recoverable as being the natural result of a breach of contract, or as being within the contemplation of the parties, be incapable of being recovered because they are founded on the costs incurred to make reparation for a wrongful act committed by himself? If this principle is applicable, then it follows that the damages and costs incurred in the libel actions
I would not be recoverable by the appellant, although the contract should contain an express promise of indemnity from the respondent. This position was not contested in the able argument on behalf of the respondents.

I think that the proposition stated in this general language is too wide, and that there are circumstances in which an indemnity can be claimed against a wrongful act of the plaintiff, which is not either criminal or wilful in its character. With this limitation in mind I should be content to take the law as laid down by Kennedy, J., in *Burrows* v. *Rhodes* (1) ([1899] 1 Q.B. 828):

"It has, I think, been established that if an act is manifestly unlawful, or the doer of it knows it to be unlawful as constituting either a civil wrong or criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void . . . Where the circumstances constituting the unlawfulness of this act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear."

Does the libellous document entrusted to the respondent, which was in itself privileged, but which was found to be malicious, come within an act "manifestly unlawful, or which the doer of it knows to be unlawful?" There appears to me no direct authority, but SCRUTTON, L.J., expresses the opinion:

"I cannot say that Mr. Weld-Blundell must be taken to have known that he was committing an unlawful act so as to lose all protection if the letter was revealed."

In other words, the learned lord justice finds that the wrong was not wilful, and comes within the category of cases in which a plaintiff can legally claim indemnity against his own negligent act or the negligent act of those for whom he is responsible. In *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (41) the negligent navigation was held not to defeat a claim to recover on a marine insurance policy, although such negligent action had directly conduced to the collision, but it is indicated that the conclusion would have been different if the negligence had been wilful. The same principle applies in the case of fire policies with the same distinction between negligence and a wilful act. In *Cointat* v. *Myham & Son* (5) a claim for damage was allowed in respect of a fine and costs, as well as for a loss of trade. On the other hand, in *R. Leslie, Ltd.* v. *Reliable Advertising and Addressing Agency, Ltd.* (4) it was held that, as the plaintiffs had been convicted of sending a money-lending circular, without having reasonable grounds for believing the addressee to be of full age, the claim was not maintainable. I desire, in the present appeal, to express no opinion of what the legal result would be in a case in which damages in the nature of an indemnity for a criminal act are sought to be recovered for a criminal act. In such a case questions of public policy would arise which do not arise in the present appeal. On the whole, I agree with the judgment on this point of SCRUTTON, L.J., and, apart from authority, I can see no reason why, if the action is maintainable, damages in the nature of an indemnity should not be recovered if such damages can be regarded either as the natural and probable result of the negligence or as in the contemplation of the parties when they entered into the contract.

It was further contended on behalf of the respondent that the damages were too remote, in that the actions for libel were directly attributable, not to the negligence of the respondent, but to the action of Hurst in disclosing the libellous document to Lowe and Comins. This point was not raised at the trial before DARLING, J., and is not referred to in the judgment of the Court of Appeal, but the intervening negligence of a third party does not necessarily in law render the negligence too remote, and if it had been intended to raise this point it should have been raised at the trial of the action so that the necessary relevant question might have been left to the jury. It is sufficient to refer to *Engelhart* v. *Farrant & Co.* (7), in which the defendant was held to be liable where the negligence of his driver in leaving a cart was the effective cause of the damage, although in his absence a lad drove on and came into collision with the plaintiff's carriage. This principle was recognised in *McDowell* v. *Great Western Rail. Co.* (35), although it was held in that case that the evidence did not support the finding of the jury, and that the negligence of the defendants was not the effective cause of the accident. I would refer also to *Clark* v. *Chambers* (8), *Bowen* v. *Hall* (12) and *Lynch* v. *Knight*

A (37). In my opinion, the judgment of the Court of Appeal should be reversed and judgment entered for the appellant for the amount of the verdict.

LORD WRENBURY.—By his letter of May 4, 1915, the plaintiff Weld-Blundell published to the defendant Stephens, with express malice, a libel upon certain persons, including Lowe and Comins. The relevant facts for the moment stop there. Whether Lowe and Comins knew it or not there existed by reason B of those facts a cause of action against Weld-Blundell at the suit of each of them. He lay under a legal obligation to pay damages for his wrongful act. They subsequently learned that they had this cause of action. Each of them sued and recovered damages and costs. Those damages were, of course, the pecuniary equivalent of the wrong done to the parties libelled. Weld-Blundell in those C actions suffered no damage at all. He had to pay money, but a defendant is in no sense damaged by being compelled by legal process to satisfy his legal obligation. In that state of facts Weld-Blundell in the present action seeks to recover from Stephens the money he has had to pay to Lowe and Comins. He is entitled, he says, to recover it because Stephens in breach of duty to him, did such acts as that Lowe and Comins became aware that they had the above right of action. D If Stephens had not committed that breach of duty Lowe and Comins would not have known that they had or might not have known that they had and would not have exercised their right of action, and Weld-Blundell would not have been compelled to pay money. He is damaged, he says, by the amount of money he has had to pay, and Stephens is liable to him in the amount of the damages and costs in the libel actions and damage for Stephens' negligence and breach of E duty. There is, in my judgment, more than one answer to this contention.

The relations between Weld-Blundell and Stephens were such that the latter, no doubt, owed a duty to the former, and in that duty he was negligent. Weld-Blundell's liability to pay money to Lowe and Comins, however, arose not from that negligence but from his own wrongful act in indulging in malicious libel. And the amount he had to pay was measured by his own wrongful act. It bore F no pecuniary relation to Stephens' wrongful act. Stephens' act was not the cause (whether with or without the word "effective") of his having to pay, but was an act without which possibly he would never have been called upon to pay. It was not causa causans, but at most causa sine qua non. In discharging his liability to pay damages for malicious libel, Weld-Blundell suffered no damage at all. A man is not damnified by being compelled to satisfy his legal obligation. In *Neville* G v. *London "Express" Newspaper, Ltd.* (2), the House were unanimous upon this proposition. Further, the following passage in the judgment of KENNEDY, J., in *Burrows* v. *Rhodes* (1) correctly, in my judgment, states the law ([1899] 1 Q.B. at p. 828):

> "It has, I think, long been settled law that if an act is manifestly unlawful or the doer of it knows it to be unlawful as constituting either a civil wrong or H a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express compromise or indemnity to him for the commission of such an act is void."

In support of this proposition he cites *Shackell* v. *Rosier* (42), *Arnold* v. *Clifford* (43), *Martyn* v. *Blithman* (44). In the present case Weld-Blundell did an unlawful act in libelling Lowe and Comins. He cannot by legal process reimburse himself I for the consequences and throw the cost upon another. Further, notwithstanding what was said by KELLY, C.B., in *Riding* v. *Smith* (45), I think *Ward* v. *Weeks* (17) is good law. BRAMWELL, L.J., in *Bree* v. *Mavescaux* (39) said:

> "There is ample authority to show that a man is not liable for damage occasioned by the repetition of a slander, that is to say, if A. said to B. that C. stole his sheep though A. would be liable to C. for such slander, yet if B. repeats this slander, A., the original speaker, would not be responsible for this."

The proposition thus stated, however, requires, I think, qualification. If, for instance, A. expressly authorised B. to repeat the slander, or if from the surrounding circumstances it is to be inferred that he anticipated and wished that he should repeat it, the proposition would not, I think, be true: *Speight* v. *Gosnay* (46), *Ratcliffe* v. *Evans* (47). A

The present case is not one of slander but of libel. But not only had Weld-Blundell not authorised Stephens to repeat the libel, he had sent him the letter containing the libel in such circumstances that he (Stephens) owed him the duty not to disclose it. Assuming that it can be said that Stephens made publication to Lowe of the libel on Comins and made publications to Comins of the libel on Lowe, nothing results from this for (i) Weld-Blundell was not liable in respect of that publication which he had not authorised, and (ii) he was made liable not for that publication but for the publication made by Weld-Blundell to Stephens, and the last-mentioned publication had been made and its consequences incurred before the events happened that Swift dropped the letter and Hurst picked it up and wrongfully read it, and as a result Lowe and Comins were informed. Nothing that Stephens did created the liability under which Weld-Blundell lay. I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty. If it be worth while to pursue it further, that which Stephens did in breach of duty was not that he informed Lowe and Comins, but that he negligently gave Hurst the opportunity to commit another wrongful act, namely that of reading the letter—an opportunity of which he wrongfully availed himself, and then did the act of informing Lowe and Comins. We have heard little, and I have so far said nothing as to the question discussed below and on which the Court of Appeal expressed an opinion, namely, whether the duty (although the Court of Appeal call it a contract) found by the jury to keep secret the letter of May 4 was contrary to public policy. All the lords justices held that it was not. I fully agree. The contrary proposition would seem to be that public policy requires that a man should spread a malicious libel to the best of his ability, or at least that he should inform the party libelled (if he does not already know it) in order that he may be induced to bring an action. I do not think public policy requires anything of the kind. In my judgment, the order under appeal is right. There was a duty: there was negligence; there was no special damage. The damages are nominal. I think the appeal should be dismissed with costs. B C D E F

Solicitors: *J. S. Blanckensee & Co.; Guedalla, Jacobson & Spyer.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

ATTWOOD *v.* LAMONT

[Court of Appeal (Lord Sterndale, M.R., Atkin and Younger, L.JJ.), June 18, 21, July 30, 1920]

[Reported [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 36 T.L.R. 895; 65 Sol. Jo. 25]

Contract—Illegality—Restraint of trade—Covenant by employee not to engage in employer's business—Limit of legitimate restraint—Protection of employer's business—Illegality of restraint merely against competition.

Contract—Severability of covenant—Need for severed parts to be independent—No alteration in meaning and object of original contract.

A master can only place a restraint on the actions of his servant to the extent necessary to protect his business against an improper use by the servant of the knowledge which he has acquired in the master's service. It may be necessary to have a general restraint against trading in a certain area in order to avoid such acts on the part of the servant without specifying in the covenant the particular acts against which it is directed, but any restraint beyond what is necessary to prevent such practices, and especially a restraint against competition only, is too wide. An employer may not, after his employee has left his employment, prevent that employee from using his own skill and knowledge in his trade or profession even if they were acquired when in the employer's service, for that skill and knowledge is only placed at the employer's disposal during the employment. The permissible extent of a covenant imposed on an employee must be tested in every case with reference to the character of the work done for the employer by the employee while in his service and by the consideration whether on that view the covenant taken from him goes further than is reasonably necessary for the protection of the proprietary rights of the employer. The restraint must be reasonable, not only in the interests of the employer, but in the interests of both the contracting parties. There is every difference in the matter of its validity between a covenant embodied in a contract of service and the same covenant when found in an agreement for the sale of goodwill.

A contract can only be severed if the severed parts are independent of one another and can be severed without the severance giving to the part remaining a meaning and object different in kind and not merely in extent. The doctrine of severance has not gone further than to make it permissible in a case where the contract contains what is not really a single covenant, but is in effect a combination of several distinct covenants. In such a case, where the severance can be carried out without the addition or alteration of a word, it is permissible.

Per Younger, L.J.: Where the agreement as a whole is invalid severance generally should not be allowed.

By a contract of service made between employers and their employee, it was provided: "In consideration of the employers employing him in the capacity and at the salary aforesaid, the [employee] hereby agrees with the employers that he will not at any time hereafter, either on his own account or that of any wife of his, or in partnership with, or as assistant, servant, or agent, to any other person, persons, or company, carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies', or children's outfitter, at any place within a radius of ten miles of the employers' place of business. . . ."

Held: on construction the agreement was an agreement not to trade in opposition to the employers and was not an agreement to restrain the unfair use of secrets or knowledge of customers acquired by the employee while in the employers' service; to effect that object the retention of the restraint

regarding the business of all the departments was necessary, and to strike out references to all but the tailoring department was not merely to remove one of several covenants each directed to the legitimate object of preventing unfair competition, but to alter entirely the scope and intention of the agreement; therefore, the agreement could not be severed, and, as it stood, was too wide and so invalid. A

Per YOUNGER, L.J.: Even if the covenant relating to tailoring were severable and severed, it would still be void as being merely a covenant against competition and inappropriate to protect the employers against such activities of the employee as, apart from competition, might be regarded as injurious to their goodwill and as being unreasonably wide. B

Notes. Applied: *Clark, Sharp & Co., Ltd.* v. *Solomon* (1920), 37 T.L.R. 176; *Bowler* v. *Lovegrove*, [1921] 1 Ch. 642; *British Concrete Co.* v. *Schelff*, [1921] All E.R. Rep. 202; *Spence* v. *Mercantile Bank of India* (1921), 37 T.L.R. 390; *Putsman* v. *Taylor*, [1927] All E.R. Rep. 356. Considered: *English Hop Growers* v. *Dering*, [1928] All E.R. Rep. 396; *Express Dairy Co.* v. *Jackson*, [1929] All E.R. Rep. 327. Applied: *Wyatt* v. *Kreglinger and Fernau*, [1933] All E.R. Rep. 349. Considered: *Warner Brothers Pictures, Incorporated* v. *Nelson*, [1936] 3 All E.R. 160; *Empire Meat Co.* v. *Patrick*, [1939] 2 All E.R. 85. Distinguished: *Ronbar Enterprises, Ltd.* v. *Green*, [1954] 2 All E.R. 266. Referred to: *Vincents of Reading* v. *Fogden* (1932), 48 T.L.R. 613; *Wessex Dairies, Ltd.* v. *Smith*, [1935] All E.R. Rep. 75; *Marco Productions, Ltd.* v. *Pagola*, [1945] 1 All E.R. 155; *Routh* v. *Jones*, [1947] 1 All E.R. 758; *Jenkins* v. *Reid*, [1948] 1 All E.R. 471; *M. & S. Drapers (a firm)* v. *Reynolds*, [1956] 3 All E.R. 814; *Vandervell Products, Ltd.* v. *McLeod*, [1957] R.P.C. 185. C D E

As to contracts in restraint of trade see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq., and for cases see 43 DIGEST 19 et seq.

Cases referred to:

(1) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143*. F

(2) *Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, *154*.

(3) *Goldsoll* v. *Goldman*, [1914] 2 Ch. 603; 84 L.J.Ch. 63; 112 L.T. 21; 59 Sol. Jo. 43; affirmed, [1915] 1 Ch. 292; 84 L.J.Ch. 228; 112 L.T. 494; 59 Sol. Jo. 188, C.A.; 43 Digest 48, *489*. G

(4) *Nevanas & Co.* v. *Walker and Foreman*, [1914] 1 Ch. 413; 83 L.J.Ch. 380; 110 L.T. 416; 30 T.L.R. 184; 58 Sol. Jo. 235; 43 Digest 49, *506*.

(5) *Mumford* v. *Gething* (1859), 7 C.B.N.S. 305; 29 L.J.C.P. 105; 1 L.T. 64; 6 Jur. N.S. 428; 8 W.R. 187; 141 E.R. 834; 43 Digest 44, *448*. H

(6) *Leather Cloth Co.* v. *Lorsont* (1869), L.R. 9 Eq. 345; 39 L.J.Ch. 86; 21 L.T. 661; 34 J.P. 328; 18 W.R. 572; 43 Digest 23, *147*.

(7) *Mallan* v. *May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, *258*.

(8) *Homer* v. *Ashford* (1825), 3 Bing. 322; 11 Moore, C.P. 91; 4 L.J.O.S.C.P. 62; 130 E.R. 537; 43 Digest 31, *250*. I

(9) *Maxim Nordenfelt Gun and Ammunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630; 62 L.J.Ch. 273; 68 L.T. 833; 9 T.L.R. 150; affirmed, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139*.

(10) *Tallis* v. *Tallis* (1853), 1 E. & B. 391; 22 L.J.Q.B. 185; 21 L.T.O.S. 43; 17 Jur. 1149; 1 W.R. 114; 118 E.R. 482; 43 Digest 30, *240*.

(11) *Leng* v. *Andrews*, [1909] 1 Ch. 763; 78 L.J.Ch. 80; 100 L.T. 7; 25 T.L.R. 93, C.A.; 43 Digest 25, *164*.

A (12) *Henry Leetham & Sons, Ltd.* v. *Johnstone-White*, [1907] 1 Ch. 322; 76 L.J.Ch. 304; 96 L.T. 348; 14 Mans. 162; sub nom. *Leetham & Sons, Ltd.* v. *White*, 23 T.L.R. 254, C.A.; 43 Digest 61, *634*.

(13) *Eastes* v. *Russ*, [1914] 1 Ch. 468; 83 L.J.Ch. 329; 110 L.T. 296; 30 T.L.R. 237; 58 Sol. Jo. 234, C.A.; 43 Digest 43, *432*.

B (14) *Mills* v. *Dunham*, [1891] 1 Ch. 576; 60 L.J.Ch. 362; 64 L.T. 712; 39 W.R. 289; 7 T.L.R. 238, C.A.; 43 Digest 62, *641*.

(15) *Haynes* v. *Doman*, [1899] 2 Ch. 13; 68 L.J.Ch. 419; 80 L.T. 569; 15 T.L.R. 354; 43 Sol. Jo. 553, C.A.; 43 Digest 24, *158*.

Also referred to in argument:

C *Pickering* v. *Ilfracombe Rail. Co.* (1868), L.R. 3 C.P. 235; 37 L.J.C.P. 118; 17 L.T. 650; 16 W.R. 458; 12 Digest (Repl.) 325, *2513*.

Chesman v. *Nainby* (1727), 2 Stra. 739; 2 Ld. Raym. 1456; 93 E.R. 819; 43 Digest 28, *206*.

Nicholls v. *Stretton* (1847), 10 Q.B. 346; 11 Jur. 1008; 116 E.R. 134; 43 Digest 69, *725*.

Price v. *Green* (1847), 16 M. & W. 346, Ex.Ch.; 43 Digest 19, *122*.

D *Bairns* v. *Geary* (1887), 35 Ch.D. 154; 56 L.J.Ch. 935; 56 L.T. 567; 51 J.P. 628; 36 W.R. 98; 3 T.L.R. 523; 43 Digest 40, *394*.

Davies, Turner & Co. v. *Lowen* (1891), 64 L.T. 655; 7 T.L.R. 476; 43 Digest 46, *475*.

Rogers v. *Maddocks*, [1892] 3 Ch. 346; 62 L.J.Ch. 219; 67 L.T. 329; 36 Sol. Jo. 695; 2 R. 53, C.A.; 43 Digest 42, *417*.

E *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q.B. 478; 65 L.J.Q.B. 397; 74 L.T. 180; 44 W.R. 436; 12 T.L.R. 259; 40 Sol. Jo. 334, C.A.; 43 Digest 43, *438*.

William Robinson & Co., Ltd. v. *Heuer*, [1898] 2 Ch. 451; 67 L.J.Ch. 644; 79 L.T. 281; 47 W.R. 34; 42 Sol. Jo. 756, C.A.; 43 Digest 54, *560*.

Underwood v. *Barker*, [1899] 1 Ch. 300; 68 L.J.Ch. 201; 80 L.T. 306; 47 W.R. 347; 15 T.L.R. 177; 43 Sol. Jo. 261, C.A.; 43 Digest 73, *777*.

F *Hooper and Ashby* v. *Willis* (1906), 94 L.T. 624; 22 T.L.R. 451, C.A.; 43 Digest 48, *490*.

Bromley v. *Smith*, [1909] 2 K.B. 235; 78 L.J.K.B. 745; 100 L.T. 731; 43 Digest 47, *477*.

Great Western and Metropolitan Dairies, Ltd. v. *Gibbs* (1918), 34 T.L.R. 344; 43 Digest 66, *696*.

G *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438; 1 Nev. & P.K. 215; 112 E.R. 167, Ex.Ch.; 43 Digest 36, *326*.

Hastings v. *Whitley* (1848), 2 Exch. 611; 154 E.R. 635; 43 Digest 64, *665*.

Sainter v. *Ferguson* (1849), 7 C.B. 716; 18 L.J.C.P. 217; 13 L.T.O.S. 72; 13 Jur. 828; 137 E.R. 383; 43 Digest 64, *660*.

H *Howard* v. *Woodward* (1864), 5 New Rep. 8; 34 L.J.Ch. 47; 11 L.T. 414; 29 J.P. 3; 10 Jur. N.S. 1123; 13 W.R. 132; 17 Digest (Repl.) 411, *2162*.

Gravely v. *Barnard* (1874), L.R. 18 Eq. 518; 43 L.J.Ch. 659; 30 L.T. 863; 39 J.P. 20; 22 W.R. 891; 43 Digest 29, *226*.

May v. *O'Neill* (1875), 44 L.J.Ch. 660; 43 Digest 6, *723*.

Jacoby v. *Whitmore* (1883), 49 L.T. 335; 48 J.P. 325; 32 W.R. 18, C.A.; 43 Digest 40, *398*.

I *Webb* v. *Clark* (1884), 78 L.T. Jo. 96; 43 Digest 75, *797*.

Parsons v. *Cotterill* (1887), 56 L.T. 839; 51 J.P. 679; 43 Digest 62, *640*.

Palmer v. *Mallet* (1887), 36 Ch.D. 411; 57 L.J.Ch. 226; 58 L.T. 64; 36 W.R. 460; 3 T.L.R. 760, C.A.; 43 Digest 52, *542*.

Hood and Moore's Stores, Ltd. v. *Jones* (1899), 81 L.T. 169; 43 Digest 73, *776*.

Lyddon v. *Thomas* (1901), 17 T.L.R. 450; 43 Digest 71, *743*.

Edmundson v. *Render*, [1905] 2 Ch. 320; 74 L.J.Ch. 585; 93 L.T. 124; 53 W.R. 632; 49 Sol. Jo. 620; 43 Digest 70, *737*.

Dewes v. *Fitch* (1919), 122 L.T. 366; 36 T.L.R. 187; affirmed, [1920] 2 Ch. 159; 89 L.J.Ch. 499; 123 L.T. 541; 36 T.L.R. 585, C.A.; [1921] All E.R. Rep. 13; [1921] 2 A.C. 158; 90 L.J.Ch. 436; 37 T.L.R. 784, H.L.; 43 Digest 34, *276.*

Proctor v. *Sargent* (1840), 2 Man. & G. 20; Drinkwater, 56; 2 Scott, N.R. 289; 10 L.J.C.P. 34; 133 E.R. 647; 43 Digest 25, *172.*

Appeal from an order of the Divisional Court (BAILHACHE and SANKEY, JJ.).

By an agreement made Feb. 15, 1909, between the plaintiff, Harry Attwood, and Robert Isaac, of Regent House, Kidderminster, drapers, tailors, and general outfitters, and the defendant, James Duncan Lamont, Messrs. Attwood & Isaacs agreed to employ him as an assistant in their business at an annual salary commencing at £208 and 2½ per cent. commission on turnover above £1,000 in the tailoring department, and the defendant agreed that

> "he will not at any time thereafter, either on his own account or that of any wife of his or in partnership with, or as assistant, servant, or agent to, any, other person, persons, or company, carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies', or children's outfitter at any place within a radius of ten miles of the employers' place of business at Regent House, Kidderminster."

In March, 1919, the defendant set up for himself in Worcester, which he was entitled to do as it was outside the ten mile limit, but he took and executed tailoring orders in Kidderminster, and so broke his contract. The plaintiff, who was the surviving partner of the employers' firm, thereupon brought an action in the county court for an injunction to restrain the defendant from committing any future breach of the covenant. The learned county court judge, however, held that the contract was not severable and was wider than was reasonably necessary for the protection of the plaintiff's business, and he gave judgment for the defendant. The plaintiff appealed to the Divisional Court, who held (i) that the covenant as it stood was unreasonably wide and consequently void as being in restraint of trade; (ii) that the covenant was severable by limiting its operation to the trade or business of a tailor; and, (iii) that it ought to be so severed and an injunction granted in the terms of the covenant as so restricted. From that decision the defendant appealed to the Court of Appeal.

Disturnal, K.C. and *R. A. Willes* for the defendant.
Compton, K.C. and *R. H. Norris* for the plaintiff.

Cur. adv. vult.

July 30. The following judgments were read.

LORD STERNDALE, M.R.—In this case the plaintiff is the proprietor of a business which may be called that of a general outfitter. It contained different departments which are enumerated in an agreement to which I shall refer more in detail directly as follows: "The trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies', or children's outfitter." The defendant was employed as a cutter and head of the tailoring department by the plaintiff and his then partner in 1909. His employment was terminable by a month's notice. He was not concerned with any of the other departments, but, no doubt, some of the customers in the tailoring department were also customers in some of the others. On entering into the service of the firm he executed the following agreement:

> "An agreement made between Harry Attwood and Robert Isaac . . . (hereinafter called 'the employers') of the one part and James Duncan Lamont (hereinafter called 'the assistant') of the other part. Whereas the assistant has requested the employers to employ him as an assistant in their business at

Kidderminster at an annual salary commencing at £208 and 2½ per cent. commission on turnover above £1,000 in the tailoring department, and the employers are only willing to do so upon him entering into the agreement not to trade in opposition with them which is hereinafter expressed. Now this agreement witnesseth that in consideration of the employers employing him in the capacity and at the salary aforesaid the assistant hereby agrees with the employers that he will not at any time hereafter, either on his own account or that of any wife of his, or in partnership with, or as assistant, servant, or agent, to any other person, persons, or company, carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies', or children's outfitter, at any place within a radius of ten miles of the employers' place of business at Regent House, Kidderminster, aforesaid. And also that this agreement shall not be affected by any change or changes in the constitution of the employers' firm, but that in the event of any change or changes therein the right to enforce this agreement shall continue to the surviving or continuing partner or partners and his or their executors, administrators, or assigns."

In February, 1919, the defendant asked the plaintiff to release him from the agreement or make him a partner, and the plaintiff refused. The defendant then left the plaintiff's service and established himself in business on his own account at Worcester, which is outside the ten-mile radius mentioned in the agreement. There he did business with several of the plaintiff's customers, and had personal dealings with them, such as taking orders in Kidderminster.

The plaintiff then brought an action to restrain the defendant from acting in breach of the agreement, and asked for: "An injunction restraining the defendant from committing any future breach of the said agreement." The defendant, in answer to the claim, contended that the agreement was invalid as being in restraint of trade and too wide in its terms to be reasonable. It was not seriously contended on behalf of the plaintiff that the agreement could be supported to the full extent of its terms, but it was argued that the restrictions as to the tailoring business could be severed from those relating to the other businesses, and that, when so severed, it was a reasonable and valid agreement. The case was tried in the county court at Worcester, and the learned county court judge decided that the contract was not severable and was wider than was reasonably necessary for the protection of the plaintiff's business. He, therefore, gave judgment for the defendant. On appeal to the Divisional Court that court held that the contract was severable, and that, when so severed and confined to the tailoring business, it was reasonable and valid. Judgment was, therefore, given for the plaintiff.

On this appeal to us, therefore, two questions arise: (i) Is the contract severable? (ii) If so, is the agreement when confined to the tailoring business valid? These questions are difficult, as they require the reconciliation of two principles: (i) that of freedom of contract by which a person is held bound by an agreement into which he was deliberately entered: (ii) that of freedom of work by which an employer is prevented from restraining a servant from exercising his energies in work for himself or others to an extent greater than is necessary for the protection of the employer. Those questions are also made more difficult by an alteration in the tendency of decisions on the subject, the earlier cases tending to the enforcement of the former principle, while the tendency of later decisions, especially those of *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1) and *Morris, Ltd.* v. *Saxelby* (2) is towards a stricter application of the latter. The result necessarily follows that statements in some of the earlier cases require, in the light of the later decisions, considerable modification before acceptance.

The doctrine of severability has been much criticised by Moulton, L.J., in

Mason v. *Provident Clothing and Supply Co., Ltd.* (1) ([1913] A.C. at p. 745) and by NEVILLE, J., in *Goldsoll* v. *Goldman* (3) ([1914] 2 Ch. at p. 613). These criticisms, however, were not accepted by the Court of Appeal: see per KENNEDY, L.J., in *Goldsoll* v. *Goldman* (3) ([1915] 1 Ch. at p. 299), or by SARGANT, J., in *Nevanas & Co.* v. *Walker and Foreman* (4) ([1914] 1 Ch. at p. 423). I think, therefore, that it is still the law that a contract can be severed if the severed parts are independent of one another, and can be severed without the severance affecting the meaning of the part remaining. This has been sometimes expressed, as in the present case by the Divisional Court, that the severance can be effected when the part severed can be removed by running a blue pencil through it. This is a figurative way of expressing the principle, and like most figurative expressions may quite possibly lead to misunderstanding. I prefer the statement of principle by SARGANT, J., in *Nevanas & Co.* v. *Walker and Foreman* (4) when he thus expresses it. After referring to the remarks of LORD MOULTON in the case which I have already cited of *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1), he says ([1914] 1 Ch. at p. 423):

> "I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants."

It remains, therefore, to consider whether the covenant in this agreement can be considered as though it contained a number of several covenants each relating to a separate trade. I think it clear that if the severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, the different parts of it cannot be said to be independent.

According to the decision in *Morris, Ltd.* v. *Saxelby* (2), a master can only place a restraint upon the actions of his servant to the extent necessary to protect himself against an improper use by the servant of the knowledge which he has acquired in the master's service: see per LORD ATKINSON in *Morris, Ltd.* v. *Saxelby* (2) ([1916] 1 A.C. at pp. 700 and 702) and LORD PARKER in the same case (ibid. at p. 709). It was argued on behalf of the defendant that the result of these statements was that no restraint could be good unless it were specifically stated to be limited to the acts described. I do not agree with this contention. I think it may be necessary to have a general restraint against trading in a certain area in order to avoid such acts on the part of the servant without specifying in the covenant the particular acts against which it is directed. Still, any restraint beyond what is necessary to prevent such practices, and especially a restraint against competition only, is too wide: see the passages before cited from *Morris, Ltd.* v. *Saxelby* (2) (ibid.).

I think it is necessary to examine the meaning of the agreement in the present case as unsevered in order to see whether it complies with the principles above stated, and then to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operation. It is indorsed "Agreement not to trade in opposition within a radius of ten miles of Regent House, Kidderminster," and it recites as I have already read:

> "Whereas the assistant has requested the employers to employ him as an assistant in their business at Kidderminster at an annual salary commencing at £208 and 2½ per cent. commission on turnover above £1,000 in the tailoring department, and the employers are only willing to do so upon him entering into the agreement not to trade in opposition with them which is hereinafter expressed."

Then it proceeds on the terms that I have read. I should attach little, if any importance to the words as to competition if they stood by themselves, because any restraint, however unobjectionable, involves some prohibition against trading in opposition. But I think it is permissible to look at the surrounding circumstances in which the agreement was made in order to arrive at its meaning.

A This was a common form of agreement which was required from the head of every department and each such head was required to agree not to engage in the business of any department, however distinct from that of his own, for instance, children's outfitting and tailoring, and however unlikely or even impossible it might be for such head to be brought into contact with the customers of the other departments. If it be admissible to look at the plaintiff's evidence, it becomes manifest B that this was his intention, for he referred in justification of this extent of the restriction to the fact that customers would have to pass through one department in order to get to another. Apart, however, from the evidence, I think it is quite clear that this agreement was part of a scheme by which every head of a department was to be restrained from competition with the plaintiff, even in the business of departments with which he had no connection and with the customers of which C he was never brought into contact.

If this be the true meaning of the agreement, it was, as it is described, an agreement not to trade in opposition, and not an agreement to restrain the unfair use of secrets or knowledge of customers acquired by the servants in the employers' service. To effect this object the retention of the restraint regarding the business of all the departments is necessary, and I think that to strike out references to all D but the tailoring department is not merely to remove one of several covenants each directed to the legitimate object of preventing unfair competition, but to alter entirely the scope and intention of the agreement. It is thereby sought to be converted from an agreement to restrain general competition into an agreement which will conform to the requirements of the cases to which I have referred. I am of opinion that such a severance does not come within the principle stated E by SARGANT, J., in *Nevanas & Co.* v. *Walker and Foreman* (4), a statement which I accept, and that, therefore, this agreement should not be severed. If this be right, the agreement is invalid, for, as it stands, it is far too wide, and it is unnecessary to consider whether, if severed, it could be upheld. The appeal should therefore, in my opinion, be allowed, and judgment entered for the defendant, with costs here and below.

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ATKIN, L.J.—I agree that the appeal should be allowed. I am not proposing to deliver a judgment of my own because I have read the judgment about to be delivered by YOUNGER, L.J., and I agree with it.

YOUNGER, L.J.—The three questions to which the argument in support of this appeal was directed were: First, whether the stipulations of the restrictive G covenant in the agreement of Feb. 15, 1909, were severable as the Divisional Court thought they were? Secondly, whether, if these stipulations were severable, they ought in this case to be severed, as the Divisional Court also thought? Lastly, whether, if they were severed, the covenant which would then remain—a covenant confined to the trade or business of a tailor only—was not, contrary to the view of that court, still void as being in restraint of trade. There was no cross-appeal H by the plaintiff from the finding of the Divisional Court that the covenant, unsevered, is invalid. Upon these questions I have arrived at the conclusion that the stipulations in this covenant are not severable, that the case is not one in which, if they were, the court ought to sever them, and that, even if the covenant be severed by deleting what BAILHACHE, J., called the excess, the resulting covenant I would still be void as being in restraint of trade. I regret, in expressing these conclusions, to find myself at variance with the learned judges of the Divisional Court. But the difference of opinion is really a difference on one matter only. Recent decisions of the House of Lords upon the invalidity of many of these covenants when imposed upon employees in contracts of service have, as I read them, effected in more than one aspect of the subject a much more fundamental change in hitherto accepted views upon it than has seemed to the learned judges of the Divisional Court to be the case. That is the difference between us.

We are here dealing with a branch of the law which has at all times been peculiarly

susceptible to influence from current views of public policy. Its modern developments have grown up under the shadow of the laissez faire school of economics, and until recently have, in consequence, been uniformly in the direction of extending the principle of freedom of contract in relation to such contracts, a tendency that has not yet ceased to be operative when the covenant in question is one exacted from a vendor on the sale of the goodwill of his business. But current opinion on the relations between employers and employed has moved rapidly in recent years, and thus it is that the House of Lords, itself bound by comparatively few of the numerous previous decisions on the subject, took the opportunity in 1913, when the validity of a restrictive covenant entered into by an employee came in question before it, to examine the whole question afresh, with the result that the supreme tribunal for the guidance of all courts has now placed upon the permissibility of such covenants a limit which the general interest, including, of course, that of employees themselves, had not previously seemed to require. In consequence, it must now, I think, be recognised in all courts that there is every difference in the matter of its validity between such a covenant as we find here embodied in a contract of service, and the same covenant when found in an agreement for the sale of goodwill, and the dispute between the parties to this action must be decided with due regard to that difference. This declared difference is, as I have said, a matter of recent development, and although it has not been put forward by the House of Lords as a new departure, its effect upon previously accepted views has already been as complete as if it were. Moreover, it may be doubted whether all its incidental consequences have yet become apparent. A reference to two judgments of long standing and high authority dealing with this subject, one a judgment of the Court of Common Pleas, and the other a judgment of the Court of Chancery, will serve to show that this distinction so strongly emphasised did not occur at all to the judges of an earlier day.

The first of the judgments to which I refer is that of ERLE, C.J., in *Mumford* v. *Gething* (5), a case of an employee's restrictive covenant, and the second that of JAMES, V.-C., in *Leather Cloth Co.* v. *Lorsont* (6), a case of a vendor's covenant. In each case the necessity in the general interest for upholding such covenants is strongly advocated, but in words so similar as to leave no room for drawing any distinction between the two classes of covenants in any matter of principle. The passage from the judgment of ERLE, C.J., to which I have referred and is as follows (7 C.B.N.S. at p. 319):

> "I entirely dissent from the notion thrown out by the defendant's counsel that agreements of this sort are to be discouraged as being contrary to public policy. On the contrary, I think that contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties; for, if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity, seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers and their mode of conducting business, and then transferring their services to a rival trader. It appears to me to be highly important that persons like this defendant should be able to enter into contracts of this sort, which will afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice. I think the doctrine laid down by PARKE, B., in *Mallan* v. *May* (7) (11 M. & W. at p. 666) is a correct exposition of the law upon this subject. 'The public,' he says, 'derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business.' The learned baron afterwards

A adds: 'It is justly observed by LORD WYNFORD, in giving the judgment of the court in *Homer* v. *Ashford* (8), that it may often happen that individual interest and general convenience render engagements not to carry on trade, or act in a profession, in a particular place, proper; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of B such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry.' "

The observations of JAMES, V.C., in *Leather Cloth Co.* v. *Lorsont* (6) are to be found at p. 354 of L.R. 9 Eq. There the vice-chancellor, dealing with a covenant by the vendor on the sale of goodwill, says:

C "The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable D him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard E to the subject-matter of the contract."

Nor, again, can the existence of the distinction be traced in the historical account given by LINDLEY, L.J., in the *Nordenfeldt Case* (9) ([1893] 1 Ch. at p. 647), of the stages in which the law on this subject had up to that date gradually been relaxed to suit developments of trade and to conform to current ideas and views of public policy and reasonableness, while in his judgment in the same case F (ibid. at p. 656), BOWEN, L.J., after an elaborate review of all the cases, states his conclusion to be—a conclusion be it noted applicable indifferently to vendor's covenants and to employee's covenents—that by 1837 the idea had been freely realised that all partial restraints of trade which satisfied the conditions of the law as to reasonableness and good conduct were not an injury but a benefit to the public, and that by 1853 the further progress was made, viz, in *Tallis* v. *Tallis* G (10), that the onus lay upon the person who attacked a covenant in partial restraint of trade to displace the consideration. The lord justice's own view of the law as it then stood he expresses thus:

"Partial restraints or, in other words, restraints which involve only a limit of places at which, or persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they H do not extend further than is necessary for the reasonable protection of the covenantee."

BOWEN, L.J.'s, view, then expressed a view concurred in by the other judges of the Court of Appeal and supported by a long line of common law authority was in other words this—that at that date general or unlimited restraints in trade were, as they had always been, void as being contrary to public policy, but that I partial restraints in the sense indicated by him were primâ facie valid. In the words of LINDLEY, L.J., every such restraint the court upheld, unless it was affirmatively shown to be unreasonable as extending further than was required for the protection of the covenantee.

It is very important in the present case to bear in mind the confident assertion by the Court of Appeal in the *Nordenfeldt Case* (9) that these partial restraints were valid. The actual covenant in question in that case was a general restraint, and that covenant—one between vendor and purchaser—was held valid. The

decision of the Court of Appeal was upheld by the House of Lords unanimously, and the view of the Court of Appeal as to the primâ facie validity of partial restraints did not fail to meet with approval in that House, e.g., at the hand of LORD HERSCHELL. The Homeric battle which LORD MACNAGHTEN there waged with BOWEN, L.J.'s, judgment in support of the authorities in equity attacked by him, which were to the effect that all covenants in restraint of trade, partial as well as general, were primâ facie invalid, had no effect upon the decision of the House, which was concurred in by all the noble lords irrespective of their views on that point. Indeed, the actual decision of the House did not in terms affirm either the one view or the other. Thus it was that until the decision of the House of Lords in *Mason's Case* (1) in 1913, in which LORD MACNAGHTEN'S so-called test in the *Nordenfeldt Case* (9), a test which embodied the equity view, was definitely declared by the House to be the correct statement of the law, BOWEN, L.J.'s, statement, particularly in confining as it does, all considerations of reasonableness to the position of the covenantee alone, and in treating all partial restraints as primâ facie good, and not LORD MACNAGHTEN'S test indicating the contrary, continued to provide all lower courts with their working rule. Since *Mason's Case* (1), however, LORD MACNAGHTEN'S test has become the touchstone of the matter, and the House of Lords has found in it and in the distinction between vendor's covenants and employee's covenants to which in his speech LORD MACNAGHTEN refers the foundation for the pronounced views with reference to the limited permissible scope of employee's covenants which the House has now developed.

The direct reference to this distinction in LORD MACNAGHTEN'S speech is to be found in the following passage from it ([1894] A.C. at p. 566):

> "To a certain extent different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership, on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment."

Certainly the distinction is there. But I cannot find that it had, prior to *Mason's Case* (1), any influence upon any decision on employees' covenants. Except in *Leng* v. *Andrews* (11), to which reference will again be made, the views of such covenants enunciated by the common law courts prior to the decision in the *Nordenfeldt Case* (9) continued to be enforced without any manifest alteration, notwithstanding that the resulting mischief—as he saw it—was more than once alluded to by NEVILLE, J.: see *Henry Leetham & Sons* v. *Johnstone-White* (12); who, however, felt himself bound to acquiesce in it, so well settled did he conceive the law to be.

At length, however, in 1913, as I have said, the House of Lords in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1), and in the subsequent case of *Morris, Ltd.* v. *Saxelby* (2) defined the limited permissible effect of such a covenant and the difference between it and one entered into by a vendor was then clearly emphasised. The subject is thus introduced by LORD HALDANE, where he says in *Mason's Case* (1) ([1913] A.C. at p. 734):

> "It is no doubt, as a general rule, wise, to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the court to scrutinise agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the courts have to check, and the judges have to see that LORD MACNAGHTEN'S test is carefully observed."

LORD SHAW, in the same case, expresses the view that there is much greater room

for allowing as between buyer and seller a larger scope for freedom of contract, and a correspondingly large restraint in freedom of trade than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work.

Proceeding upon these lines, the House of Lords has developed this distinction, and the following points may now, I think, be taken to be established. First, it is the covenants. The plaintiff here had to show that the restriction sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business. This obligation was so laid down by LORD HALDANE in *Mason's Case* (1) ([1913] A.C. at p. 773), and notwithstanding the judgment of SWINFEN EADY, L.J., in *Eastes* v. *Russ* (13), who pointed out that this view displaced the rule laid down in sundry cases of high authority, it was adhered to by the House in *Morris, Ltd.* v. *Saxelby* (2): see per LORD ATKINSON, [1916] 1 A.C. at p. 700. It is interesting to note how great was the change thereby made. In 1891, before the *Nordenfeldt Case* (9), LORD LINDLEY in *Mills* v. *Dunham* (14) had said this ([1891] 1 Ch. at p. 586):

> "I think that Mr. Levett's contention that you are to treat a restraint of trade as primâ facie bad, and throw upon the person supporting it the onus of showing that it is reasonable, is introducing a wholly unsound principle into the construction of documents."

In 1899, i.e., after the *Nordenfeldt Case* (9) ROMER, L.J., in *Haynes* v. *Doman* (15) expressed himself thus ([1899] 2 Ch. at p. 30):

> "Where a man of sufficient age and business capacity knowingly enters into a contract of service which is only in partial restraint of trade, I think the onus lies on him to prove that it goes beyond what was reasonably necessary."

That is to say, the Court of Appeal in these decisions, after as well as before the *Nordenfeldt Case* (9), followed the common law rule as therein enunciated by BOWEN, L.J., and by LORD HERSCHELL, as if it still were the rule of the court. But, when in *Mason's Case* (1), LORD MACNAGHTEN'S test was definitely accepted as the true one, the burden of proof in all these cases necessarily changes as appears from the following passage in LORD PARKER'S judgment in *Morris, Ltd.* v. *Saxelby* (2), ([1916] 1 A.C. at p. 706). Reading LORD MACNAGHTEN'S judgment in the *Nordenfeldt Case* (9), LORD PARKER said that he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course—these words "of course" are noticeable—rest on the party alleging them. When it is remembered that the leading cases of severance were decided at a time when such partial restraints were treated as primâ facie valid, and where the rule of the court, dating from *Tallis* v. *Tallis* (10), was that it rested with the covenantor, who was bound by, and sought to escape from, a covenant of partial restriction, to establish its invalidity, the importance of this pronouncement on the severance aspect of the present case is obvious.

Secondly, the restraint must be reasonable, not only in the interests of the covenantee, but in the interests of both the contracting parties. This disposes of the almost passionate protest of NEVILLE, J., in *Henry Leetham & Sons, Ltd.* v. *Johnstone-White* (12), that no agreement was provided, the restriction was reasonably necessary for the protection of the employer, however oppressive to the employeee and fatal to his chance of obtaining his own living in this country it might be. This is no longer so, although under BOWEN, L.J.'s, rule, the statement was, I think, justified. This modern view of the House of Lords does not, however, involve the restoration of the old principle, at one time obtaining that the consideration received by the employee for his covenant must be adequate.

It has not. "The court no longer considers the adequacy of the consideration in any particular case," says LORD PARKER in *Morris, Ltd.* v. *Saxelby* (2) ([1916] 1 A.C. at p. 707), but it does involve (see per LORD SHAW in the same case, ibid. at p. 715), and the consideration is of importance in the present case, that, as the time of restriction lengthens or the space of its operation grows, the weight of the onus on the covenants to justify it grows, too.

Thirdly—and the most important of all. An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition per se, although a purchaser of goodwill is entitled to protect himself against such competition on the part of his vendor. There are at least two reasons given for this distinction. An employer may not, after his employee has left his employment, prevent that employee from using his own skill and knowledge in his trade or profession, even if acquired when in the employer's service. That skill and knowledge is only placed at the employer's disposal during the employment. It has not been made a subject of sale after that employment has ceased: see *Leng* v. *Andrews* (11). Again, when a purchaser takes over the goodwill of a business, if he is to have all its advantages it must, in his hands, be immune from its former owner exercising his special knowledge and skill to its detriment, and without a covenant on the part of the vendor against competition a purchaser cannot get what he is contracting to buy nor can the vendor give what he is intending to sell. But, on the other hand, as is pointed out by LORD PARKER in *Morris, Ltd.* v. *Saxelby* (2), the case is very different when the employer takes such a covenant from his employee. The employer's goodwill is always necessarily subject to the competition of all persons—including the employee—who choose to engage in a similar trade.

> "The employer, in such a case, is not endeavouring to protect what he has, but to gain a special advantage he could not otherwise secure."

Accordingly, covenants against competition by a former employee are as such not upheld, and the permissible extent of any covenant imposed upon an employee must be tested in every case with reference to the character of the work done for the employer by the employee while in his service, and by the consideration whether in that view the covenant taken from him goes further than is reasonably necessary for the protection of the proprietary rights of the covenantee. In *Morris, Ltd.* v. *Saxelby* (2), LORD PARKER said ([1916] 1 A.C. at p. 710):

> "The reason, and the only reason for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill acquired by the employee in his employer's business."

Fourthly: In the opinion, at least, of two learned lords, LORD SHAW and LORD MOULTON, previously accepted rules as to the doctrine of severance require careful application if not entire reconsideration. To this point I will return.

Proceeding now to apply these principles to the facts of the present case, the position appears to be that the plaintiff is the owner of a considerable business at Kidderminster, described in the agreement in question as a business of drapers, tailors, and general outfitters. The business is, I presume for convenience, divided into different departments all under the same roof, customers going from one to another, and many customers dealing in all departments. The agreement into which the defendant entered, a printed form which all managers of departments are required to sign, with modifications of salary and detail appropriate to the individual case, is indorsed as an agreement not to trade in opposition within a radius of ten miles of Regent House, Kidderminster, and contains a recital

A "that the assistant has requested the employers to employ him as an assistant in their business at Kidderminster at an annual salary commencing at £208 and 2½ per cent. commission on turnover above £1,000 in the tailoring department, and the employers are only willing to do so upon his entering into the agreement not to trade in opposition with them which is hereinafter expressed"

B —and witnesses—

"that in consideration of the employers employing him in the capacity and at the salary aforesaid . . . he will not at any time thereafter . . . carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, or haberdasher, gentlemen's, ladies', or children's

C outfitter, at any place within a radius of ten miles of the employer's place of business at Regent House, Kidderminster, aforesaid."

The agreement is expressed to be, and is, in my opinion, nothing more than an agreement not to trade in opposition with the employers in any part of their business. It will be broken if the defendant not only carries on, but is directly or indirectly concerned in any of the specified businesses. And the period of

D restriction is to cover the whole life of the defendant, although the employment was itself an employment only for a month certain. The defendant, although not so stated in the agreement, was manager of the tailoring department, and was the principal or only cutter in the plaintiff's employ. He measured, cut, and fitted on the clothes made in that department, and in doing so he, of course, became acquainted with the customers. He is said to be an extremely skilful

E cutter, and the department prospered when under his management. He has now set up in business at Worcester, beyond the ten-mile radius. But he has supplied with clothes former customers of the plaintiff within that radius, and has also fitted on their clothes within it. That is the breach of covenant complained of. The evidence of a Mr. Middleton, called to prove one such breach, was that

F he had been measured and fitted by the defendant when he was at the plaintiff's establishment; that he gave him every satisfaction; that he met him in Broad Street, Worcester, one day, and said: "I hear you have started business in Worcester. I may as well give you an order, send me over some patterns." That evidence confirms me in the conclusion which I should have drawn from the case generally that it is the defendant's known personal skill as a cutter which

G attracts to him the customers to whom he attended when with the plaintiff, and except that they made his acquaintance when he was in the plaintiff's service, it was not his position there, but his own skill which leads them to desire to have the continued benefit of his services, now that he is in business for himself.

The question, accordingly, is whether in these circumstances, and in view of the principles applicable to it enunciated by the House of Lords, this covenant has

H any validity. In my opinion, as I have already said, it has none. It was apparently strongly urged in the Divisional Court that the covenant was valid as it stands. The learned judges there held that extending to business with which the defendant had had no connection when in the plaintiff's employment it was manifestly too wide, and they so held.

But the learned judges held also that they were entitled to sever the covenant

I by limiting it to the business of a tailor, and this they did. I agree with the Master of the Rolls that this was not a case in which upon any principle this severance was permissible. The learned judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance had not, I think, gone further than to make it permissible in a case where the contract contains what is not really a single covenant, but is in effect a combination of several distinct covenants. In that case, and where the severance can be carried out without the addition or alteration of a word, it is permissible.

But in that case only. Here, I think, there is in truth but one covenant for the protection of the plaintiff's entire business, and not several covenants for the protection of his several businesses. The plaintiff is, on the evidence, not carrying on several businesses, but one business; and, in my opinion, this covenant must stand or fall in its unaltered form. But, further, I am of opinion that, even if this were not so, this case is not one in which any severance, even if otherwise technically permissible, ought to be made.

In my view, the necessary effect of the application of the principle on which *Mason's Case* (1) and *Morris, Ltd.* v. *Saxelby* (2) have both been decided has been to render obsolete the cases in which the courts have severed these restrictive covenants when acting on the view that, being primâ facie valid, it was their duty to bind the covenantor to them as far as was permissible. It may well be that those cases are still applicable to covenants between vendor and purchaser, for upon such covenants the effect of LORD MACNAGHTEN'S test upon the law as previously understood has been little more than a matter of words, and LORD MOULTON'S observations, now to be referred to, have no direct application to such covenants. But these authorities do not seem to me to be any longer of assistance in the case of a covenant between employer and employee. To such a covenant I think the statement of LORD MOULTON in *Mason's Case* (1) necessarily applies. LORD MOULTON says this ([1913] A.C. at p. 745):

> "I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though, taken as a whole, the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would, in my opinion, be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and by applying their ingenuity and knowledge of the law carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master."

After a passage which does not apply to the present case, his Lordship goes on:

> "And the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the court would in the end enable them to obtain everything which they could have obtained by acting reasonably."

LORD SHAW expresses the same opinion in his speech where he says:

> "Courts of law should not be astute to disentangle such contracts and to grant injunctions or restraints which are not justified by their terms."

These opinions are very strongly re-enforced by the following extract from the judgment of NEVILLE, J., in *Goldsoll* v. *Goldman* (3) ([1914] 2 Ch. at p. 613), a learned judge whose words on this subject deserve to have especial weight attached to them in that he was a pioneer on the road subsequently taken by the House of Lords:

> "It seems to me to be in accordance both with principle and justice that if a man seeks to restrain another from exercising his lawful calling to an extent which the law, even as it now stands, deems unreasonable, the contract by which he does so, whether grammatically severable or not, should be held to be void in toto. To hold otherwise seems to me to expose the covenantor to the almost inevitable risk of litigation which, in nine cases out of ten, he is very ill able to afford, and should he venture to act upon his own opinion

A as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation."

In my judgment, a reference to the very principle which, in the view of the House of Lords, rendered the closest scrutiny of these covenants essential makes it necessary, if that scrutiny, when fruitful, is to be operative, that severance where the agreement as a whole is invalid should not in the general case be allowed. I know that this view has not been taken either by SARGANT, J., in *Nevanas & Co.* v. *Walker and Foreman* (4), or by the Court of Appeal in *Godsoll* v. *Goldman* (3) on the ground generally that the question did not directly arise in *Mason's Case* (1), and that the House of Lords could not be supposed in what was there said to have cast doubt on successive decisions of the Court of Appeal which had held that the doctrine of severability applied to such covenants. But it is to be observed that both of these judgments were given before the decision in *Morris, Ltd.* v. *Saxelby* (2) in which the principles of *Mason's Case* (1) were strengthened and reinforced and in which it was made plain that the House of Lords had there, at least, made havoc of strong uniform previous decisions as to the burden of proof, to which I have already referred. SARGANT, J., too, held that the covenant in the case before him was invalid even if severed, so that his remarks on severance were by the way, while the covenant in *Goldsoll* v. *Goldman* (3) was one between vendor and purchaser to which the principle of *Mason's Case* (1) is not, as I have pointed out, directly applicable. While censure in reference to the covenant with which we have to deal is not fairly attributable to the plaintiff, for the agreement is dated in 1909 when even the Court of Appeal had, in view of the subsequent decision in *Mason's Case* (1), failed fully to appreciate the effect of the *Nordenfeldt Case* (9), the present case is not, I think, one in which the court, if it need not do so, should be astute to sever its provisions. The system of printed covenants prepared beforehand for signature by every future employee, irrespective of the nature of his employment or his personal qualifications, is to be deprecated in the interest of fair play, and the system is only likely to disappear if it be thoroughly understood by employers that such covenants will not be assisted in cases where, in their integrity, they are found to be oppressive. I think, therefore, that there ought to be no severance here.

Lastly, I am of opinion that even if the covenant be severable and be severed as the Divisional Court had severed it, it remains invalid. The severed covenant continues to be a covenant against competition, and, in my opinion, in the circumstances of this case, a covenant against competition only. The defendant is a dangerous rival of the plaintiff in his own district, not by reason of any knowledge of the plaintiff's connection or customers possessed by him, but by reason of his own skill. The covenant is quite inappropriate to protect the plaintiff against such activities of the defendant as, apart from competition, might be regarded as injurious to his goodwill, and, moreover, being a covenant for life and excluding the defendant for that period from a considerable area with reference to the great bulk of whose residents, in connection with tailoring, the plaintiff had no relation at all, it is, I think, on any view, unreasonably wide. This, in my judgment, was not a case in which from the nature of the defendant's employment the only method by which the plaintiff could obtain protection for that which he was entitled to protect was by prohibiting competition on the part of the defendant in a defined area. I agree that had that been the case such a restraint, if otherwise reasonable, would not have been illegal by reason of its preventing the defendant from doing within that area acts which the plaintiff could otherwise not lawfully restrain. But, in my opinion, this was not such a case. The covenant is essentially inappropriate to the attainment of any legitimate purpose of the plaintiff, while, as it stands, it has not been justified by any evidence from him that his connection required so wide a restraint, or, at any rate, a restraint so extended in duration.

I fully share, if I may be allowed to say so, SANKEY, J.'s, view that the court should not lightly absolve parties from the performance of contracts solemnly entered into. LORD WATSON's words in the *Nordenfeldt Case* (9), must also command immediate assent, "that the community has a material interest in maintaining the rules of fair dealing between man and man," and that "it suffers far greater injury from the infraction of these rules than from contracts in restraint of trade." Even so, however, there has developed in late years in these employees' covenants a distinct tendency to make them penal rather than protective, and if that mischievous tendency can only be effectively checked by absolving, in a few cases, from their bargain employees who have no equity to claim release, the result is still not altogether regrettable. It must not, however, be supposed that I take this to be one of these cases.

In my judgment, the defendant is deriving no substantial advantage in what he is doing from his previous connection with the plaintiff's business. Even, however, if he were, the decision in his favour might do this service—it might compel employers to consider the proper limit of restraint which, in any particular case, they are fairly entitled to insist upon, and having kept the restriction imposed within these limits they will not, without success, apply to the courts to exercise their primary function of seeing to it that such bargains, like any others fairly entered into, are duly observed. For these reasons I am of opinion that this appeal should be allowed, and the judgment of the county court judge restored with costs here and below.

Appeal allowed.

Solicitors: *Arthur C. Dowding*, for *Eustace Roberts*, Worcester; *Milner & Bickford*, for *H. G. Ivens*, Kidderminster.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

MACLAINE AND OTHERS *v.* GATTY AND OTHERS

[HOUSE OF LORDS (Lord Birkenhead, L.C., Viscount Finlay, Lord Dunedin, Lord Atkinson and Lord Shaw), November 29, 30, 1920]

[Reported [1921] 1 A.C. 376; 90 L.J.P.C. 73; 124 L.T. 385; 37 T.L.R. 139; 26 Com. Cas. 148]

Contract—Mortgage—Payment of interest—Breach of condition—"Punctual payment"—Payment seven days after specified date.

Estoppel—Estoppel by conduct—Agreement for "punctual payment" of interest—Instalment accepted substantially after specified date—Effect on enforcement of right to punctual payment of subsequent instalment.

Where an instrument clearly expresses that payment is to be made punctually on a day specified such a payment is not made unless it is made on that day. Where there has been a single acquiescence, not unexplained, in a single tardy payment, the party accepting it has not rendered it impossible for him thereafter to require that payments should be made at the due dates.

The appellant borrowed from the respondents on the security of his estate £36,000 and £2,000 secured on two bonds of even date, the principal sum to be repaid on Whitsunday, 1911, and interest at the rate of five per cent. to be paid on certain quarterly dates. The conditions on which the loan was made

were expressed in a minute of agreement, and one of the conditions was that, provided the interest on the loan "be punctually paid in the terms of the bond," the lenders agreed (i) not to call in the loan for a period of fourteen years, and (ii) to modify the rate of interest to four per cent. A quarterly payment of interest became due on Feb. 1, 1918, the respondents requested payment by letters dated April 11 and 29, payment was not made until May 13, and it was then accepted without comment or protest. A further payment became payable on Aug. 1, 1918, but it was not paid until Aug. 8, 1918.

Held: (i) the appellant had not fulfilled the condition as to punctual payment in the agreement and was not entitled to the benefit of it; (ii) the acceptance of the late payment of interest on May 13 did not estop the respondents from enforcing their right under the agreement with regard to the payment falling due on Aug. 1.

Dictum of LORD M'LAREN in *Scott-Chisholm* v. *Brown* (1) (1893), 20 R. (Ct. of Sess.) 575, 580, disapproved.

Leeds and Hanley Theatre of Varieties v. *Broadbent* (2), [1898] 1 Ch. 343, approved.

Nova Scotia Steel Co. v. *Sutherland Steam Shipping Co.* (3) (1899), 5 Com. Cas. 106, distinguished.

Decision of First Division of Court of Session, 1920 1 S.L.T. 291, affirmed.

Notes. Considered: *Sowerby* v. *Lindsay* (1928), 44 T.L.R. 501; *Lyle-Meller* v. *A. Lewis & Co.* (*Westminster*), [1956] 1 All E.R. 247.

As to time of performance of a contract see 8 HALSBURY'S LAWS (3rd Edn.) 163–167; as to reduction of mortgage interest on punctual payment see ibid., vol. 27, pp. 204, 205; and as to estoppel by representation and conduct see ibid., vol. 15, pp. 223, 235. For cases see 12 DIGEST (Repl.) 510, 35 DIGEST 659–662, 21 DIGEST 290 et seq., 328 et seq.

Cases referred to:

(1) *Scott-Chisholme* v. *Brown* (1893), 20 R. (Ct. of Sess.) 575; 30 Sc.L.R. 558; 31 Digest (Repl.) 282, **1404.*

(2) *Leeds and Hanley Theatre of Varieties* v. *Broadbent*, [1898] 1 Ch. 343; 67 L.J.Ch. 135; 77 L.T. 665; 46 W.R. 230; 14 T.L.R. 157; 42 Sol. Jo. 183, C.A.; 35 Digest 297, *488.*

(3) *Nova Scotia Steel Co., Ltd.* v. *Sutherland Steam Shipping Co., Ltd.* (1899), 5 Com. Cas. 106; 12 Digest (Repl.) 392, *3034.*

(4) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, *1032.*

(5) *Paterson* v. *Tod* (1828), 6 Sh. (Ct. of Sess.) 1062.

Also referred to in argument:

Ford v. *Earl of Chesterfield* (1854), 19 Beav. 428; 24 L.T.O.S. 30; 2 W.R. 640; 52 E.R. 416; 12 Digest (Repl.) 503, *3772.*

Mitchell v. *Heys* (1894), 21 R. (Ct. of Sess.) 600.

Chadwick v. *Manning*, [1896] A.C. 231; 65 L.J.P.C. 42, P.C.; 21 Digest 294, *1047.*

Carron Co. v. *Henderson's Trustees* (1896), 23 R. (Ct. of Sess.) 1042; 33 Sc.L.R. 736; 4 S.L.T. 91; 34 Digest 684, *m.*

Appeal from an interlocutor of the First Division of the Court of Session (reported 1920 1 S.L.T. 291) recalling an interlocutor of the Lord Ordinary (LORD SANDS).

The action was commenced by the respondents against the appellants, Maclaine of Lochbuie and others, to have it found and declared that the interest due to the respondent on Aug. 1, 1918, in respect of two bonds and dispositions in security over the estate of Lochbuie and relative agreements was not punctually paid, and that the respondents were in consequence entitled to call up the bonds free of the restrictions contained in the agreements. The Lord Ordinary (LORD SANDS)

held that there had not been default in punctual payment and dismissed the action, but his decision was recalled by a majority of the judges of the First Division (the President (LORD STRATHCLYDE), LORD SKERRINGTON, and LORD CULLEN, LORD MACKENZIE dissenting) and the claim allowed. The appellants appealed.

W. Watson, K.C. (of the Scottish Bar), *Schwabe, K.C.* (of the English Bar), and *D. P. Fleming* (of the Scottish Bar) for the appellants.

H. P. Macmillan, K.C. and *Morrice Mackay, K.C.* (both of the Scottish Bar), for the respondents, were not called on to argue.

LORD BIRKENHEAD, L.C.—This is an appeal against an interlocutor of the First Division of the Session, recalling an interlocutor of LORD SANDS and discerning against the defenders, the present appellants, in the terms of the conclusion of summons. The facts giving rise to the present dispute are shortly as follows. The appellant, Maclaine, borrowed, on Nov. 9, 1910, a sum of £36,000 on the security of his estate in Lochbuie in the island of Mull. The transaction was carried out by means of two documents, namely, a register bond and disposition in security by the provision of which the sum advanced was to be repaid at the term of Whitsunday, 1911, and interest was payable at the rate of five per cent. per annum, and also a minute of agreement whereby on certain conditions which are immaterial to any issue arising here the respondents agreed that they would not call in the loan for fourteen years from the term of Martinmas, 1910, and that the interest should be payable at the rate of four per cent. per annum, and it was made an express condition that the interest should be punctually paid. The material words of the agreement are as follows :

> "(2) Provided the covenant in art. 1 hereof be duly observed, and the interest of the loan be punctually paid in terms of the bond and disposition in security as modified by the immediately succeeding clause, art. 3 hereof, the lenders agree not to call in the loan for a period of fourteen years from and after the term of Martinmas (being Nov. 11) 1910."

Article 3 is in these terms :

> "Notwithstanding the said bond and disposition in security specifies 5 per cent. per annum as the rate of interest which the loan is to bear, the lenders agree to modify the rate to 4 per centum per annum, provided and so long as punctual payment shall be made of interest at said lower rate."

On April 16, 1911, Maclaine borrowed a further sum of £2,000 on terms which as far as material are identical with those of the earlier loan.

At the date of the first advance and for some years following the respondent, Sir Stephen Gatty, was the tenant of Lochbuie at a rent which exceeded the amount of interest falling due in respect of the said loans, but he took advantage of the terms of his lease to terminate his tenancy on Oct. 31, 1917. That circumstance prevented any question of punctuality in the payment of interest arising until a date with which I will presently deal. In the meantime, in March, 1912, the appellant, Maclaine, had made a trust deed in favour of the Lochbuie Trust, the remaining appellants, who thereafter have been owners in fee of the estates in question. In October, 1917, and for some considerable period afterwards, Maclaine was on duty with His Majesty's forces abroad, and the rent due in respect of the quarter ending Nov. 1, 1917, was not paid until April, 1918, although two applications had been made by the agents of the Lochbuie trustees. I only advert to this circumstance because it was mentioned in argument and some stress was laid upon it in the case. The interest on the loans falling due in 1918 could no longer be met out of the rent which formerly had accrued from the lenders, and consequently it became necessary to make some other arrangement to discharge the payments as they fell due. The first of such payments became due on Feb. 1, 1918, and a request for payment was made by the lenders' agents on April 11,

1918, and on April 29 of the same year they repeated their request in a letter which read as follows:

> "Referring to our letter of 18th inst., we must ask you to let us have without further delay a remittance for the interest payable on our clients' bonds on 1st Feb. last. Another quarter's payment of interest amounting to £285 falls due on 1st proximo and you may be so good as to send us a remittance for it at the same time. We are instructed to say that unless the interest be in future regularly and punctually paid, interest at the rate (of 5 per cent.) stipulated in the bonds will be exacted."

Payments were in fact not made until May 13, 1918, and were accepted without comment or protest at the lower rate of four per cent. On July 24, 1918, the respondents' agents write to the trustees' agents sending a note of interest due at Aug. 1, 1918, and requesting a remittance in due course. That letter was in these terms:

> "Sir Stephen and Lady Gatty.—Interest on Loans.—Dear Sirs,—We send you herewith note of interest due to Sir Stephen and Lady Gatty by the Maclaine of Lochbuie in respect of loans over the estate of Lochbuie as at 1st proximo, and shall be glad to receive a remittance for the amount of the interest, less tax, in due course.—Your faithfully, JOHN C. BRODIE & SONS."

On Aug. 7, 1918, a cheque in payment was sent by the appellants' agents, but the cheque was returned on the ground that the tender was not timeous or sufficient, and payment was demanded at the rate of five per cent. At the same time an intimation was given that the respondents held themselves at liberty to exercise their rights and powers under their bonds free from any restrictions imposed by the agreements which accompanied and modified the bonds. Various explanations of the delay are given in the letter of the trustees' agents of Aug. 14, 1918. I do not think it necessary to dwell upon the various explanations which are put forward, because, although they may aggravate the apparent harshness of which the appellants complain, they cannot, in my judgment, modify in any way the resultant legal situation. A claim was made that the interest had not been punctually paid within the meaning of the back agreements, which accordingly had ceased to apply, so that the rights of the parties, such is the pursuers' contention, was held to be governed by the bonds alone. This claim was not admitted by the appellants, and the respondent commenced the proceedings which have resulted in the appeal to your Lordships.

The questions which require decision now are two—in the first place, whether payment made in the circumstances indicated in the short statement of facts which I have thought it necessary to make is a payment punctually made on Aug. 1; and the second question which has been argued at the Bar is that, if your Lordships do conclude that payment was not punctually made, was the conduct of the pursuer such as to preclude him, having regard to the familiar principles of estoppel or bar, from contending before your Lordships here that he is entitled to avail himself of his literal rights under the relevant instrument?

I will deal with those points in order. The first question is a short one. Where the party has contracted that he will make a payment punctually upon a day specified, can he be heard to say that that payment is a payment punctually made if in fact it is made at a later date? In a matter which would have seemed to me to be clear, had there not been a difference of judicial opinion in the courts below, I am of opinion that where an instrument clearly expresses that payment is to be made punctually on a day specified, such a payment is not so made unless it is made upon that day. Some authority was referred to by counsel for the appellants in the Scottish courts which certainly pointed in the opposite direction. He referred particularly to *Scott-Chisholm* v. *Brown* (1), and the passage in the judgment in that case which assists his argument is to be found in the judgment of LORD MACLAREN. It is as follows (20 R. (Ct. of Sess.) at p. 580):

"I think the difference between a stipulation that an abatement is to be given if the rent is punctually paid and a stipulation that an abatement shall be given if the rent is paid at the 'time' is only this: The word 'punctually' is a little more elastic and would cover the case of rent paid within a few days after it is due, or as soon as it is demanded."

I must not, speaking for myself, be taken as an assentient to the distinction which the learned judge draws between a stipulation that an abatement is to be given if the rent is paid at the time, but I am bound expressly to dissociate myself, having regard to the view which I have formed, from the further expression of opinion that the word "punctually" in such a case would cover the case of rent paid within a few days after it is due; and I note that the opinion expressed by this learned judge in that sense must be treated as obiter having regard to the fact that the period of delay in the case under consideration was notably longer than that with which we are concerned. The decision in fact was that the actual payment in that case was not timeous.

The point is important, nor has this House hitherto pronounced upon it. It is, therefore, worth while to add a few further observations. Counsel for the appellants was driven, and I think irresistibly driven, to the admission that, had the words in the instrument which require construction been that the payment of interest was to be made upon Aug. 1 without containing the word "punctually," the payment would necessary have been made upon that day, and no such latitude could have been argued for as on the existing language he conceives himself at liberty to claim. This admission involves its mouthpieces in a very strange and untenable position, because they are driven to contend that a man who has stipulated on his own behalf that a person who contracts with him is to pay him on Aug. 1 punctually is actually in a worse position than he who has contracted that he shall be paid on Aug. 1 simpliciter. The suggestion that the cautious insertion of the word "punctually" is actually to be treated as importing an element of unpunctuality seems to me a paradox which on principle it would be extremely difficult to support, and, when I address myself to the different authorities, which I will shortly do, which have been cited at the Bar, I am confirmed rather than shaken in the impression which I have formed.

I will refer, in the first place, to the decision in *Leeds and Hanley Theatres of Varieties* v. *Broadbent* (2). This case of all those cited at the Bar in its facts most closely resembles the matters now under consideration. The headnote in that case, which is extremely short, is as follows ([1898] 1 Ch. 343):

"A mortgage deed contained an agreement that the payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years from the date of the deed 'if in the meantime every half-yearly payment of interest shall be punctually paid': Held, by the Court of Appeal (reversing the judgment of KEKEWICH, J.), that payment 'punctually' meant payment on the day fixed for payment, and that payment nine days after such fixed day was not good payment."

I read this case, while the learned counsel was referring to it, with considerable care, and I am quite unable to assent to the suggested distinctions between it and the present case which counsel for the appellants attempted to draw. On the contrary, I desire to adopt and associate myself with the judgment that was given by LORD LINDLEY, M.R., in that case. He reads the words which so resemble the words which fall to be construed in the present case, and, having read them, continues:

"That surely means if in the meantime every half-yearly payment of interest is paid on the days specified in the covenant. I do not think you want authority to show that 'punctually' means punctually on the day fixed for payment, and I am not aware of any authority which shows it does not. According to the plain language, the mortgagees are in the right. The money was

not paid on the day, nor for several days afterwards, and no attempt was made to provide for payment at all on Aug. 15, when the first half-yearly interest became payable, and, there being no sign of payment, the mortgagees served a notice calling in the money."

An authority was referred to by counsel for the appellants which is somewhat in his favour, and on which, therefore, I make an observation. It was *Nova Scotia Steel Co.* v. *Sunderland Steel Shipping Co., Ltd.* (3). This case was concerned with the charter of a steamer for three months at a monthly hire, payment to be made monthly in advance, and, failing the punctual and regular payment of the hire, it was provided that the owners were to be at liberty to withdraw the vessel from the service of the charterers. The second month's hire was payable on July 12; the hire was in fact tendered on July 14, and BIGHAM, J., held that there had been a punctual and regular payment of the hire. The language used in the charterparty in that case was not so precise as that which is under consideration in the present case, and the learned judge did not give an extensive or elaborate consideration to the point which requires decision in the present case. I do not think it necessary to reach a conclusion whether, in the different language and in the different circumstances which it was necessary for the learned judge to construe and deal with, I should agree with him, but the view which he reached in the *Nova Scotia Case* (3) in no way affects the decision I have formed with regard to the first part of this case. I have only to add that it would be a very singular circumstance if he who had been careful to stipulate that certain payments of interest under an instrument of this kind should be made to him punctually on a certain specified day were deprived by a decision of the law courts of the right of insisting upon the strict implement of that for which he stipulated. It would be both undesirable and dangerous that courts of law should set up an elastic, and, from the nature of the case, an undefinable, judicial discretion in substitution for the expressed agreement of the parties to the instrument. So much for the first point which has been argued at the Bar.

It is then contended that, even if according to its original tenor properly construed the respondents were entitled to require that the payments of interest should be made punctually on the days specified, they have by their conduct in this matter precluded themselves from raising such a contention. The learned counsel cited various authorities in which these doctrines have been discussed, but the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A. has by his words or conduct justified B. in believing that a certain state of facts exists, and B. has acted upon such belief to his prejudice, A. is not permitted to affirm against B. that a different state of facts existed at the same time. Whether one reads *Pickard* v. *Sears* (4) or the later classic authorities which have discussed this topic, one will not, I think, greatly vary or extend this simple definition of the doctrine.

Approaching, then, the facts of this case, I ask myself where is the evidence of any such representation, either by words or by conduct, on the part of the respondents as to preclude them from reliance upon the strict letter of their contract? It is said that when an instalment was asked for in the letter of April 29, 1918, a course of conduct was set in train which justifies the contention advanced. I will read that letter:

"Dear Sir,—Referring to our letter of 18th inst., we must ask you to let us have without further delay a remittance for the interest payable on our clients' bonds on Feb. 1 last. Another quarter's payment of interest, amounting to £285, falls due on the 1st proximo, and you may be so good as to send us a remittance for it at the same time. We are instructed to say that unless the interest be in future regularly and punctually paid, interest at the rate (of 5 per cent.) stipulated in the bonds will be exacted."

Upon this letter two observations may conveniently be made. In the first place, the payments of interest under discussion in that letter are the first payments of interest which had been made at all, having regard to the balance slightly in favour of Lochbuie upon an adjustment of the two accounts. We are then dealing from this date with a new state of things, and at this point of time the respondents in the clearest possible manner place on record their intention of insisting strictly upon their legal rights under the instrument. The money was in fact paid on May 13, and upon its acceptance without protest of the appellants and upon the letter written on May 1 is founded a contention that the respondents were thereafter, till they recalled the impression created by that letter, precluded from insisting upon the letter of their contract. I am unable to agree that in such a case as this, where there has been a single acquiescence, not unexplained, in a single tardy payment, the party accepting it has rendered it impossible for him thereafter to require that payments should be made at the due date. Even if no express notice had been sent to the appellants, I should still think that there had been no conduct in this case which would have prevented the respondents from insisting upon their right; but in fact on July 24, 1918, we find the respondents' agents writing in these terms:

> "Dear Sirs,—We send you herewith note of interest due to Sir Stephen and Lady Gatty by the Maclaine of Lochbuie in respect of loans over the estate of Lochbuie as at 1st proximo, and shall be glad to receive a remittance for the amount of the interest, less tax, in due course."

I read that letter as amounting to a clear notification a week before the payment was due that the respondents intended to require that payment should be made on the day it was due; and the unfortunate circumstances which have been described to us by the learned counsel and are adverted to in the correspondence do not and cannot do away with the rights of the respondents under the instrument. It was for the appellants, having regard to the obligation into which they had entered, diligently to prepare themselves to carry out their duty timeously, and they should not have left themselves at the mercy of the disabling circumstances which are described in the letter in question. Even if it be true that the attitude of the respondents has resulted in a harsh and difficult situation for the appellants, that circumstance cannot produce the slightest effect when once a clear view is reached as to the legal situation. In my view, the respondents are entitled to succeed, the interlocutor delivered on appeal was right and ought to be affirmed, and I move your Lordships accordingly.

VISCOUNT FINLAY.—I am of the same opinion, and upon the same grounds. The bond provided for payment of interest at five per cent. by equal quarterly payments on Feb. 1, May 1, Aug. 1, and Nov. 1 in each year. The back agreement provided by its third article that, notwithstanding the specification of five per cent. as the rate of interest which the loan was to bear according to the bond, "the lenders agree to modify the rate to 4 per centum per annum provided and so long as punctual payment shall be made of interest at said lower rate." The interest fell due on Aug. 1, it was not sent until Aug. 7. Various reasons are given for the delay, which I have no doubt are perfectly true. It appears that one of the trustees was travelling about and that there was some delay in the cheque getting her signature. These reasons afford no justification for not observing the terms of the contract between the parties; there was, indeed, nothing whatever to prevent the agents paying the money by their own cheque and then being recouped when the trustees were able to send the necessary signature. It was contended that payment on Aug. 7 might be considered punctual payment on Aug. 1. I am totally unable to take that view. If I rightly understood counsel for the appellants, he admitted that, if the words had been that payment should be payment on Aug. 1, he would not contend—he could not contend—that they were satisfied, but that the words "punctual payment on Aug. 1" in some way qualified

A the provision for "payment on Aug. 1." "Punctual payment," he said, was not an expression really applicable in any strict sense to payment on a day; it was applicable only to payment at a particular point of time in the course of a day. It appears to me that the expression "punctual payment" is perfectly applicable to a provision for payment on a particular day, and that then it emphasises the necessity of payment being made on that day, and not on a subsequent day. Instead of
B diluting the meaning of the provision for payment on that day it emphasises it. It appears to me, therefore, that it is perfectly clear that there was not punctual payment on Aug. 1, in terms of the provision in the contract as contained in the back agreement as well as in the bond.

The second point is a totally different point, and has given me more ground
C for consideration than I think was necessary with regard to so obvious a question of construction as arose on the first point. It is whether there was anything in the nature and course of conduct which would prevent the creditors from insisting on their right to have payment at the higher rate of interest because the payment was not made for a few days after the day stipulated. The principle in such matter is most admirably laid down by LORD GLENLEE in *Paterson* v. *Tod* (5).
D LORD GLENLEE says this (6 Sh. (Ct. of Sess.) at p. 1064):

> "This loan is certainly so qualified that Paterson might have given notice that if the interest was not paid on the term-day he would call it up. But his conduct led the borrower to expect that it was not to be demanded strictly on the term-day. He might, however, at any time have said: 'You must now pay me the interest on the term-day or I will call the money up.' But as his
E own conduct gave reason to believe that a day or two's delay would be considered sufficiently regular payment, as on the former occasions, although his having formally passed over the irregularity was no ground to bind him in future, still it prevents him from going back and taking advantage of failures before warning."

F The question in the present case is whether there was such conduct on the part of the creditors as to bring the debtors within that principle. I have come to the conclusion that, although there may be great hardship in enforcing the strict rights of the parties in this particular case, it is much better that these rights should be enforced, even although there is hardship in the individual case, than that the principle should be trenched upon, as infringement of it might lead to
G confusion in law and possible hardship and difficulty in other cases. Do the appellants bring themselves within the principle of that case? The whole foundation for the argument on this part of the case is founded upon the correspondence. The first is the letter of April 29, which has been read more than once already and concludes with the notice "that unless the interest be in future regularly and punctually paid, interest at the rate (5 per cent.) stipulated in the bonds
H will be exacted." That letter was written on April 29, and certain interest fell due on May 1, within two days after the date of that letter. On May 1, this answer comes:

> "We are in receipt of your letter of 29th ultimo. The delay in remitting has arisen, we understand, from the factor being away from home for the last fortnight, but he has now returned, and we hope to have cheque immediately."

I That was given by way of apology for delay, and a settlement took place by payment of Feb. 1 interest and May 1 interest on May 13. It appears to me that acceptance of one payment in these circumstances is a foundation altogether inadequate to sustain the inference of any course of dealing between the parties which the appellants would need to erect in order to bring themselves within the doctrine enunciated by LORD GLENLEE. Then comes the letter of July 24, which is a bald intimation that certain interest will be due on Aug. 1, and stating that the writers would "be glad to receive a remittance for the amount of the interest, less tax,

in due course." After this occurred the delays to which I have already referred. In these circumstances it appears to me that there is no ground whatever for alleging any course of dealing, or that the appellants were in any way misled by the actings of the creditors in not paying with punctuality. It follows that the consequences which the contract between the parties prescribed as ensuing a failure to make punctual payment at the stipulated day must ensue.

LORD DUNEDIN.—I concur with all that has been said by the noble and learned lord on the Woolsack. I desire particularly to associate myself with that portion of his speech in which he pointed out that the use of the word "punctual" connoted an added stress, not a relaxation of the duty of timeous payment. As regards the second point, I confess I think the case a hard one, but I think the pursuers are within their rights, and that they neither did nor said anything that was sufficient to found a plea at Bar.

LORD ATKINSON.—I, too, concur with the observations that have been made by my noble and learned friend on the Woolsack. It is not contended that the language used in the two documents with which this House cognisant have any but the ordinary meaning, and it appears to me to be beyond doubt that, when in an instrument certain days are specifically fixed for payment of moneys, the provision that the payment shall be punctually made necessarily means that it should be made on those named days, and really gives every force and stringency to the provision fixing those days for payment.

As to the second point, it appears to me that, whatever may have been the practice of these parties before April 29, upon that day there was, as it were, a new departure and an intimation by the writers that henceforth the persons on whose behalf the letter was written would stand upon their legal rights and insist upon punctual payment. They had a perfect right to do that. It is established by the cases which have been cited that, whatever may have been their previous practice, it was competent for them to change their method of dealing and to assert that henceforth they would act upon their strict rights. The question is: Have they abandoned the position they took up upon April 29? The letter of July most certainly does not amount to an abandonment; on the contrary, it is rather an insistence on the right asserted by the previous letter; and, therefore, the only dealing that can be relied upon as abandoning the position they took up in April is the transaction which culminated on May 13. What was that? They asked to be paid the gale due upon May 1, and excuse is made on May 1, the very day, that, owing to the absence of the factor, that demand could not be at once complied with, and the payment is ultimately made, I presume, when the factor returned on May 13. It appears to me to be perfectly impossible to construe that transaction as a departure in any way from the assertion of their legal right as expressly made in the letter of April 29. I do not think, if one is permitted to say it, that the conduct of Sir Stephen Gatty is very commendable, but, at all events, he cannot be deprived of his legal rights, although one may not be disposed altogether to admire the course he has taken.

LORD SHAW.—I concur. Stated in a sentence, this two-handed bargain—combining a back letter with a bond and disposition in security—may be put thus: On condition that interest at four per cent. is punctually paid, then (i) that will be accepted in full satisfaction of interest at the larger rate of five per cent. in the bond; and (ii) the loan shall be continued for the long period of fourteen years. On the first point, as regards the construction put by counsel for the appellants upon the words "punctually paid," I confess to your Lordships that I have difficulty in understanding what the point is. He pled, and pled briefly, but strenuously, in favour of the principle of elasticity—elasticity in the construction of a contract which provides for punctuality. My mind cannot comprehend the elasticity of

A punctuality. I know of no method of construction of a contract by way of contradiction of it. Further, once you introduce in a matter of construction questions of circumstances, of motive, of ability or inability to pay, or of shortness or length of delay—once you do that, the terms of the bargain might vary with the view taken of these things by judges from time to time, and the whole solid contract relations of the parties might disappear. The ground of these relations may be B hard, but that is better than that it should be slippery.

On the second point of argument, namely, that the conduct of the parties has barred the lenders from reverting to the term of the bond and enforcing the lenders' rights accordingly, I, of course, am not prepared to say that such a case, which might in some aspects appear to be an uphill case, is impossible—far from it. I venture to express my adoption of the view just expressed in this House by my C noble and learned friend LORD FINLAY, and to say that I agree with the view taken in *Paterson* v. *Tod* (5) (6 Sh. (Ct. of Sess.) at p. 1064) in the judgment of LORD GLENLEE. In order to make a change for all the future term of the written bargain, I presume that such a change would have to be reduced to writing. But it was said, and in this the argument was supported by *Paterson* v. *Tod* (5), that the conduct of the lenders did mislead the borrower as to what was either expected D or required as for a particular impending term. It was maintained that to change the written obligation as for a particular term all you required was a course of conduct antecedent to that term. That may be so in a clear and continuous case. This was not such a case of clearness and continuity. The point just stated by my noble and learned friend LORD ATKINSON makes that perfectly clear. In short, punctual payment was clearly as the day stated to be a condition which E was not dispensed with but was insisted upon.

Appeal dismissed.

Solicitors: *Grahames & Co.*, for *Hope, Todd & Kirk*, W.S., Edinburgh; *R. S. Taylor, Son & Humbert*, for *John C. Brodie & Sons*, W.S., Edinburgh.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL (ON BEHALF OF HIS MAJESTY) *v.* DE KEYSER'S ROYAL HOTEL, LTD.

[House of Lords (Lord Dunedin, Lord Atkinson, Lord Moulton, Lord Sumner and Lord Parmoor), March 1, 2, 4, 5, 8, 9, May 10, 1920]

[Reported [1920] A.C. 508; 89 L.J.Ch. 417; 122 L.T. 691; 36 T.L.R. 600; 84 Sol. Jo. 513]

Crown—Prerogative—Requisition of land—Payment of compensation—Nature of prerogative—Method of exercise—Defence Act, 1842 (5 & 6 *Vict.*, *c.* 94), *s.* 19—*Defence of the Realm (Consolidation) Act*, 1914 (5 *Geo.* 5, *c.* 8)—*Defence of the Realm Regulations*, 1914.

The Crown, as suprema potestas, is endowed with the right and duty of protecting the realm and for that purpose is entitled to take any man's property. Where, however, Parliament has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations contained in the statute so that the whole ground of something which could be done by the prerogative is covered by the statute, the statute rules, the prerogative is rendered unnecessary and is superseded by the statute, and the powers can only be exercised by the Crown subject to those limitations, for, inasmuch as the Crown is a party to every Act of Parliament, when a statute deals with something which before the Act could be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to the prerogative being curtailed. The principles of construction to be applied in deciding whether the royal prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or where an Act of Parliament is made for the public good, the advancement of religion or justice, and to prevent injury or wrong. Statutes which provide rent or compensation as a condition to the right of the executive to take over possession of land or buildings on the occasion of public exigency come within the category of statutes made for the advancement of justice and to prevent injury and wrong.

Where a building was requisitioned by the military authorities expressly under statutory powers,

Held: the Defence Act, 1842, and the regulations made under the Defence of the Realm Consolidation Act, 1914, gave the Crown powers to requisition property which were wider than those exerciseable under the prerogative and bound the Crown; under the Act of 1842 compensation was given to the owner of property which was taken; and, therefore, the owners of the building in question were entitled to the compensation provided by that Act.

Decision of the Court of Appeal, [1919] 2 Ch. 197, affirmed.

Per Lord Parmoor: The royal prerogative connotes a discretionary authority or privilege exerciseable by the Crown or the executive which is not derived from Parliament and is not subject to statutory control. This authority or privilege is in itself a part of the common law, not to be exercised arbitrarily, but per legem and sub modo legis. The royal prerogative has been considerably curtailed as a statutory rule of law has taken the place of the uncertain and arbitrary administrative discretion.

Notes. Civil proceedings against His Majesty, including petitions of right, were abolished by s. 13 of and Sched. 2 to the Crown Proceedings Act, 1947 (6 Halsbury's Statutes (2nd Edn.) 46). Civil proceedings against the Crown are now regulated by that Act.

Considered: *Hudson's Bay Co.* v. *Maclay* (1920), 36 T.L.R. 469; *Re Ferdinand*, [1921] 1 Ch. 107. Applied: *Re Azoff-Don Commercial Bank*, [1954] 1 All E.R.

947. Considered: *Bank Voor Handel en Scheepvaart N.V.* v. *Hungarian Property Administrator*, [1954] 1 All E.R. 969. Referred to: *R.* v. *Daily Mail, Ex parte Farnsworth*, [1921] All E.R. Rep. 476; *R.* v. *Egan*, *R.* v. *Higgins* (1921), 65 Sol. Jo. 782; *Robinson* v. *R.*, [1921] 3 K.B. 183; *Curling* v. *Matthey* (1921), 37 T.L.R. 717; *Federated Coal and Shipping Co.* v. *R.*, [1922] 2 K.B. 42; *A. & B. Taxis* v. *Secretary of State for Air*, [1922] 2 K.B. 328; *Matthey* v. *Curling*, [1922] All E.R. Rep. 1; *Re Colnbrook Chemical and Explosives Co., A.-G.* v. *The Co.*, [1923] 2 Ch. 289; *Commercial and Estates Co. of Egypt* v. *Board of Trade*, [1925] 1 K.B. 271; *Netherlands-American Steam Navigation Co.* v. *Procurator-General* (1925), 42 T.L.R. 81; *Rowland & Mackenzie-Kennedy* v. *Air Council* (1927), 96 L.J.Ch. 470; *France Fenwick* v. *R.*, [1927] 1 K.B. 458; *Austrian Property Administrator* v. *Russian Bank for Foreign Trade* (1931), 47 T.L.R. 550; *Hirsch* v. *Somervell*, [1946] 2 All E.R. 430; *Port Line, Ltd.* v. *Ben Line Steamers, Ltd.*, [1958] 1 All E.R. 787.

As to the royal prerogative see 7 HALSBURY'S LAWS (3rd Edn.) 221 et seq., and for cases see 11 DIGEST (Repl.) 566 et seq.

Cases referred to:

(1) *Re Petition of Right*, [1915] 3 K.B. 649; sub nom. *Re X's Petition of Right*, 84 L.J.K.B. 1961; 113 L.T. 575; 31 T.L.R. 596; 59 Sol. Jo. 665, C.A.; 17 Digest (Repl.) 437, *90*.

(2) *R.* v. *Hampden, Ship Money Case* (1637), 3 How. St. Trs. 826; 17 Digest (Repl.) 423, *36*.

(3) *King's Prerogative in Saltpetre* (1606), 12 Co. Rep. 12; 77 E.R. 1294; 17 Digest (Repl.) 436, *87*.

(4) *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48; 62 L.J.Ch. 963; 69 L.T. 208; 41 W.R. 677; 9 T.L.R. 559; 37 Sol. Jo. 615; 2 R. 549, C.A.; 19 Digest 55, *317*.

(5) *Coomber* v. *Berks. Justices* (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 42 Digest 648, *547*.

(6) *Newcastle Breweries, Ltd.* v. *R.*, [1920] 1 K.B. 854; 89 L.J.K.B. 392; 123 L.T. 58; 84 J.P. 125; 36 T.L.R. 276; 18 L.G.R. 781; 17 Digest (Repl.) 448, *142*.

(7) *Phillips* v. *Homfray* (1883), 24 Ch.D. 439; 52 L.J.Ch. 833; 49 L.T. 5; 32 W.R. 6, C.A.; 34 Digest 649, *457*.

(8) *Churchward* v. *Ford* (1857), 2 H. & N. 446; 26 L.J.Ex. 354; 5 W.R. 831; 157 E.R. 184; 31 Digest (Repl.) 307, *4448*.

(9) *Howard* v. *Shaw* (1841), 8 M. & W. 118; 10 L.J.Ex. 334; 151 E.R. 973; 40 Digest (Repl.) 207, *1690*.

(10) *Markey* v. *Coote* (1876) 1 R. 10 C.L. 149; 40 Digest (Repl.) 194, **850*.

(11) *Hellier* v. *Sillcox* (1850), 19 L.J.Q.B. 295; 15 L.T.O.S. 88; 14 Jur. 573; 31 Digest (Repl.) 303, *4411*.

(12) *Marquis Camden* v. *Batterbury* (1860), 7 C.B.N.S. 864; 28 L.J.C.P. 335; 23 J.P. 821; 7 W.R. 616; 141 E.R. 1055; sub nom. *Batterbury* v. *Marquis Camden*, 5 Jur. N.S. 1405, Ex.Ch.; 31 Digest (Repl.) 90, *2408*.

(13) *Levy* v. *Lewis* (1859), 6 C.B.N.S. 766; 28 L.J.C.P. 304; 5 Jur. N.S. 1408; affirmed (1861), 9 C.B.N.S. 872; 30 L.J.C.P. 141; 7 Jur. N.S. 759; 9 W.R. 388; 142 E.R. 343, Ex.Ch.; 30 Digest (Repl.) 510, *1495*.

(14) *Re Bonham, Ex parte Postmaster-General* (1879), 10 Ch.D. 595; 48 L.J.Bcy. 84; 40 L.T. 16; 27 W.R. 325, C.A.; 42 Digest 691, *1057*.

(15) *London and North-Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16; 62 L.J.Ch. 1; 67 L.T. 630; 41 W.R. 149; 9 T.L.R. 50; 2 R. 120, C.A.; 11 Digest (Repl.) 171, *412*.

(16) *R.* v. *Doutre* (1884), 9 App. Cas. 745; 53 L.J.P.C. 85; 51 L.T. 639, P.C.; 3 Digest 332, *207*.

(17) *Windsor & Annapolis Rail. Co.* v. *R. & Western Counties Rail. Co.* (1886), 11 App. Cas. 607; 55 L.J.P.C. 41; 55 L.T. 271; 51 J.P. 260; 2 T.L.R. 743, P.C.; 16 Digest 239, *346*.

(18) *Tobin* v. *R.* (1864), 16 C.B.N.S. 310; 4 New Rep. 274; 33 L.J.C.P. 199; 10 L.T. 762; 10 Jur. N.S. 1029; 12 W.R. 838; 2 Mar. L.C. 45; 143 E.R. 1148; 16 Digest 240, *352*. A

(19) *Rodgers* v. *Maw* (1846), 15 M. & W. 444; 4 Dow. & L. 66; 16 L.J.Ex. 137; 7 L.T.O.S. 260; 153 E.R. 924; 42 Digest 994, *224*.

(20) *Smith* v. *Hodson* (1791), 4 Term Rep. 211; 100 E.R. 979; 4 Digest (Repl.) 439, *3875*. B

(21) *New Windsor Corpn.* v. *Taylor*, [1899] A.C. 41; 68 L.J.Q.B. 87; 63 J.P. 164; 15 T.L.R. 67; sub nom. *Windsor Corpn.* v. *Taylor*, 79 L.T. 450, H.L.; 17 Digest (Repl.) 23, *267*.

(22) *The Zamora*, [1916] 2 A.C. 77; 85 L.J.P. 89; 114 L.T. 626; 32 T.L.R. 436; 60 Sol. Jo. 416; 13 Asp. M.L.C. 330, P.C.; 37 Digest 652, *1071*.

(23) *Hole* v. *Barlow* (1858), 4 C.B.N.S. 334; 27 L.J.C.P. 207; 22 J.P. 530; 4 Jur. N.S. 1019; 6 W.R. 619; 140 E.R. 1113; sub nom. *Holl* v. *Barlow*, 31 L.T.O.S. 134; 36 Digest (Repl.) 262, *122*. C

(24) *The Fox* (1811), 1 Edw. 311; 2 Eng. Pr. Cas. 61; 165 E.R. 1121; 37 Digest 652, *1070*.

(25) *A.-G.* v. *Horner* (1884), 14 Q.B.D. 245; 54 L.J.Q.B. 227; 49 J.P. 326; 33 W.R. 93, C.A.; 42 Digest 743, *1679*. D

Appeal by the Crown from an order of the Court of Appeal (Lord Swinfen Eady, M.R., and Warrington, L.J., Duke, L.J., dissentiente), reported [1919] 2 Ch. 197, reversing a decision of Peterson, J.

The Attorney-General (*Sir Gordon Hewart, K.C.*), *the Solicitor-General* (*Sir Ernest Pollock, K.C.*), *C. F. Lowenthal*, *Austen-Cartmell* and *Branson* for the Crown (appellant). E

Sir John Simon, K.C., *Leslie Scott, K.C.* and *W. Copping* for the respondent company.

The House took time for consideration.

May 10. The following opinions were read. F

LORD DUNEDIN.—It will be well that I should first set forth succinctly the facts which give rise to the present petition, all the more as regards them there is no real controversy between the parties.

In April, 1916, the Army Council, finding it necessary to have accommodation in London for the headquarters personnel of the Royal Flying Corps and for the Design Section of the same, communicated with the Board of Works with a view G to finding a suitable building. The Department, which had previously had some tentative offers from the receiver and manager, in possession of the premises belonging to the De Keyser Hotel Co., Ltd., came to the conclusion that the building known as De Keyser's Hotel would suit. They communicated with the War Office to that effect on April 18, 1916, and on the same date applied to the receiver to see on what terms he would let. After a short period of ineffectual negotiation H the Board of Works, on April 29, informed the receiver that "after full consideration of the matter the Board are of the opinion that it will be to the advantage of all concerned to refer the question of the amount to be paid by the government for the use of such of the hotel premises as will be required to the Defence of the Realm Losses Commission. In these circumstances the Board have no option but to communicate with the War Office with a view to the hotel premises, excluding the shops, being requisitioned under the Defence of the Realm Acts in the usual manner." Following on this communication to the War Office, on May 1, wrote as follows to the receiver: I

"De Keyser's Royal Hotel, E.C.—I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations, excluding the shops, the other portions sub-let, and the wine cellars. . . . I inclose forms of claim for submission to the Defence of the Realm Losses

A Commission. Compensation, as you are probably aware, is made ex gratiâ, and is strictly limited to the actual monetary loss sustained."

On receipt of this letter the receiver expressed his willingness to facilitate the taking possession, but at the same time he safeguarded his position by the following letter on May 3:

B "I write to inform you that I have instructed Messrs. John Barker and Son, Ltd., to represent me at the making of the inventory of the contents of this hotel, and also to meet your representative there tomorrow, and to render every facility in order that the necessary work may be done with the utmost expedition. I desire, however, to inform you that the steps which I am taking are without prejudice to the question whether the Army Council are C within their rights in acquiring possession of the above property under their notice dated May 1, 1916, as to which I am being advised."

This was followed up by a letter of May 5, to the following effect:

"Referring to the letter of the 1st inst. from Captain Cole of the Lands Branch, War Office, it does not seem to me that the acquisition of this building as D offices is necessary for the purpose of securing the public safety or the defence of the realm, or that such an acquisition is within the powers conferred by the Defence of the Realm Consolidation Regulations, 1914. I must, therefore, enter a protest against the notice contained in the letter if acted upon, and you must understand that anything which I am doing in the matter is without prejudice to the rights of all parties interested in the hotel. I think that a E fair rent might be fixed by personal negotiation between a representative of the authority acquiring the building and myself; but, failing this, I would ask you to agree to submit the question to arbitration."

To this the Office of Works replied on May 9:

"With regard to your letter of 5th inst., the premises, having been com- F mandeered by the military authorities under the Defence of the Realm Acts, the amount of payment to the applicants out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with the applicants' property or business through the exercise by the Crown of its rights and duties in defence of the realm will be determined by the Defence of the Realm Losses Commission. Having regard, G therefore, to your letter it would seem advisable for the claim to be made on a form prepared for the purpose, a supply of which I believe you have, as soon as possible."

As no settlement was arrived at and the receiver declined to go before the Losses Commission, there was presented a petition of right by the De Keyser company. The relief asked was:

H "(i) A declaration that your suppliants are entitled to payment of an annual rent so long as Your Majesty's Principal Secretary of State for the War Department or Your Majesty's Army Council or any other person or persons acting on Your Majesty's behalf continues in use and occupation of the said premises. (ii) The sum of £13,520 11s. 1d. for use and occupation of your I suppliants' premises from the 8th day of May, 1916, to the 14th day of February, 1917. . . . (iv) A declaration that your suppliants are entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.

To this reply was made by the Attorney-General on behalf of His Majesty to the following effect:

"No rent or compensation is by law payable to the suppliants in respect of the matters aforesaid or any of them either under the Defence Act, 1842, or at all. The suppliants have been offered on behalf of His Majesty payment of

such sum as, in the opinion of the Defence of the Realm Losses Commission, ought in reason and fairness to be made to them out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown as aforesaid of its rights and duties in the defence of the realm."

The case depended before PETERSON, J., who dismissed the petition, holding himself bound by the decision of the Court of Appeal in *Re Petition of Right* (*The Shoreham Case*) (1). Appeal being taken to the Court of Appeal that court, by a majority, LORD SWINFEN EADY, M.R., and WARRINGTON, L.J., DUKE, L.J., dissenting, reversed the decision of PETERSON, J., and made the following declaration:

"And this court doth declare that the suppliants are entitled to a fair rent for use and occupation of De Keyser's Royal Hotel on the Thames Embankment in the city of London by way of compensation under the Defence Act, 1842."

Against this order the present appeal has been brought.

I shall mention first, in order to put it aside, one argument put forward for the respondents. It was that the Crown should pay a reasonable sum for use and occupation of the premises upon the ground of an implied contract, the entry of the Crown to the premises having been permitted by the receiver and taken by the Crown in virtue of the receiver's permission. The simple answer to this argument is that the facts as above recited do not permit of its application. In any case of implied contract there must be implied assent to a contract on both sides. Here there was no such assent. There was no room for doubt as to each party's position. The Crown took as a right, basing that right specifically on the Defence of the Realm Acts. The receiver did not offer physical resistance to the taking, and was content to facilitate the taking. He emphatically reserved his rights, and gave clear notice that he maintained that the Crown was wrong in its contention and that no case for taking under the Defence of the Realm Acts had arisen—in other words, that the Crown had in the circumstances, according to their proposals, unlawfully taken. To spell out of this attitude on either side an implied contract is, to my mind, a sheer impossibility.

That the act of taking by the Crown was in itself legal is necessarily admitted by both sides. It is the basis of the case for the Crown, who said at the time that they took under the Defence of the Realm Act, and now add in argument that, whether that was so or not, they took de facto and can justify that taking under the powers of the prerogative. It must necessarily be admitted by the respondents, for if taking in itself was purely illegal then it would be a tort not committed by the Crown, who cannot commit a tort, but by the officers of the Crown, and the petition of right would not lie. The question in the case is, therefore, narrowed to one point and one point only. The Crown having legally taken, is it bound to pay compensation ex lege, or is the offer to pay compensation ex gratiâ, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands? I have already quoted the letter of May 1, which shows that the War Office propose to take possession of the hotel under the Defence of the Realm Regulations, but in the argument in the court below and before your Lordships the taking has been justified by the power of the prerogative alone, and there has been a very exhaustive citation of authority of the powers of the Crown in virtue of the prerogative.

I do not think it necessary to examine and comment on the various cases cited. The foundations of the contention are to be found in the concessions made in the speech of Mr. St. John in *R.* v. *Hampden, Ship Money Case* (2), and in the opinion of the consulted judges in *King's Prerogative in Saltpetre* (3). The most that could be taken from them is that the King, as suprema potestas endowed with

A the right and duty of protecting the realm is, for the purpose of the defence of the realm, in times of danger entitled to take any man's property, and that the texts gives no certain sound as to whether this right to take is accompanied by an obligation to make compensation to him whose property is taken. In view of this silence it is but natural to inquire what has been the practice in the past. An inquiry as to this was instituted in this case, and there has been placed before B your Lordships a volume of extracts from various records. The search is admittedly not exhaustive, but it is sufficient to be illustrative. The learned Master of the Rolls in his judgment has analysed the document produced. He has divided the time occupied by the search into three periods, the first prior to 1788, then from 1788 to 1798 and the third subsequent to 1798. The first period contained instances of the acquiral of private property for the purposes of defence by private C negotiation in all of which, it being a matter of negotiation, there is reference to the payment to be offered for the land taken. With the second period we begin the series of statutes which authorise the taking of lands and make provision for the assessment of compensation, the statutes being, however, of a local and not of a general character, dealing each with the particular lands proposed to be acquired. The third period begins with the introduction of general statutes not D directed to the acquisition of particular lands, and again making provision for the assessment and payment of compensation. I shall refer to the statutes presently, but, speaking generally, what can be gathered from the records as a matter of practice seems to resolve itself into this. There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. On the other hand, there is no mention of a claim made in respect E of land taken under the prerogative, for the acquisition of which there was neither bargain nor statutory sanction. Nor is there any proof that any such acquisition had taken place. I do not think that from this usage of payment there can be imposed on the Crown a customary obligation to pay, for, once the taking itself is admitted to be as of right, the usage of payment so far as not resting on statutory provision is equally consistent with a payment ex lege and a payment ex gratiâ F On the other hand, I think it is admissible to consider the statutes in the light of the admitted custom to pay, for in the face of a custom of payment it is not surprising that there should be consent on the part of the Crown that this branch of the prerogative should be regulated by statute. It is just here that the full investigation into the statutory history which has been made in this case, and of which the Court of Appeal and your Lordships have had the advantage, serves to G dislodge a view which I cannot help thinking was very influential in determining the judgment of the Court of Appeal in *Re Petition of Right* (1).

Digressing for the moment to that case, I am bound to say that I do not think that this case can be distinguished from that in essential particulars. The existence of a state of war is common to both. As to the necessity for the taking over of the particular subject, the Crown authorities must be the judge of that, and H the evidence as to the necessity for the occupation of these premises, in the opinion of the Crown advisers, is just as distinct and uncontradicted in this case as it was in that. I confess that, had I been sitting in the Court of Appeal, I should have held the same view as was expressed by Peterson, J., namely, that it was ruled by *Re Petition of Right* (1). This, however, is immaterial, for *Re* I *Petition of Right* (1) is not binding on this House, and it would have been equally proper for Swinfen Eady, M.R., and for Warrington, L.J., who had obviously changed his opinion on further argument, to give your Lordships the benefit of the opinions they had come to on the merits, even if being unable to distinguish between the two cases their judgment had been formally given to the opposite effect from what it was.

The view which I think prevailed in *Re Petition of Right* (1) was that the prerogative gives right to take for use of the moment in a time of emergency, that when you come to the Defence Acts of 1803 and 1842 you find a code for

the taking of land permanently in times of peace as well as of war, and that consequently the two systems could well stand side by side; and then, as there was no direct mention of the prerogative in the statutes, you were assisted by the general doctrine that the Crown is not bound by a statute unless specially mentioned. That in cases where the burden or tax is imposed the Crown must be specifically mentioned no one doubts. Instances are given by the Master of the Rolls in *Wheaton* v. *Maple & Co.* (4), and *Coomber* v. *Berks. Justices* (5), and there are many others. None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations if the Crown could, at its pleasure, disregard them and fall back on prerogative?" The prerogative is defined by a learned constitutional writer as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act would be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

I have read very carefully and considered the judgments delivered in *Re Petition of Right* (1), and it is, I think, apparent that the view of the series of statutes there presented was that the general statutes had their inception for the purpose of permanent acquisition in times of peace as well as of war, but in the fuller citation that has been made in this case we find that this is not so. It is somewhat significant that in the first statute of all dealing with the acquisition of land, 7 Anne, c. 26, we have a reference to "the usual methods" that had been taken to prevent extortionate demands, and the usual methods are said to be a valuation by jury. It is also significant that in the whole statutory series there is no trace of any claim to take under the prerogative and not to pay. On the contrary, for instance, in 31 Geo. 2, c. 39, dated 1757, we find that during the war (that is, the Seven Years War), land had actually been taken, that extravagant claims were feared, and then that is followed by a statutory provision for vesting the lands taken in trustees till the price may be paid as fixed by assessment by jury, and then on payment the trustees are to hold for His Majesty. But the real point seems to me to be that we find that even before the idea of a general Act, that is to say, when the Acts were limited in time to the continuance of a war, there is provision made for a temporary taking, and for payment, or, in other words, for getting by statute, with the concomitant obligation of payment, that very temporary possession which, according to the view expressed above, was the function of the prerogative to provide free of charge, leaving it to statute to provide for a permanent acquisition. Thus, in 38 Geo. 3, c. 27, date 1798, in the middle of the war with the revolutionary government of France which began in February, 1793, and ended with the peace of Amiens in March, 1802, we find in s. 10 powers given to His Majesty to authorise a general officer to mark out any piece of ground wanted for the public service, and to treat with the owner thereof or any person or persons having any interest therein "for the possession or use thereof during such time as the exigencies of the service shall require," and in case of refusal to take the land and get the value assessed by jury. This Act was limited to the continuance of the war. War again broke out against France on April 29, 1803, Napoleon being First Consul for life, and 43 Geo. 3, c. 35, July, 1803, repeated the provisions of 38 Geo. 3, c. 27. It again was limited to the duration of "the present hostilities with France." Then in 1804, there still being war with France and a prospect of invasion by Napoleon, 44 Geo. 3, c. 95, was passed. This had no temporary clause. It recited that doubts had arisen as to whether the Act of 1803 authorised permanent acquisition, and it proceeded to provide for temporary taking, using the old phrase "for such time as the exigencies of the public service

may require," and contained the old arrangements for assessment of the payment by a jury. This Act was the forerunner of, and was superseded by the existing Act of 1842, which again repeats the words "during the exigencies of the public service." This Act was passed in time of peace. It thus appears that the inception of the legislation was during that very period and connected with that very requirement which, if the argument in *Re Petition of Right* (1) was sound, was satisfied by the powers of the prerogative alone, that is to say, it dealt with temporary acquisition during a period of war, and the Act of 1842 only continued that legislation. It is, therefore, impossible, in my opinion, to say that the whole field of the prerogative in the matter of the acquisition of land or rights therein was not covered by the Act of 1842. It follows from what I have said above that there is no room for asserting an unrestricted prerogative right as existing alongside with the statutory powers authorising the Crown to acquire on certain terms. The conclusion is that the Crown could not take the petitioners' premises by the powers of the prerogative alone.

I now come to the Defence of the Realm (Consolidation) Act, 1914, the Act under the powers of which the Crown professes to take. Now, just as the statutes must be interpreted in view of what the rights and practices antecedent to them had been, so we must look at the Defence of the Realm Act in view of the law as it stood previous to its passing. The Act of 1914, passed on Nov. 27, 1914, declares by s. 1 (1) that His Majesty has power during the continuance of the war to issue regulations for securing the public safety and the defence of the realm. Subsection (2) says that any such regulations may provide for the suspension of any restrictions on the acquisition or user of land . . . under the Defence Act, 1842 to 1875. Pursuant to this Act a regulation was issued on Nov. 28, 1914, which empowered the competent naval or military authority, or any person authorised by him, "when for the purpose of securing the public safety or the defence of the realm it is necessary so to do" (sub-s. (a), to take possession of any land, and sub-s. (b) to take possession of any buildings). It is clear that under these subsections the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety of the defence of the realm that payment should not be made, such payment being on the hypothesis that the views above expressed as to the Act of 1842 were sound—a necessary concomitant to taking. The very structure of the Act points the same way. Why provide by sub-s. (2) for the suspension of restrictions under the existing Act which allowed of taking of land if a mere taking simpliciter was all that was wanted? The thing may be tested in another way. Suppose the regulation as to taking land had had added to it the words "without making any payment therefor." That would have left no doubt as to the regulation. The question would have been, was it ultra vires? It could only be intra vires if it were necessary for the safety of the realm, and that is the same question over again, and again the existence of the powers of sub-s. (2) of the Act can be appealed to. The argument is practically analogous to the argument that prevailed and I think rightly prevailed, in the judgment of Salter, J., in *Newcastle Breweries Co., Ltd.* v. *R.* (6) where the taking of the goods was held a necessity, but the extrusion of the subject where goods were taken from the King's courts in the event of non-agreement as to value was not. It will have been noticed that the regulation which authorises the taking of land says nothing about doing away with restrictions, or, in other words, does not specifically purport to be made in virtue of sub-s. (2) of the Act. None the less, it may well be held to be virtually so. There are various restrictions as to the initiation of proceedings, notices, &c., which I have not thought it necessary to quote. These may be taken as swept away by the simple authority to take. There remains the question whether the obligation to pay can be considered as a restriction and also swept away. I think it cannot. The word "restriction" seems to me appropriate to the various provisions as to notice, but not at all appropriate to the obligation to make compensation.

There are two other matters as to which I should say a few words. The learned Attorney-General laid great stress on the words of s. 1 of the Defence of the Realm (Acquisition of Land) Act, 1916, which, providing for a continuation of powers after the war, begins thus: A

> "Where, during the course of or within the week immediately preceding the commencement of the present war, possession has been taken of any land by or on behalf of any government department for purposes connected with the present war, whether in exercise or purported exercise of any prerogative right of His Majesty, or of any powers conferred by or under any enactment relating to the defence of the realm, or by agreement, or otherwise, it shall be lawful, . . . B

This, he argued, was a statutory confirmation and declaration of the power to take under the prerogative. So it may be, but if the views expressed in the first part of my remarks are right it leaves those views untouched. And further, the words used really amounts to this. They do not in any way define the rights which the Crown has to take, but they say if the Crown has de facto taken quocumque modo then it shall be lawful as thereafter provided to continue possession. C

The other point is as to the remedy. I am of opinion that a petition of right lies, for it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but as already insisted on, what was done here so far as the taking of the premises was concerned was perfectly legal. On the whole matter I am, therefore, of opinion that the judgment of the Court of Appeal was right and ought to be confirmed, and the appeal dismissed with costs. D E

LORD ATKINSON.—The facts have been already stated by my noble and learned friend who has preceded me. If any thing be clear in this important case, it is on the correspondence already referred to this—that the Army Council, acting through their agent, Captain R. C. Coles, did not claim to take possession of the respondents' hotel by virtue of the unrestricted and unqualified prerogative of the Crown. On the contrary, they justified their action and claimed the right to do what they, in fact, did, by virtue of the power and authority conferred upon them by the legislative provision of the Defence of the Realm Regulations in force on May 1, 1916. It is, I think, equally clear that the respondents never admitted that the Crown possessed under these regulations the power it claimed to exercise. This is apparent from Mr. Whinney's letters of May 3 and 5, 1916. F G

In only three ways, it would appear to me, could the respondents resist or oppose the action of the Crown: (i) By physical force—which is, of course, impossible; (ii) by immediate proceedings at law; and (iii) by protest. They adopted the last-named of these methods, but subject to that they yielded only to force majeure. Mr. Whinney no doubt informed Captain Coles that, notwithstanding what he had said, all those interested in the hotel felt that every assistance should be given to the military authorities, and that no steps should be taken which would cause them inconvenience or delay, and further, that he had caused notice to be given to all the guests in the hotel and would hand over possession in accordance with the notice (i.e., the letter of May 1, 1916). Possession was handed over accordingly on May 8. It appears to me impossible, on these facts, to hold that this handing over by the respondents of the possession of their hotel was not in reality done in invitum. The respondents having done this, and expressly preserved all their legal rights, they, like good citizens, without prejudice to those rights, facilitated these officers in taking over the possession in order to help the aerial service to be better carried on. If anything resembling what has taken place in this case had taken place between two citizens, it is obvious that the most appropriate remedy of the party aggrieved would have been to sue in trespass for H I

damages. The respondents cannot proceed by petition of right to get redress for a tort like trespass, for the King can do no wrong and the principle of respondent superior does not apply to the Crown where the wrong is committed by its officers. It by no means follows, however, that because the respondents cannot sue in tort by petition of right they can sue in contract for compensation for the use and occupation of their premises. It is, no doubt, quite true that a private person or, in some instances, a public body, can, as it is phrased, waive a tort and sue in contract, but that can only be true where both of these remedies are open to him or it. The aggrieved party may then elect which remedy to pursue, and this, though both causes of action arise out of the same transaction. The familiar case of a passenger in a railway train who takes and pays for a ticket to be carried to his destination and is injured in transitu by the negligence of the company's servants is a familiar instance of this. He can sue the company in either form of action. That, however, of course, does not apply to a case where a trespasser enters into and holds possession of a man's land against his will while purporting to act under a power the existence of which the owner challenges, and against the exercise of which he protests.

The Court of Appeal, as I understand their judgment, have held that the Crown should be proceeded against by petition of right to recover compensation in use and occupation for the breach of its contract to pay for the use and enjoyment of the respondents' hotel. Several authorities had been cited to support this view. Differing, as I do, on this point from the views of the two learned lord justices who constituted the majority, and entertaining, as I do, the most sincere respect for the survivor of those two lord justices, as well as for the memory of the distinguished judge since, unhappily, deceased, I feel bound to justify my dissent from their views by an examination of the authorities on the point at greater length, perhaps, than might otherwise be excusable. These authorities establish, I think, this proposition—that in order to recover in the ordinary action for use and occupation the plaintiff must prove the existence of an agreement, express or implied, between him and the defendant to the effect that the latter shall at least be the tenant at will of the former of the lands or premises occupied, and shall pay for that occupation. In *Phillips* v. *Homfray* (7), Bowen, L.J., said (24 Ch.D. at p. 461):

> "Actions for use and occupation according to the better opinion have been confined to the class of cases where the defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract (see *Churchward* v. *Ford* (8), per Pollock, C.B.). No doubt the mere enjoyment by one man of another man's property, real or personal, may be held under such circumstances as leave still open as a reasonable inference the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station takes it on the implied promise to pay for it."

A familiar example of the class of cases in which the circumstances negative the implication of such a contract is where a purchaser enters, with the owner's permission, into possession of property sold under a contract of sale, and the purchase which subsequently goes off. In *Howard* v. *Shaw* (9), Parke, B., said (8 M. & W. at p. 122):

> "If the defendant had entered under an agreement for a lease, there is no doubt he would have been a tenant at will until the lease was granted. Here he may be assumed to have entered into possession under an agreement for sale which was to be carried into effect by a conveyance. . . . I quite agree, however, that while the agreement subsisted, the defendant was not bound to pay any compensation for the occupation of the land because the contract shows that he was to occupy without compensation, and so long as it subsisted, he was entitled so to occupy, but still he was tenant at will; when the agreement

went off he was still tenant at will, but after that there is nothing to show that he was not to pay compensation because the stipulated compensation by payment of the purchase money was at an end. From that time, therefore, he became liable to be sued in an action for use and occupation."

ALDERSON, B., gave judgment to the same effect, as did also PALLES, C.B., in *Markey* v. *Coote* (10).

Even on the assumption that the Crown went into possession of the hotel, not by virtue of a legislative title or by force of a paramount power, but by the permission of the respondents, which, for the reason already given, I think it impossible to hold, I am at a loss to see how a permissive occupation can be inferred, in face of the distinct refusal of the Captain Coles in his letter of May 1, 1916, to pay any compensation whatever ex debito, but merely ex gratiâ. POLLOCK, C.B., in delivering judgment in *Churchward* v. *Ford* (8), said:

"There are authorities to the effect that where nothing appears except that one person is entitled to land which another has occupied and enjoyed, an action for use and occupation may be maintained, because a contract may be implied. That explains the decision in *Hellier* v. *Sillcox* (11). But the taking possession as of right by a disseisor could not be turned into a contract on the notion that the trespass may be waived and some imaginary contract substituted. Here the defendant was in possession, claiming title under Mrs. Foss, with whom he had contracted. It cannot be implied that there was a contract with the plaintiffs."

It would certainly appear to me that in this case the position of the Crown in reference to this matter resembles more closely that of the disseisor to whom POLLOCK, C.B., refers than it does that of a person entering with the permission of the owner of the premises. I now turn to the authorities relied on by the Court of Appeal.

The first of these is *Marquis Camden* v. *Batterbury* (12). There a certain builder named J. W. Elliott entered into agreement with the landlord of certain lands, the plaintiff in the action, to build certain houses on these lands, the plaintiff agreeing that as soon as one or more of these houses should be erected to make a lease to Elliott for a term of years upon certain terms of each messuage upon which a house was built. By the articles of agreement Elliott contracted that until the land with the buildings upon it should be leased to him, he would pay the same yearly rents or sums as were to be reserved, by the lease when granted. Elliott assigned his interest in this agreement to the defendant, who took possession of the lands, erected certain buildings upon them, paid the stipulated yearly sums, and then assigned his interest to one White. The action was brought for money claimed to be payable by the defendant (White) to the plaintiff in respect of the defendant's use by the plaintiff's permission of certain of the latter's lands and premises. It was held, affirming the judgment of the Court of Common Pleas, that neither Elliott nor the defendant acquired any interest in the land under the building agreement, nor was any tenancy from year to year created thereby, nor by the occupation of the lands and the payment of the stipulated sums. With all respect, this case is, I think, an authority rather against the proposition it was cited to support than in favour of it.

The next case is that of *Levy* v. *Lewis* (13). There Knight, the superior landlord, let the subject of the occupation to Levy the plaintiff. Levy for a term of years underlet to Lewis, the defendant, for the whole term, leaving no reversion to himself. The interest of both having expired together, Lewis applied to Knight to allow him to become his (Knight's) tenant. Knight refused and referred to Levy as still his tenant. Lewis continued to occupy, and Knight, to the knowledge of Lewis, continued to insist on holding Levy liable. Levy then sued Lewis for use and occupation of the land since the expiration of the term and Levy then paid the rent for that period to Knight who accepted it. The trial judge, WILLES, J.,

A holding that there was no evidence to go to the jury of the use and occupation of the premises by Lewis as Levy's tenant, directed a nonsuit. The Court of Common Pleas held that there was evidence to go to the jury on an implied contract by Lewis to pay Levy for the occupation of the premises. Willes, J., in delivering judgment, said (6 C.B.N.S. at p. 670):

B "Conceding that the relative position of the parties would not have enabled Levy to bring an action, yet their conduct was such that we think there was evidence from which the jury might infer an understanding or implied contract between Levy and Lewis that Lewis should pay for the occupation of the premises. . . . The jury might have thought that Lewis might have known he was not considered tenant to Knight, but that he was considered tenant to C Levy, and that Knight and Levy had severally shown by their conduct that they severally took that view, adding, however, that the court gave no option as to the conclusion to which the jury ought to come."

On appeal to the Exchequer Chamber, Wightman, Crompton and Hill, JJ., held that the decision of the Court of Common Pleas was right and should be affirmed, Bramwell and Channell, BB., thought it was wrong and should be D reversed, Bramwell, B., adding that Martin, B., when he left the court was very much of his (Bramwell's) opinion. If Lewis had immediately on the termination of the term told Levy that he stoutly refused to admit that he was under any legal liability to pay compensation for his future occupation of the premises, there might possibly be some resemblance between this case and the present. As matters stand, there does not appear to me to be any resemblance whatever E between them.

The next case is that of *Hellier* v. *Sillcox* (11). In reference to this case, Bowen, L.J., in *Phillips* v. *Homfray* (7) said:

"There have been, no doubt, instances in which, nothing further appearing in evidence, but that one person is the owner of land, and that another person has taken possession of it, an action for use and occupation under the statute F has been upheld: see *Hellier* v. *Sillcox* (11). In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn that the enjoyment was by permission of the rightful owner."

Then follows the passage as to the more correct view already cited. But the two facts (i) that the Crown, in my view, did not enter into possession with the free G leave and consent of the respondents, but by the coercion by a superior power; and (ii) that the Crown, when it did enter into possession through its officer absolutely refused to acknowledge any legal liability to pay compensation in respect of the use and enjoyment of the hotel, fundamentally distinguished all these cases from the present case.

In my opinion, therefore, a petition of right, not based upon the statutes of H 1798, 1842, or 1914, nor the regulations made under them, but merely on such legal liability as arises between citizens when one occupies and enjoys the property of another with the express or implied permission of that other to pay compensation for that enjoyment would, on the facts of this case, fail. It is an entirely different question whether on those same facts these statutes and regulations do not impose upon the Crown a statutory liability to pay reasonable compensation in the form I of a rent or otherwise, for the possession, occupation, use and enjoyment, acquired compulsorily, of the respondents' hotel. The late Master of the Rolls in the following pregnant passage of his judgment put a rather unanswerable question. He said:

"Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term 'prerogative.' Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner, and subject

to the limitations contained in the statute, they can only be so exercised, otherwise what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back upon prerogative?"

It was not contended—it could not, I think, be successfully contended—that the Act of 1842 and the Defence of the Realm Consolidation Act, 1914 (hereinafter referred to as the Act of 1914), do not bind the Crown, seeing that they deal with what is the special trust and duty of the King to provide for—namely, the defence and security of the realm—or that they did not prescribe the mode in which and the methods by which land or its use is to be acquired by the Crown's officers, the Ordnance Department, the Admiralty, the Army Council, the members of His Majesty's forces and other persons acting on his behalf, for these very purposes, whether one applied the test suggested in BACON'S ABRIDGEMENT (7th Edn., vol. 7, p. 462), quoted apparently with approval by JESSEL, M.R., in *Re Bonham, Ex parte Postmaster-General* (14) (10 Ch.D. at p. 601), or that laid down by LORD LINDLEY in *Wheaton* v. *Maple & Co.* (4) ([1893] 3 Ch. at p. 64), namely, that the Crown is never bound by a statutory enactment unless the intention of the legislature to bind the Crown is clear and unmistakable. I think these statutes and regulations satisfy those tests. Before dealing with them I desire to express my complete concurrence in the conclusion at which the late Master of the Rolls arrived as to the result of the searches made by the Crown touching the nature and particulars of the commission issued in early times to determine what sums were to be paid ex gratiâ where lands were taken by the Crown or its officers for the defence of the realm, and the occupation of them connected therewith by the military. The conclusion, as I understand it, is that it does not appear that the Crown has ever taken for these purposes the land of the subject, without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the royal prerogative. I also concur with the conclusion at which that distinguished and learned judge arrived as to the purpose, object and effect of the body of legislation passed from the year 1708 to the year 1798, enabling land, or the use of it, to be compulsorily acquired by the Crown on the terms of the owner being paid for it. I further concur with him in his analysis of the provisions of the Acts passed in 1803, 1804, 1819 dealing with the public service. I agree that in all this legislation there is not a trace of a suggestion that the Crown was left free to ignore these statutory provisions and by its unfettered prerogative to do the very things these statutes empowered it to do, but free from the statutory conditions and restrictions imposed by them. It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to the exercise by, the Crown of the powers conferred by a statute, if the Crown were free, at its pleasure, to disregard all these provisions and by virtue of its prerogative do the very thing the statute empowered it to do. One cannot in the construction of a statute attribute to the legislature, in the absence of compelling words, an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not thing the word "merged" is happily chosen. I should prefer to say that when such a statute is passed expressing the will and intention of the King and of the three estates of the realm, it abridges the royal prerogative while it is in force to this extent—that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same, viz., that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject

to all the limitations, restrictions and conditions thereby imposed, however unrestricted the royal prerogative may theretofore have been.

If that be so, as I think it is, then the first question to be determined is what particular things the Defence Act, 1842, which is really the culmination of the legislation passed from 1800 downwards, enacts, what the Defence of the Realm Consolidation Act, 1914, coupled with the regulations issued under it, empowers the Crown to do, and what are the conditions, if any, imposed upon the doing of it. By s. 2 (1) of the Defence of the Realm Consolidation Act, 1914, passed on Nov. 27, 1914, the two previous statutes, the Defence of the Realm Act, 1914, and the Defence of the Realm (No. 2) Act, 1914, are repealed, but it is provided that nothing in that repeal shall affect any order made thereunder, and that all such orders in Council shall until altered or revoked by an order in Council under the Consolidation Act, continue in force and be in effect as if made under this latter Act.

By s. 1 (1), it is provided that during the continuance of the then present war, His Majesty may issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council, and the members of His Majesty's forces and other persons acting on his behalf, and may by such regulations authorise the trial by court-martial, or, in cases of minor offences, by courts of summary jurisdiction, and punishment of persons committing offences against the regulation, and in particular against any of the provisions and regulations designed for the five particular purposes mentioned. The regulations must be designed to secure the public safety and defence of the realm. Section 3 provides that any such regulations—that is, any regulations issued to effect those two objects—may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws, or any other powers under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903. There is no independent express provision in this Act of 1914 enabling the Crown, in the emergency of the war, to acquire land or the use of it for the purpose of securing the public safety and the defence of the realm. It must, therefore, I think, be assumed that, by reason of the provisions of this second section, it was designed and intended by the legislature that the ample powers for the acquisition of land or the use of it, either by agreement for purchase or compulsorily, conferred upon the Crown by the Act of 1842 should be availed of. Whether the land or its use were presumed to be acquired by voluntary purchase under its sixteenth section, or compulsorily under its nineteenth section, the owner in each case was to be paid or compensated for what he parted with. In addition, by its twenty-third section, a further restriction was placed upon the exercise of the power of compulsory purchase. That section enacted that no lands or building or other hereditament should be taken without the consent of the owner, unless the necessity or expediency of taking it should be certified by the Lord Lieutenant of the county in which the land or hereditament lay, or, in the alternative, by one or more of the other public functionaries named, and unless the taking of the land or buildings or other hereditament should be authorised by a warrant signed by the Lord High Treasurer or one or more of the Commissioners of the Treasury of the United Kingdom for the time being.

The methods of modern warfare have so vastly changed since this Act of 1842 was passed that, if it was availed of by the Crown in the course of the late war as it stood, the restrictions might seriously delay and embarrass the Crown in taking, through its officers, adequate measures to secure the public safety and the defence of the realm, while, if the restrictions were removed, its amended machinery might be adequate for the occasion. It is apparently with this view that s. 2 of the Act of 1914 is confined to the removal of those restrictions. There is no attempt to set up new machinery. The powers conferred by the Act of 1842, thus unfettered, are to be allowed to remain operative and available for use though

the procedure is altered. The words of s. 2, however, are "restrictions on the acquisition or use of land." When those restrictions are examined it is, to my mind, clear that the legal obligation to pay for the land or its use, temporarily or permanently acquired, is not a restriction upon the acquisition of either, or the condition precedent to the acquisition of either. There is nothing in the statute to suggest that this liability to pay is to be taken away by the regulations which may be issued, and if the regulations purported to do that, I doubt if they would not, having regard to the wording of s. 2, be ultra vires. Neither the public safety nor the defence of the realm require that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognised rule for the construction of statute is that, unless the words of the statute clearly so demand, the statute is not to be construed so as to take away the property of a subject without compensation. BOWEN, L.J., in *London and North-Western Rail. Co.* v. *Evans* (15) said ([1893] 1 Ch. at p. 28):

> "The legislature cannot fairly be supposed to intend, in the absence of express words showing such intention, that one man's property shall be confiscated for the benefit of others or of the public without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can override or disregard this ordinary principle . . . if it sees fit to do so, but it is not likely that it will be found to disregard it without plain expression of such a purpose."

There is not in the Act of 1914, or in the regulations framed under it, any indication of such a confiscatory purpose.

The regulations 2 and 2A do not expressly suspend any restrictions on the acquisition of or user of land imposed by the Defence Act, 1842. They commence with the statement that the enjoyment of property will be interfered with as little as may be permitted by the emergency of the measures required to be taken for securing the public safety and the defence of the realm, and provide that the Admiralty, Army Council, and Air Council, and members of the Naval and Military Forces and the other persons exercising the regulations shall, in carrying them into effect, observe these general principles. Thus by s. 2 it is further provided that the naval and military authority (defined in reg. 62) or any person duly authorised by him, may, when necessary for the purpose expressly indicated—namely, for securing the public safety and defence of the realm—do several things involving the taking possession of land and user of the real property of the subject without any of the preliminaries prescribed by the Defence Act, 1842; for instance, he may take possession of any land, construct military roads thereon, and remove any trees, hedges, or fences therefrom; take possession of any buildings or other property, including works for the supply of gas, electricity, or water, or any sources of water supply; take such steps as may be necessary for placing any buildings or structures in a state of defence; cause any buildings to be destroyed, and finally to do any other act involving interference with the private rights of property for the aforesaid purposes. As to real property, no preliminary procedure of any kind is prescribed, and no mention whatever is made as to payment or compensation in respect of it. As regards personal property, however, it is provided by the last clause of s. 2 that if, after the competent naval authority has issued notice that he has taken or intends to take possession of any movable property in pursuance of that regulation, any person having control of any such property sells, removes, or secretes it without the consent of the competent military authority, he shall be guilty of an offence against the regulations. Presumably some such notice should be given in the case of real property, though that is not expressly provided. Then one finds a most significant provision in s. 2B—namely, that where any goods the possession of which has been so taken are acquired by the Admiralty, Army Council, or Air Council, or the Minister of Munitions, the price to be paid for them is to be determined in the manner provided. These

regulations on their very face justify an immediate taking possession of the real property of the subject without any preliminary formality or procedure. They are in absolute conflict with the provisions of the Defence Act, 1842, imposing restrictions on the acquisition of land or its use and prescribing formalities. The two cannot be reconciled, and the irresistible conclusion must, therefore, be that the earlier provisions have been suspended by the later.

Again it appears to me to be almost inconceivable that the Crown should claim the right to do such things as prostrate fences, take possession of the great industrial works mentioned, or cause any buildings to be destroyed, without being bound at law to compensate therefor the owners thereof. The fact that no provision to a contrary effect has been introduced into these regulations touching real property, while one is introduced touching goods required, suggests, I think, that the provisions of the Defence Act, 1842, touching payment or compensation for real property taken or used were left to apply. There is nothing in these regulations inconsistent with their being so left. Much reliance was placed by the Crown on the fact in the Defence of the Realm (Acquisition of Land) Act, 1916, first, because in its first section it recognises that possession of land may be taken by a government Department for the purposes connected with the war, in exercise of a prerogative right of His Majesty, as well as under any statute relating to the defence of the realm or by agreement or otherwise, and enables this Department to continue in possession of the land for any period not exceeding two years after the termination of the war, and secondly, because by the same section it provides that the Department which continues to occupy the lands after the termination of the war shall pay a rent in respect of this continued occupation. As the regulations to be issued under the Defence of the Realm Consolidation Act, 1914 can only be issued and be operative during the war, of course they could not deal with possession of land after the war had ended, and, therefore, the further possession had to be provided for; but it is difficult to see upon what just or rational principle the owner of land should be paid a rent for his land in respect of the possession of it, while held by a Department after the war had terminated (obviously for the purposes of winding-up the business of the Department) and not paid a rent or compensation for its use and possession by a Department of the State while the war continued. This last provision it would appear to me hinders rather than helps the contention of the Crown. I should be sorry to attempt to lay down any rule of general application by which the limits of the royal prerogative might be determined. That is not necessary, in my view, in this case. In my opinion, in this case a statutory liability is imposed upon the Crown to pay for the use and occupation of the respondents' property. I base that opinion upon the facts of the case and the provisions of the legislation upon which the officers of the Crown justified their action. The Attorney-General in his able argument relied much on the words "temporary"—"temporary use," "temporary occupation." What does the word "temporary" mean in such a connection? It might cover years, if it meant only the duration of the war. In this case it covered over three years. At the beginning or early stages of a war its duration never can be prophetically fixed, even approximately. It has already been decided in your Lordships' House in several instances that contracts whose performance is interrupted by war are terminated because the duration of the interruption cannot be, even approximately, foretold.

The only remaining point is whether a petition of right will lie in respect of the statutory liability for an unliquidated amount, not a fixed sum. In my opinion, based on the authority of *R.* v. *Doutre* (16) and *Windsor and Annopolis Rail. Co.* v. *R. & Western Counties Rail. Co.* (17), such a petition will lie. I can see no valid distinction between a sum due under such a contract or grant made on behalf of the Crown as is mentioned by Erle, C.J., in *Tobin* v. *R.* (18) and compensation due for the lawful and authorised use and enjoyment by the officer of the Sovereign, on the Sovereign's behalf, of the lands or buildings of a subject. Both seem equally untainted by tort, both equally untouched by the principle that the King can do no

wrong. I, therefore, think that the appeal fails, that the judgment of the Court of Appeal was right and should be affirmed, and this appeal be dismissed with costs. A

LORD MOULTON.—The present appeal is in the matter of a petition of right presented by De Keyser's Royal Hotel, Ltd., the owners of the well-known hotel of that name, for compensation for the compulsory occupation of certain parts of their premises by the War Office, acting in the name and on behalf of the Crown, for purposes connected with the defence of the realm during the late war. The Crown contests the right of the suppliants to compensation for such compulsory acquiring, and pleads that it was the exercise of the royal prerogative and gave no right of compensation to the suppliants. B

The facts of the case are not substantially in dispute, the real issue being a question of law of great and general importance. I shall, therefore, deal very shortly with the evidence as to what actually took place at the time when occupation of the premises was taken by the Crown. In April, 1916, the authorities at the War Office came to the conclusion that the premises in question were the most suitable for housing the heads of the Department having charge of the Army Air Service, and accordingly they, by a letter dated April 18, 1916, instructed the Office of Works to make immediate arrangements to acquire them for that purpose. Negotiations were thereupon commenced betweeen the Office of Works and Mr. Whinney (who then represented the suppliant's interests) for such acquisition. It was at first proposed that they should be acquired voluntarily at an agreed rent, but, as the parties differed as to the amount of this rent, the Board of Works abandoned the negotiations and informed Mr. Whinney that they were about to "communicate with the War Office with a view to the total premises (excluding the shops) being requisitioned under the Defence of the Realm Acts in the usual manner." C D E

The War Office agreed to this course being taken, and on May 1, the Office of Works, by their direction, wrote to Mr. Whinney a letter the material parts of which are as follows:

> "De Keyser's Royal Hotel, E.C.—Dear Sir,—I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations (excluding the shops, the other portions sub-let, and the wine cellars). . . . We do not propose to take possession until the 8th inst., but I shall be glad if you will accept this as formal notice of the department's intention to take possession on that day." F

In accordance with this notice a representative of the War Office attended on the 8th inst. and took possession of the premises, which were forthwith occupied by the military authorities and continued to be so occupied throughout the period of the war. It is in respect of this occupation that the suppliants claim compensation. G

The representatives of the Crown have throughout insisted that possession was taken of the premises under the royal prerogative, and that, therefore, the suppliants were not entitled as or right to any payment by way of compensation, but that their sole remedy was to apply to a certain commission, named the Defence of the Realm Losses Commission, for an ex gratiâ allowance in respect of the losses that they would suffer by the occupation of their premises on behalf of the Crown. This commission was appointed by Royal Order on Mar. 31, 1915, H

> "to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid to applicants . . . in respect of direct and substantial loss and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise of the Crown of its rights and duties in the defence of the realm." I

It is evident that the existence of the powers of this commission can have no bearing upon the question raised by this petition of right. Its jurisdiction is restricted to "cases not otherwise provided for," and the whole basis of this petition of right

A is that the case is already provided for. The suppliants claim that they have a legal right to the compensation, and it is that right which they are seeking to enforce by this petition. In the petition the suppliants put forward an alternative ground for their claim—namely, that the premises were given up to the government by them voluntarily in circumstances which would, in law, imply a contract on the part of the Crown to pay for use and occupation of the premises. Without discussB ing the conditions under which such a contract may be implied, it suffices to say that, in my opinion, it is abundantly clear that the premises were not surrendered voluntarily, but were taken compulsorily. Both parties, in their letters written at the time, treat it as a case of commandeering, as it in fact was, and Mr. Whinney protested strongly against the action of the government in the matter. In short, he did everything to prevent their taking the premises short of refusing to give them C up unless the government used physical force to obtain an entry. Had he gone further in his resistance than he actually did, he would clearly have put himself in the wrong, for, whatever be the suppliants' right as to compensation, the government were entitled to commandeer the premises if they needed them for the purposes of the defence of the realm.

D In deciding the issues raised herein between the Crown and the suppliants, the first question to be settled might in the present case be treated as a question of fact namely: Was possession in fact taken under the royal prerogative or under special statutory powers giving to the Crown the requisite authority? Regarded as a question of fact, this is a matter which does not admit of doubt. Possession was expressly taken under statutory powers. The letter of May 1, 1916, from the repreE sentative of the Army Council to Mr. Whinney says: "I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations." It was in response to this demand that possession was given. It is not competent to the Crown, who took and retained such possession, to deny that their representative was acting under the powers given to it by these regulations, the validity of which rests entirely on statute. It was not a matter of slight importF ance whether the demand for possession purported to be made under the statutory powers of the Crown or the royal prerogative. Even the most fervent believer in the scope of the royal prerogative must admit that the powers of the Crown were extended by the Defence of the Realm Consolidation Act and the regulations made thereunder. It was for that purpose that the Act was passed and the regulations made. But even if that were not so, there was a manifest advantage in proceeding G under the statutory powers. It rendered it impossible for the subject to contest the right of the Crown to take the premises by the exercise of the powers given by the statute. The statutory powers of the Crown were formulated in the regulations in a manner which was beyond mistake. For example, the regulations gave to the Crown the power "to take possession of any buildings," Mr. Whinney, therefore, was clearly bound to surrender the premises when demanded. It would have been H a very different matter had the demand been made under the royal prerogative. This litigation itself is enough to show how debatable a proposition it would have been if the claim had been made that the ancient prerogative of the Crown covered the taking of a hotel in London for the more comfortable housing of a military staff and its clerks and typists. All such questions were put at rest by the legislature giving express statutory authority by the regulations. There could henceforward I be no doubt that the Crown possessed the powers formulated in the regulations and this was the object of the legislation. But when the Crown elects to act under the authority of a statute, it, like any other person, must take the powers that it thus uses cum onere. It cannot take the powers without fulfilling the condition that the statute imposes on the use of such powers.

The Defence of the Realm Consolidation Act, 1914, commenced by enacting that:

"His Majesty in Council has power to issue regulations for securing the public safety and the defence of the realm and as to the powers and duties

for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting on his behalf." A

It then goes on to particularise certain subjects to which these regulations may relate, and in sub-s. (2) it deals with the question of the acquisition of land as follows:

"(2) Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of the power of making by-laws or any other power under the Defence Acts, 1842-1875, or the Military Lands Acts, 1891-1893." B

The Defence Act, 1842 (which may be taken to represent the whole of the Defence Acts, inasmuch as the later Acts only modify it in details which do not concern the matter in this case) is the last of a series of Acts regulating the acquisition of lands and interests in land for purposes of the defence of the realm. These acts commence in 1708 and occur at intervals up to 1842. At first they related only to land for fortifications at places mentioned in the Act, but later they became more general in their character and authorised the Crown to select suitable land and acquire it. In all cases compensation was given to the owners for the land taken. But it is not necessary to dwell on their provisions, seeing that the Defence Act, 1842, repealed all such existing Acts and laid down general provisions which have regulated since that time the procedure for the acquisition by the Crown of land for such purposes. This Act gives very wide powers to the Crown. It has unrestricted powers of selection of the necessary lands, buildings, &c., to be taken. It contemplates in the first instance voluntary purchase, but, if that cannot be arranged, then the lands, &c., may be acquired compulsorily, subject to certain certificates being obtained as to the necessity or expediency of the acquisition or in case of actual invasion. I am satisfied that it enables the Crown to acquire either the property or the possession or use of it as it may need. In all cases compensation is to be paid by the Crown, the amount to be settled by a jury. C D E

The regulations, and the Act under which they are made, must, of course, be read together, and it is, in my opinion, a sound inference from the language of sub-s. (2) that the legislature intended that, so far as the acquisition or user of land was concerned, the regulations should take the form of action under the Defence Act, 1842, facilitated by the suspension of some or all of the restrictions which it imposes. The particular provisions relating to the taking of land or buildings are to be found in s. 2 of the regulations. They empower the military authorities to take possession of any land or of any buildings where, for the purposes of the defence of the realm, it is necessary so to do. These are very wide powers, but so general are the powers of the Defence Act, 1842, that they would be attained by simply suspending the restrictions therein contained and allowing its powers to be put in force without them. Reading, therefore, this regulation with sub-s. (2) of the Act I think it is clear that in the case of acquisition and user of land under the regulations we ought to consider them as authorizing action being taken under the Defence Act, 1842, save that no restrictions therein appearing are to be enforced. The duty of paying compensation cannot be regarded as a restriction. It is a consequence of the taking, but in no way restricts it, and, therefore, as the acquisition is made under the Defence Act, 1842, the suppliants are entitled to the compensation provided by that Act. F G H

On these grounds, therefore, I am of opinion that the suppliants are entitled to our judgment in this appeal. But it would be unsatisfactory in a case of such general importance to leave unconsidered the question whether, apart from the fact that the Crown expressly purported to be acting under powers given to it by statute, the suppliants' claim could be maintained. To decide this question one must consider the nature and extent of the so-called royal prerogative in the matter of taking or occupying land for the better defence of the realm. I have no doubt that in early days, when war was carried on in a simpler fashion and on a smaller scale than is I

A the case in modern times, the Crown, to whom the defence of the realm was intrusted, had wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose. But such necessity would be in general an actual and immediate necessity arising in face of the enemy and in circumstances where the rule salus populi suprema lex was clearly applicable. The necessity would in almost all cases be local, and no one could deny the right of the B Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy, if it were necessary so to do. Nor have I any doubt that in those days the subjects who had suffered in this way in war would not have been held to have any claim against the Crown for compensation in respect of the damage they had thus suffered. It must not be forgotten that in those days the costs of war were mainly borne by the royal revenues, so that the King himself was the heaviest C sufferer. The limited and necessary interference with the property of the subjects, of which I have spoken, would have been looked upon as part of the damage done by the war which it had fallen to their lot to bear, and there is no reason to think that anyone would have thought that he had a claim against the Crown in respect of it. Certainly no trace of any such claim having been put forward is to be found. This state of things lasted for several centuries. The record of the preparations made by D Queen Elizabeth to resist the attack of the Spanish Armada, which are contained in the papers in this case, show that it was in full force in her time. I am not surprised that the careful (though necessarily incomplete) researches into the public records have found no precedent for the claim as of right against the Crown for acts done under its prerogative in occupying or using land under the stress of such a E necessity as I have spoken of, and I do not think that a complete investigation would have met with greater success. But in the last three centuries very important changes have occurred which have completely altered the position of the Crown in such matters. In the first place, war has become far more complicated, and necessitates costly and elaborate preparations in the form of permanent fortifications and otherwise which must be made in times of peace. In the second place, the cost of F war has become too great to be borne by the royal revenues, so that the money for it has to come from the people through the legislature, which has long ago assumed and has since retained the command of all national resources. In the third place, the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation, and should not be allowed to fall on particular individuals, has grown to be a national sentiment.

G The effect of these changes is seen in the long series of statutes relating to the occupation of land for the purposes of fortifications or otherwise for national defence, to which I have already referred, and which cover the last two centuries. In all these Acts provision was made for compensation to the individual whose lands were taken or used, and indeed there is clear evidence that for many years prior to the first of these statutes the Crown acted on this principle. It is not necessary to H examine these Acts in detail. They were mostly local in their operation and frequently temporary, and usually related to specific fortifications which it was proposed to erect. But towards the beginning of the last century the Acts take on a more general and permanent form, and eventually they culminate in the Defence Act, 1842, which gives to the Crown, through its properly appointed officials, the widest possible powers of taking land and buildings needed for the defence of the I realm under a minutely defined procedure set out in the Act. It contemplates that the acquisition shall, as a rule, be by agreement, but it gives ample powers of compulsory acquisition if the necessity be duly vouched, or in case of an actual invasion. In all cases compensation for the taking or using of the land by the Crown is to be assessed by a jury who (in the words of the Act) have to find "the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments or for the possession or use thereof, as the case may be." This Act was not limited either in time or place, and with small modifications, which are not material for our present purpose, is still in force.

What effect has this course of legislation upon the royal prerogative? I do not think that it can be said to have abrogated that prerogative in any way, but it has given to the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself. But it has done more than this. It has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual, but shall be borne by the community. This being so, when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the statute, and, therefore, subject to the equitable provision for compensation which is to be found in it. There can be no excuse for reverting to prerogative powers simpliciter—if, indeed, they ever did exist in such a form as would cover the proposed acquisition, a matter which is far from clear in such a case as the present —when the legislature has given to the Crown statutory powers which are wider even than anyone pretends that the prerogative possessed, and cover all that is necessary for the defence of the nation, and which are, moreover, accompanied by safeguards to the individual that are in agreement with the demands of justice. Accordingly, if the commandeering of the buildings in this case had not been expressly done under statutory powers, I should have held that the Crown must be presumed to have acted under these statutory powers, and thus given to the subject the statutory right to compensation. In the argument for the Crown reference was made to the Defence of the Realm (Acquisition of Land) Act, 1916. This Act was passed subsequently to the taking of the suppliants' lands, and, therefore, has no bearing on the question before this House. There is nothing in it which apparently takes away any right already acquired by the suppliants, and if it modifies in any way the quantum of the compensation it is a matter for the tribunals which have to assess it, and is not relevant to the present appeal. I am, therefore, of opinion that the suppliants are entitled to the declaration in the form approved of by the Court below, and that this appeal should be dismissed with costs.

LORD SUMNER.—The petition alleges in substance two rights to compensation —one for a rent for the use and occupation of this hotel, of which the Crown took possession with Mr. Whinney's permission; the other for a fair rent as compensation because he voluntarily delivered possession, though protesting against the rights then alleged and maintaining his own claims of right, whatever they might be. The answer and plea, beside traverses, allege an exercise of the royal prerogative for the defence of the realm, and also rely on the Defence of the Realm Consolidation Act, 1914, and the regulations issued thereunder. Mention is made of an offer to pay whatever the Defence of the Realm Losses Commission might award, but I think this topic has no relevance. The payment would have been none the less an ex gratiâ payment, though the sum to be paid had been calculated under the forms of a judicial proceeding. Its acceptance would have involved a waiver of the suppliants' alleged right; its refusal cannot be an answer to that right, if they can establish it. Another introductory argument may be mentioned to be put aside. The appellant, as I understand it, contends that what was done was done under the prerogative and not otherwise. If the prerogative was exceeded, then every servant of the Crown who used the premises would be personally guilty of trespass, and, trespass being the suppliants' real remedy, the Crown succeeds. It is the typists and the clerks who are liable. If, on the other hand, the prerogative was not exceeded, the Crown succeeds again. The singularity of this result certainly invited criticism, and I was at first inclined to think that there might be an answer analogous to the rule of waiving a tort and suing on an implied assumpsit. When a civil right may be vindicated in more ways than one, there is a choice of remedies: *Rodgers* v. *Maw* (19), nor does it necessarily follow that this choice only arises between such remedies as are available against one and the same party. If the servant

A of a company, acting ultra vires the company, converts a stranger's chattel and, having sold it, pays the proceeds into the company's account as its servant, I suppose conversion would lie against the servant and money had and received against the company: cf. *Smith* v. *Hodson* (20). I have, however, come to the conclusion that no real advantage will be gained by pursuing arguments, turning on forms of actions, for this reason. The suppliants must make out their right, and when they B allege a right under the Defence Acts, they negative any wrong done in the name of the Crown. There was no trespass by the clerks and the typists. They acted on a possession lawfully taken by the Crown, but a possession taken upon terms, and those terms were such as gave the suppliants a right to compensation. The only question is whether there is a statutory right against the Crown under the Defence Acts.

C In terms the Crown purported to requisition under the Defence of the Realm Acts, and, on the correspondence, I think that there was no such request by the Crown for leave to occupy, followed by consent on the part of the respondents, as would support a claim to a quantum meruit compensation or rent apart from the statutes. There was, nevertheless, such assent as prevents the occupation from having been taken wholly in invitos, so as to leave the respondents no position but that of the D sufferer of a wrong. Obviously, Mr. Whinney's duty and interest alike impelled him to insistence on compensation, not to resistance to taking possession. It was money, not the hotel, that he wanted, and it does not matter whether he knew or not on what legal ground to put his claim. The question does not really turn on permission or submission. On the facts he cannot say that he so gave possession as to imply a contract for rent, but I see nothing in them to exclude his assertion of E a right to compensation, if he can establish that right in law. The Crown has throughout purported to act on statutory rights (whether fully or correctly referred to or not), and the prerogative has not been vouched except in argument in the present case. I do not mean that it is not open to the law officers to rely on the prerogative now, or that I assume the writer of the letter dated April 29, 1916, F to have had any authority to bind the Crown by an election between its statutory and its prerogative rights. If, however, under the statutes, including the Defence of the Realm Acts, which deal with taking buildings for the public safety and the defence of the realm, the Crown had the power to requisition this building on terms as to compensating the respondents, I think it cannot contend now that by the course taken the exercise of statutory powers was excluded and that none was in G fact exercised.

To begin with 1914, the question then arises whether the premises could have been acquired simply under the Defence of the Realm Consolidation Act, 1914 and the regulations made thereunder, to the exclusion of the Defence Acts, and so to the exclusion of any right to compensation, or whether, if statutory powers were exercised at all, they must have included the powers (and the obligations) for which H these Acts provided. I think that no real importance attaches to the re-arrangement of s. 1, which was made when the statute of Nov. 27, 1914, superseded that of Aug. 8. The Defence of the Realm Consolidation Act, 1914, does not purport to embody in the form of an enactment the Crown's existing prerogative. The Act empowers the Crown to issue regulations. There is no prerogative to make regulations, though it may be that some of the things which may be regulated under the I Act might also be done under the prerogative. It is, however, also clear that some things which may be validly ordered under regulations under the Act could not have been done under the pre-existing prerogative. Further, under this Act alone no building could be requisitioned unless and until some regulation had been issued to that effect. Two kinds of regulations might be issued, one for the purpose of securing the public safety and the defence of the realm, and the other in order to alter existing Acts of Parliament for the time being by providing for the suspension of any restrictions on the acquisition or user of land contained in sundry named

Acts. Section 1 (1), provides for the first kind; s. 1 (2), for the second. Of the regulations, No. 2 is that material to the present purpose; it deals with taking possession of any buildings and with doing any act (other than those specially described) involving interference with private rights of property. If the Crown were to exercise the powers of taking buildings which are given by the Defence Acts, this regulation could well be held to dispense with the formalities prescribed by them. They would be restrictions which the regulations would have suspended. The obligation to pay compensation to the dispossessed owner, which that Act provides for, is, however, not a restriction on the acquisition of his land. It might discourage the exercise of the power of acquisition, but it does not limit that power. The power is complete independently of payment, and it is fully exercised before the obligation to pay arises.

The next question is: Should reg. 2 be regarded as having been made in exercise of the powers given by the first or by the second sub-section of s. 1, of the Defence of the Realm Consolidation Act? In other words, is it to be regarded as an exercise of a power to requisition under regulations issued for the purpose, or as an exercise of the power to facilitate requisitioning already authorised? It is true that it authorises the competent naval or military authority to do the above-mentioned things "for the purpose of securing the public safety or the defence of the realm," but that is the purpose mentioned in s. 16 of the Defence Act, 1842, and the words may only be a reference to that section. Furthermore, the regulation deals with many matters beside the acquisition of land and buildings, and these would in any case require a substantive reference to the above purposes, which sufficiently accounts for the use of the words without its being necessary to read them as pointing to the exercise of a new power of requisitioning. With all respect to the opinion expressed by AVORY, J., in *Re Petition of Right* (1) (84 L.J.K.B. at p. 1963), I think it should be treated as only an exercise of the power of suspending restrictions given by sub-s. (2). If it were held that this regulation is to be deemed to have been made, so far as the acquisition of land or buildings is concerned, in exercise of new powers given by sub-s. (1), on the ground that the regulations to be issued are regulations as to the powers of the Army Council from time to time and not merely as to the exercise of its powers, then it would follow that the Crown, having full power of accomplishing the desired acquisition under the Act of 1842, and of suspending any inconvenient restrictions on that power, must be deemed to have been advised to exercise a new power of accomplishing the same object, differing from the existing power in one respect only—namely, that it is accompanied by no obligation to pay the subject anything. I think it should not be assumed that, even if the Crown has such a power under s. 1, it has been advised to exercise it solely to avoid paying a subject for the exclusive use of his property. The presumptions must be both that the executive action was taken under powers by which it can be justified, rather than beyond all powers whatever, and that the available powers have been exercised so as to prevent and not so as to cause avoidable injury to the subject. Further, the Defence of the Realm Consolidation Act, by sub-s. (2) of s. 1, gives an express and limited power of altering by regulation what is enacted by the Defence Acts. I think that no further power of restricting those enactments is intended to be conferred by the general words of sub-s. (1), nor ought that subsection, couched as it is in general terms only, to be construed as authorising the Crown to do by regulation what the legislature itself has already fully provided for by statute, least of all when that regulation would have the effect of taking the subject's property without compensation contrary to the intention of the prior Acts.

The next question must be: Is the Defence Act 1842, with the other Defence Acts, adequate to enable the Crown to effect such an object for the purpose of the defence of the realm as that involved in the taking of this hotel? It is true that the Act enables much more to be done, and that the provisions for a greater or a less exercise of the power of taking lands are not kept separate. The same series of sections enables the Crown to take lands under the Act in peace or in war in

absolute ownership and in perpetuity or for temporary occupation only, but there is no difficulty in severing these provisions. It is true that, except for an express saving in s. 34, the royal prerogatives are not named, but the powers of taking land are such as only the Crown, by its proper officers and Departments, can exercise, and the restrictions on the exercise of the statutory powers, which the Act requires, must necessarily be restrictions upon the powers of the Crown. It is true that some of these restrictions might in time of war be inconvenient in moments of extreme peril; of these the most formidable is the giving of a fourteen days' notice, though I observe that some overtures for this hotel were made in November, 1915, and, when the officials came to business in 1916, eleven days were passed in negotiating for a rent, and the parties got as close together as £19,000 and £17,500 before it was thought necessary to refer to the Defence of the Realm Act. If, however, formalities not inconsistent with the exigencies of a state of war in 1842 would have been prejudicial to the public service in 1916, the powers given by sub-s. (2) of s. 1. of the Act of 1914 had only to be exercised, as in fact they were, and all these difficulties would vanish. I see no reason to doubt that the Act of 1842 gave all the powers necessary for the exigencies of the recent war, subject only to the removal of restrictions contained in it, and there is, therefore, nothing to rebut the natural presumption that reg. 2 is, in so far as it deals with matters to which the Defence Acts would apply, only an exercise of the power of removing existing statutory restrictions, and is not new legislation by which the Crown takes new and unrestricted powers in order to obtain the same result.

The appellant further contended that all that was done could be done, and was done, independently of any statute by virtue of the royal prerogative alone. I do not think that the precise extent of the prerogative need now be dealt with. The legislature by appropriate enactment can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, even though they enact a modus operandi for securing the desired result, which is not the same as that of the prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by statute with the same subject-matter as is already dealt with by the prerogative, unless it be either to limit or at least to vary its exercise, or to provide an additional mode of attaining the same object. Even the restrictions (such as they were) imposed by the Defence Acts on any powers of requisitioning buildings in time of war were in no way inconsistent with an intention to abate the prerogative in this respect, if not absolutely: *New Windsor Corp.* v. *Taylor* (21), at least for so long as the statute operates. In truth, the introduction of regulations so reasonable only strengthens the substance of the royal authority by removing all semblance of arbitrary power. When, however, the matter is looked at, as it now must be, in the light of reg. 2, no room for doubt remains. The regulation has the force of statute and under its amelioration of the Defence Acts everything could be done for this purpose that could be done under the prerogative equally efficiently and with equal speed. One difference, and one only, can be found. According to the argument, under the prerogative the subject could claim no compensation for losing the use of his property; under the statute he could. Is it to be supposed that the legislature intended merely to give the executive, as advisers of the Crown, the power of discriminating between subject and subject, enriching one by electing to proceed under the statute and impoverishing another when it requisitions under the alleged prerogative? To presume such an intention seems to me contrary to the whole trend of our constitutional history for over 200 years. Nor is it a reasonable interpretation to say that the object of the Defence Acts was merely to supplement the prerogative by enabling the Crown to pay compensation out of public funds to a subject damnified by the exercise of the prerogative, which otherwise it would not be able to do. A prerogative right to take without paying must have been

a right to take without paying out of the royal funds, but, in truth, prerogative can at most extend to taking, and stands quite apart from payment. There is no prerogative right to elect not to pay. Conversely, if there is adequate power to do all that is required by proceeding under the statute, where is the emergency and public necessity which is the foundation for resort to the prerogative? A

For these reasons I think that the executive did not take possession under the prerogative, for the Defence Acts had superseded it; that the Act of 1914 and reg. 2 did not in themselves enable possession to be taken; that the taking of possession must be referred to the powers given by the Defence Acts, and that, in consequence, the suppliants are entitled to be compensated in accordance therewith. I do not refer to the many statutes which preceded the Defence Act, 1842, from the time of Queen Anne, because they only seem to me to justify without altering my reasons for this conclusion. B C

This being so, there are only two further matters to which I wish to refer. They are the search which was made into the public records at the suggestion of the late Master of the Rolls, and the passages which have been cited from the opinion of the Judicial Committee in *The Zamora* (22). That the search for documents relating to the taking of land for fortifications and similar purposes in times past was left incomplete, and, indeed, was not much more than begun, is matter of considerable regret. So far as it went, it is said to have been inconclusive. Probably it will never go any further, for the result has scarcely been such as would encourage the executive to proceed with it, and the subject does not greatly attract the student of history. The records cover both peace and war. The result, as it stands at present, seems to be this. Many documents are forthcoming which relate to the taking of land for such purposes by agreement and on payment of compensation. None can be found relating to taking land as of right and without any compensation at all even in time of war. No petition of right is to be found in which a suppliant seeks to recover compensation, but whether this be, as the Crown suggests, because no subject ever had the temerity to put forward such a contention or, as the respondents argue, because the Crown never gave him occasion to do so, is a matter which remains unknown. There appears to be no reported case which has decided that the subject is entitled to compensation for lands taken by the Crown in purported exercise of the prerogative, but to this circumstance the same observation applies. The point that no suppliant has presented a petition of right with such an object seems to me to be in itself of minor importance. Experience in the present war must have taught us all that many things are done in the name of the executive in such times, purporting to be for the common good, which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to which might have been disputed, and that the absence of contest, and even of protest, is by no means always an admission of the right. In a lesser degree I see no reason why similar courses may not have been taken in times of less gravity. At any rate, the fact remains that the claim of prerogative right maintained by the appellant is one of the exercise of which history has preserved no record. D E F G H

As to the judgment in *The Zamora* (22), I conceive what was there said to have been correct, but I think that it has been pressed beyond anything for which, truly understood, it is an authority. What has to be borne in mind is that no issue as to the royal prerogative arose for determination in that case. The question was whether it was consistent with the law of nations that a Court of Prize should release to the Crown, against deposit of the value in court, the property of a neutral held in its custody pending adjudication, whenever the Crown duly declared that it was necessary for the defence of the realm to requisition them. As part of the reasoning of the judgment their Lordships dealt with two points: first, that such requisitioning imposed no greater burden on the neutral than was borne by the subject, but rather less; and, secondly, that, if on comparison of the municipal laws of different countries requisitioning was found in some with compensation and in some I

A without (of which latter class this country was an example), this circumstance would only show that the right contended for was, as against the neutral, as moderate as any municipal law warrants and more so than what is warranted by our own. The legislation on the subject of national defence was not material and was not discussed. I think it is plain that the judgment in *The Zamora* (22) made, and could make, no attempt to formulate an exhaustive definition of the prerogative as to B requisitioning; that it took and could only take decisions on the subject as it found them, in order to draw from them legitimate inferences throwing light on the matter in hand. The *Shoreham Case* (1), as it is now called, for obvious reasons meagrely reported as to the facts under the name of *Re Petition of Right* (1), was the most recent exemplification of the ancient rule, traced back to the Year Books, that for the purpose of repelling invasion the King, and, indeed, the subject too, may enter C another's close in order to raise bulwarks therein without committing a trespass. Rightly or wrongly, the facts of the *Shoreham Case* (1) were assumed to have been analogous to the case of raising bulwarks. No question arose of the taking of buildings for the mere use of administrative officials, although employed in one of the combatant branches of the Administration. The statement about the absence of compensation was an exact statement of the state of the reported cases then exist- D ing. It did not purport to lay down that no right to compensation could exist in law, but merely recorded that none had been decided to exist. The statement that no court ought, in time of war, to require of the officers of the Crown proof (ex hypothesi public proof) of the reasons of State which had led them to hold that in a particular case a certain course should be taken seems to me to be an obvious statement. It is not in conflict with what seems to me to be an equally obvious E proposition—namely, that, when the court can see from the character and circumstances of the requisition itself that the case cannot be one of imminent danger, it is free to inquire whether the conditions, resting on necessity, which were held to exist in the *Shoreham Case* (1), are applicable to the case in hand. If so, the argument in the judgment of *The Zamora* (22) did not touch such a case. Unless the court has such a power, the mere fact that the competent military authority honestly believed F that what he demanded was needed for the defence of the realm would, on the appellant's argument, enable everything to be taken and nothing paid. Of course, with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries, as was resolved in the *Saltpetre Case* (3), but there is a difference between things belonging to that category of urgency, in which the law arms Crown and subject G alike with the right of intervening and sets public safety above private right, and things which, however important, cannot belong to that category, but, in fact, are simply committed to the general administration of the Crown. I think that the judgment of the Court of Appeal was in accordance with the law and ought to be affirmed.

H **LORD PARMOOR**.—The question in debate in this appeal is whether the respondents are entitled to rent or compensation for the temporary use and occupation of the De Keyser's Royal Hotel, on the Thames Embankment. Possession of the hotel was taken, during the war, by the executive government, as representing the Crown, for purposes admittedly connected with the defence of the realm. It is not I necessary to re-state in detail to your Lordships the negotiations and letters which passed between the representatives of the executive government and the respondents in connection with taking possession of the hotel.

The first question raised and argued at great length before your Lordships was whether the executive government could justify their action in taking possession of the hotel, without payment of rent or compensation, under the sanction of the royal prerogative. The royal prerogative connotes a discretionary authority or privilege exercisable by the Crown, or the executive, which is not derived from Parliament and is not subject to statutory control. This authority or privilege is

in itself a part of the common law, not to be exercised arbitrarily, but per legem and sub modo legis. In the present appeal it is not alleged that, if the royal prerogative did authorise the taking of possession of the premises of the responents for temporary use and occupation without payment of rent or compensation, the authority was used improperly or in an arbitrary manner. Under this head no objection is put forward. The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive and in the extention of Parliamentary protection in favour of the subject, under a series of statutory enactments. The result is that, whereas at one time the royal prerogative gave legal sanction to a large majority of the executive functions of the government, it is now restricted within comparatively narrow limits. The royal prerogative has of necessity been considerably curtailed as a statutory rule of law has taken the place of the uncertain and arbitrary administrative discretion. A similar tendency may be traced in the growth of our legal system. Portions of the common law have been systematically incorporated in or modified by Acts of Parliament, and in this way the obligations which the law imposes have become more definite and more certain in their application. Apart from the implication from precedents, which will be referred to later, the appellant states that he relies on the royal prerogative because, in a case of necessity for the public defence, the Crown has by the common law a prerogative right, which has not been abated, abridged, or curtailed by any of the Defence Acts, 1842–1873, or by any other statute, to enter upon or to take possession of or to occupy and use the land of any subject without payment of compensation. It is not necessary to inquire how far, in certain cases of necessity, for the public defence, the executive has power to act without statutory authority, but a generalisation of this wide character requires careful analysis in its application to special conditions such as have arisen in the present appeal.

In this instance the De Keyser Hotel was required for administrative purposes. Under modern conditions the use and occupation of land for administrative facilities is a matter of necessity for public defence, but the necessity is not of the same character and cogency as arise when the use and occupation of land is required on the occurrence of invasion, or during the occurrence of actual fighting. On this point I agree with the decision of the Court of Appeal. Assuming that there is a public necessity to take possession of land for administrative purposes in connection with public defence, there can be no reason why this necessity should be urged as an answer to a claim for compensation. It is clear on the negotiations and correspondence that Mr. Whiney did not raise any objection to handing over the hotel for the use and occupation of the executive government, but that his protest was limited to the claim of the executive government to take this action and, at the same time, to deny any claim for compensation, except such as might be offered as a matter of grace by a reference to the Defence of the Realm Losses Commission. An illustration of the distinction which arises in the character and cogency of the necessity when land or buildings are required for the exigency of the public service is to be found in s. 23 of the Defence Act, 1842, which provides certain safeguards for the protection of the subject "unless the enemy shall have actually invaded the United Kingdom at the time when the land or buildings have been taken." It is further noticeable that the prerogative right claimed is limited to an entry upon, or to taking temporary possession of, or to the temporary occupation and use of the land of any subject without payment of compensation. It is not claimed that it can be extended to a case of disseisin. Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown. It is not easy to see what the distinction is between disseisin and an indefinite use and occupation which may extend beyond the estate of any particular owner. The later statute law gives the same claim to compensation to the subject in either case. An analogy arises in the case of taxation. Money is of primary necessity for public defence during war, but it has long been established that, in order to obtain the

A requisite supplies, the executive must follow constitutional precedent and obtain Parliamentary sanction. If, however, it could be established that there had been at one time such a prerogative right as is claimed by the appellant, I am unable to accept the further proposition that such right has not been abated, abridged, or curtailed by any of the Defence Acts, 1842–1873, or any other statute. The provisions, however, of the statute law, as they affect the royal prerogative which the appellant B claims, will be considered subsequently.

The precedents on which the appellant relies in support of his appeal are *Hampden's Case* (2), the *Saltpetre Case* (3), *Hole* v. *Barlow* (23) and *The Zamora* (22). No one would dispute the high character of the arguments of Mr. St. John against the Crown in the *Hampden's Case* (2), but admissions made in such an argument do not constitute precedents, and the arguments applicable to the royal C prerogative before the revolutionary period must be read subject to the restrictions which have been subsequently imposed. DUKE, L.J., in his exhaustive review refers to the judgments of two of the judges whose opinions were given adversely to the claim of the Crown, and quotes passages from the judgments of CROOKE, J., and HUTTON, J. The quotation from CROOKE, J., is:

D "The law provides a remedy in case of necessity and danger, for then the King may command his subjects, without Parliament, to defend the kingdom. How? By all men of arms whatsoever for the land, and by all ships whatsoever for the sea, which he may take from all parts of the kingdom and join them with his own navy, which has been the practice of all former kings."

This opinion of CROOKE, J., would, in any case, be no precedent for the claim E made in the present appeal, but it is doubtful whether the royal prerogative would at the present time cover so wide an exercise of authority. During the war a Conscription Act was passed and Parliamentary authority was obtained. The quotation from Hutton, J., is: "The King is bound to defend the kingdom." There is no need to question the accuracy of this general statement, but it cannot be intended to cover the proposition that the executive government is entitled, without regard F to the limitations which have been imposed from time to time, to take all such steps as in the discretion of the government, for the time being, may be considered necessary for this purpose. The *Saltpetre Case* (3) was decided in 1606 at a time when the claim to act by royal prerogative was carried to an extreme limit. This case, however, is no precedent for the contention put forward by the appellant. The saltpetre was taken under the right of purveyance and payment was made. G Purveyances were abolished in 1660 by 12 Car. 2, c. 4. The volume of extracts from public records made for the purposes of this case by the Record Agent contains warrants for the searching for saltpetre, but in every case on the payment of rent or compensation. The importance of the case consists in the terms of the resolution of the judges:

H "When enemies come against the realm to the sea coast it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law every man may come upon my land, for the defence of the realm, as appears by 8 Edw. 4, c. 2, and in such cases on such extremity they may dig for gravel for the making of bulwarks; for this is for the public, and everyone hath benefit by it; but after the damage is over, the trenches and I bulwarks ought to be removed so that the owner shall not have prejudice in his inheritance, and for the commonwealth a man shall suffer damage: as for the saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Hen. 8, fol. 15."

A right common both to the Crown and all subjects is not, in the strict sense, a prerogative right of the Crown. Royal prerogative implies a privilege in the Crown

of a special and exclusive character, but in any case the illustrations contained in the resolution cannot be relied upon in support of the claim made by the appellant. To take premises for administrative purposes is essentially different from an entry upon land adjoining to the coast to protect the realm from a landing by enemy forces. The analogy of plucking down a house if the next be on fire, for the saving of a city or town, is an apt instance of the restrictive limitations under which the right referred to in the resolution can be exercised, and it would be impossible to suggest that any subject would have been entitled to take possession of the hotel of the respondent for temporary use and occupation. A statute of 4 Hen. 8, c. 1 (1512), which was to endure to the next Parliament, makes special provision for the protection of the county of Cornwall against invasion from Bretayne and also the Haven of Brest, and authorises every one of the King's subjects under the conditions mentioned to enter upon and for the making of bulwarks, &c., without any manner of payment to be demanded or any manner of action by any manner of person or persons at any time thereafter to be attempted. This statute illustrates the nature of a right which is based, not on an exclusive privilege of the Crown, but on the duty of all subjects within the specified area to make common cause in defence of the realm. DUKE, L.J., refers to a series of cases between subjects in which there was no determination of the rights as between the Crown or the executive government and the subject. The decision in these cases do not, in my opinion, assist to solve the questions raised in this appeal.

The Zamora (22) was a prize case which raised a question of the authority of royal prerogative in international law and of the right to requisition vessels or goods in the custody of the Prize Court of a belligerent Power. As regards the authority of the royal prerogative the dictum of LORD STOWELL in *The Fox* (24), was disapproved, and it was held that, prior, at any rate, to the Naval Prize Act, 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. So far, the case cannot be quoted in favour of the claim to take possession of the property of the subject without payment of compensation. In the course of his judgment LORD PARKER does incidentally refer to the authority of the royal prerogative within the domain of municipal law, but this was not a matter in issue in the case, and there was no argument addressed to the question now in appeal before your Lordships. So far as the *Shoreham Case* (1) is concerned, it need only be added that LORD PARKER was sitting in your Lordships' House when the arrangement was come to which made a formal judgment unnecessary. The dictum of WILLES, J., in *Hole* v. *Barlow* (23), is not in favour of the contention of the appellant. It states the general proposition that every man has a right to the enjoyment of his land, and then, by way of illustration, limits the application of the power of the royal prerogative to the event of a foreign invasion.

Apart from legal precedent, it was urged by the appellant in the Court of Appeal during the argument that, where lands had been taken over for temporary use and occupation for the purposes of the defence of the realm, without obligation on the part of the Crown to pay rent or compensation, special commissions had been issued from time to time to determine what payment should be made by the Crown ex gratiâ. Consequently, a search was made, with the result stated in the judgment of the Master of the Rolls:

> "The result of searches which have been made is that it does not appear that the Crown has ever taken subjects' land for the defence of the country without paying for it, and even in the Stuart times I cannot trace any claim by the Crown to such a prerogative."

These latter words are important in considering the claim of the executive government in the present case to act under the royal prerogative. If no precedents can be found prior to the year 1688 of a claim to use and occupy the land of the subject for an indefinite time without the payment of compensation, it would be improbable

A that such precedents would be found at a later date. The documents and warrants extracted from public records give no support to the claim put forward by the appellant. A large number of them are concerned with the acquisition of estates in land, which admittedly could not be acquired compulsorily by the exercise of the royal prerogative. In some of the instances it is difficult to determine whether an estate in the land was acquired or possession was taken for temporary use and occupation. B The extracts to which the attention of your Lordships was specially directed during the argument are as follows. On Nov. 24, 1668, and on Dec. 22, 1688, there are two ordnance minutes ordering in one case the payment of rent for ground upon which a battery is standing, and in the other case compensation for damage at the time of "Ye proveing the Morter peece nere Bishopps hall." Both these minutes appear to relate to a case of temporary use and occupation. On Sept. 4, 1805, a letter was C written urging the necessity of obtaining the mills at Cheshunt for purposes of increasing the supplies of gunpower for His Majesty's service. The Board concurred in the opinion and recommended to the Master-General to authorise the mills of Cheshunt to be taken possession of under the Defence Act, which will be attended also with the further advantage of removing some legal obstacles arising from a claim of the poor of the neighbourhood to have their corn ground at the mill. D Proceedings were accordingly taken under the Defence Act to get possession of the mills in order that, by the acquisition of the water, the manufacture of gunpower might be increased. The subsequent orders and minutes relate to valuation for the purchase of all interests in the premises. At this date the Act 43 Geo. 3, c. 55, was in force, authorising His Majesty to survey and mark out ground wanted for public service and to treat and agree for "possession and use of it during such E time as the exigence of the public service shall require," and, in default of agreement, compensation to be paid for possession and use, to be ascertained by the jury. In the following year a further Act was passed enabling land required for the exigencies of the service to be purchased absolutely and for ascertainment of the price by jury in default of agreement. These Acts were temporary in character, but contained provisions similar to those which were made permanent in the F Defence Act, 1842. On June 20, 1813, a report was made on the claims of Mr. Cowl, of Margate, and other persons in reference to damage done by stopping up gateways by which farmers drew up seaweed from the beach as a manure for lands at a time when an enemy landing was apprehended. A money payment appears to have been made in each case with the further recommendation that the gateways should be re-opened at the expense of the government. It was stated at the hear- G ing before the Court of Appeal that the documents which had been extracted were illustrative, and that there was no reason for thinking that a further search would disclose documents of a different import. The conclusion is that the executive government has not established a right under the royal prerogative to take the hotel of respondents for temporary use and occupation during war without the payment of compensation or be referring the respondents to a commission which could only H make grants ex gratiâ within the limits of its jurisdiction.

I am further of opinion that the plea of the appellant that the prerogative right of the Crown, whatever it may have been, has not been abated, abridged, or curtailed by any of the Defence Acts, 1842–1873, or by any other statute, cannot be maintained. We propose to examine the main statutory provisions which regulate the I rights of the subject and the obligations of the executive when lands or buildings are taken temporarily for use and occupation on the occasion of a public exigency. The constitutional principal is that when the power of the executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by statute, the executive no longer derives its authority from the royal prerogative of the Crown, but from Parliament, and that in exercising such authority the executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. I think that the statutory provisions applicable to the interference by the executive with land and buildings of the respondents

bring the case within the above principle. It would be an untenable proposition to suggest that courts of law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the royal prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or, as stated in BACON'S ABRIDGMENT, where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong. Statutes which provide rent or compensation as a condition to the right of the executive to take over the temporary possession of lands or buildings on the occasion of public exigency come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment. I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a royal prerogative right such right can no longer be enforced.

In 1798 (38 Geo. 3, c. 27) power is given to take possession of land during such time as the exigencies of public service should require, with a provision for compensation, but this Act was limited in its operation to the continuance of the then present war. In 1803, by 43 Geo. 3, c. 55, similar powers are given. This, again, was a temporary Act during the then present war with France. A doubt arose whether this Act would enable the executive to take land for a definite period of time extending beyond the immediate exigency. In consequence it was repealed in 1804, and 44 Geo. 3, c. 45, enacts that land may be acquired either by absolute purchase for public service or for use and possession during such time as the exigency of the public service may require. Sections 11 and 12 provide compensation either for purchase of land or for its temporary use. In 1842 the Defence Act was passed to consolidate and amend the laws relating to the services of the ordnance Department, and the vesting and purchase of lands and hereditaments for those services and for the defence and security of the realm. This Act has been subsequently amended, but not on any subject material to this appeal, prior to 1914. Section 16 empowers the principal officers of Her Majesty's Ordnance to treat and agree with the owner or owners of land, buildings, and hereditaments, or with any person or persons interested therein, either for the absolute purchase thereof or for the possession or use thereof during such time as the exigence of the public service shall require. Section 19 enacts that if bodies or other persons thereby authorised to contract on behalf of themselves or others, or other person or persons interested in any such lands, buildings, or other heritaments, which shall for the space of fourteen days next after notice in writing decline to treat or agree, or shall refuse to accept such sum of money as shall be offered for absolute purchase, or such annual rent or sum as shall be offered for hire or rent thereof either for a time certain, or for such period as the exigency of the public service may require, the principal officers may require two or more justices of the peace, or other authority named, to put them or any person appointed by them into immediate possession of such lands, buildings, or other hereditaments. Then follows a complete provision for summoning a jury to assess the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof, as the case may be. Section 23 provides that no such lands, buildings, or other hereditaments shall be taken without the consent of the owner or owners or other interested person or persons unless the necessity or expediency of the taking the same has been certified as directed, or "unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings, or other hereditaments shall be taken." This latter provision is important, since it clearly shows that the legislature was providing against such an emergency as invasion

which might occur during a period of war and introducing in such a case an exceptional procedure. Section 34 empowers the principal officer of Her Majesty's Ordnance to bring actions, suit, or other proceedings, provided that in all such actions, suit, or other proceedings, the legal rights, privileges, and prerogatives of Her Majesty, her heirs and successors, shall not be defeated or abridged. It is not alleged that procedure by petition of right defeats or abridges the legal rights, privileges or prerogatives of the Crown if the conditions are such as entitle the respondent to resort to this form of procedure. If this Act and the amending Acts prior to 1914 had stood alone it would have been no answer to say that the statutory conditions were inconvenient or unduly cumbrous to meet the exigency of the public service in defence of the realm. It is for Parliament to determine what the exigency of the public service may require and, if amending provisions are found to be necessary, to enact them in an amending statute. It will appear subsequently that this course was followed on the outbreak of war in 1914.

It was further argued on behalf of the appellant that, apart from the royal prerogative, or from any power vested in the executive under the preceding statutes, a subject was deprived of his right to compensation by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the regulations issued thereunder. Under this Act "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm." There is a special provision that such regulations may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws, or any other power under the Defence Acts, 1842 to 1873, or the Military Lands Acts, 1891 to 1903. The regulations issued authorise the competent naval or military authority, and any person duly authorised by him, where for the purpose of securing the public safety or defence of the realm it is necessary so to do, to take possession of any land, building, or other property, or to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid. The effect of this regulation is to enable the competent naval or military authority to take immediate possession of land or buildings where it is necessary for securing the public safety or defence of the realm. In reg. 62 the competent naval or military authority may be any commissioned officer, not below the rank of a lieutenant commander in the Navy, or field officer in the Army or Air Force. There is no provision for compensation for acts done under the powers conferred by reg. 2. Nor is any such provision necessary. Compensation was already assured under statutory enactment. Regulation 2 (b) does contain a method of determining the price to be paid on taking possession of war material, food, forage, and stores, in default of agreement, and the attention of your Lordships was not called to any preceding statute containing a right to compensation. I agree in the view expressed by Warrington, L.J., that the Defence Act, 1842 to 1873, and the Act of 1914 and the regulations made thereunder must be read together. The power to take possession of land or buildings for temporary use or occupation is derived from the Defence Act, 1842, and the Act of 1914 and the regulations made thereunder. The Act of 1914 and the regulations made thereunder adapt the exercise of the powers conferred by the Defence Act, 1842, to the exigencies of modern warfare during a period of war, but they do not affect the provisions of the Defence Act which confer a right to compensation and provide procedure for assessment of the amount in default of agreement. I think that there is no difficulty in applying the ordinary rules of construction, but, if there is room for ambiguity, the principle is established that, in the absence of words clearly indicating such an intention, the property of one subject shall not be taken without compensation for the benefit to others or of the public: *A.-G.* v. *Horner* (25); *London and North-Western Rail. Co.* v. *Evans* (15). So long as the possession of land or buildings can immediately be taken for purposes of public safety there is no inconsistency in subsequently determining under statutory procedure the amount of payment, either by way of

rent or compensation. It is not necessary in your Lordships' House to distinguish the present appeal from *Re Petition of Right* (1). PETERSON, J., thought that the present case was covered by the judgment of the Court of Appeal in that case, but when that case came before your Lordships' House, an arrangement was made rendering it unnecessary to give a formal judgment. The appellant, in the statement of contentions tabled in his case, claimed "that the legislature had, by the Defence of the Realm (Acquisition of Land) Act, 1916, recognised the existence of and had confirmed the prerogative." Reliance is placed on the words in s. 1, which allows the government department in possession of lands to continue in possession for the specified times, where possession had been taken whether in exercise or purported exercise of any prerogative right of His Majesty, or of any powers conferred by or under any enactment relating to the defence of the realm. This section does not enlarge or extend the royal prerogative in any direction, or deprive the subject of compensation if, apart from this section, he would have been entitled to claim it. In the letter of May 9, 1916, the Controller of Supplies states that the premises have been commandeered by the military authorities under the Defence of the Realm Act, and this statement is, in my opinion, well founded. If the respondents are entitled to a declaration in the terms of the petition of right, the proper form of procedure to obtain such a declaration in favour of a subject against the Crown has been followed. There is no allegation of any tortious conduct on the part of the Crown. On the contrary, the claim to compensation assumes that the entry on and the taking of possession of the hotel are acts which are legally justifiable. In an ordinary case under the Lands Clauses Acts, when promoters enter into possession of lands in conformity with their statutory rights, and delay or refuse to put in force the necessary procedure for the assessment of compensation in default of agreement, the remedy is by mandamus. The remedy would not be applicable against the Crown. I did not understand the Attorney-General to raise any objection to the procedure by petition of right if the respondents could establish a claim to compensation, or to the form of the declaration made by the Court of Appeal. In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor; Miller & Smiths.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

HARMER *v.* JUMBIL (NIGERIA) TIN AREAS, LTD.

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), October 21, 22, 25, November 12, 1920]

[Reported [1921] 1 Ch. 200; 90 L.J.Ch. 140; 124 L.T. 418; 37 T.L.R. 91; 65 Sol. Jo. 93]

B

Landlord and Tenant—Derogation from grant—Use of demised premises rendered illegal—No physical interference with premises—Mining district—No implication that grant not to extend to interfere with lessor's mining rights—No need for special stipulation protecting lessee against exercise of rights—Explosives Act, 1875 (38 *& 39 Vict., c.* 17), *s.* 5, *s.* 6.

C By a lease dated Dec. 30, 1911, a lessor demised to the plaintiff for a term of twenty-one years a piece of land together with an explosive magazine erected or to be erected thereon by the plaintiff who held a licence for the magazine under the Explosives Act, 1875, which licence provided that certain distances must be maintained between the magazine and other buildings, and that, on breach of that provision, the use of the magazine for the keeping of explosives should D cease to be authorised. By an indenture dated June 3, 1919, the lessor's successor in title demised to the defendants for a term of sixty years liberty to mine the land adjacent to the land the subject of the lease of Dec. 30, 1911. The defendants then erected buildings and other works within the limits prescribed by the licence, thus rendering the licence without effect and the maintenance of the magazine illegal. In an action by the plaintiff for an injunction,

E **Held:** although the district was a mining district no implication was to be made that the grant to the plaintiff in 1911 did not extend so as to interfere with the lessor's right to mine or grant a mining lease; nor was the plaintiff deprived of his rights under the lease in the absence of a special stipulation therein protecting him against the exercise by the lessor of his mining rights; the lessor must be taken to have known of the terms of the licence; and, con- F sequently, there was an implied obligation in the lease of 1911 that he would not do anything which would render the demised premises unfit or materially less fit for the purpose for which they had been demised; that obligation could be broken as well by acts which rendered it illegal to use the demised premises as by acts which rendered them physically unfit; and, therefore, the defendants, whose acts must be taken as having been done by the lessor, were in G derogation of the grant to the plaintiff who was entitled to the injunction which he claimed.

Notes. The penalty prescribed by s. 5 of the Explosives Act, 1875, was amended by s. 3 of the Explosives Act, 1923.

Referred to: *O'Cedar, Ltd.* v. *Slough Trading Co., Ltd.*, [1927] All E.R. Rep. H 446; *Matania* v. *The National Provincial Bank, Ltd.*, [1935] All E.R. Rep. 923; *Port* v. *Griffith*, [1938] 1 All E.R. 295; *Newman* v. *Real Estate Debenture Corpn., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131.

As to derogation from grant see 23 Halsbury's Laws (3rd Edn.) 608, and cases there cited.

Cases referred to:

I (1) *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; 63 L.J.Ch. 601; 71 L.T. 119; 42 W.R. 553; 10 T.L.R. 452; 38 Sol. Jo. 458; 8 R. 352; 30 Digest (Repl.) 541, *1755.*

(2) *Browne* v. *Flower*, [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 55 Sol. Jo. 108; 31 Digest (Repl.) 142, *2807.*

(3) *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch.D. 295; 57 L.J.Ch. 601; 59 L.T. 609; 36 W.R. 914; 4 T.L.R. 437, C.A.; 19 Digest 47, *261.*

(4) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 31 Digest (Repl.) 145, *2846.*

Also referred to in argument:

Myers v. *Catterson* (1889), 43 Ch.D. 470; 59 L.J.Ch. 315; 62 L.T. 205; 38 W.R. 488; 6 T.L.R. 111, C.A.; 19 Digest 49, *271.*

Grosvenor Hotel Co. v. *Hamilton*, [1894] 2 Q.B. 836; 63 L.J.Q.B. 661; 71 L.T. 362; 42 W.R. 626; 10 T.L.R. 506; 9 R. 819, C.A.; 31 Digest (Repl.) 143, *2821.*

Cable v. *Bryant*, [1908] 1 Ch. 259; 77 L.J.Ch. 78; 98 L.T. 98; 19 Digest 175, *1256.*

Genders v. *L.C.C.*, [1915] 1 Ch. 1; 84 L.J.Ch. 42; 112 L.T. 365; 79 J.P. 121; 31 T.L.R. 34; 59 Sol. Jo. 58; 13 L.G.R. 14, C.A.; 11 Digest (Repl.) 193, *597.*

Westhoughton U.D.C. v. *Wigan Coal and Iron Co.*, [1919] 1 Ch. 159; 88 L.J.Ch. 60; 120 L.T. 242, C.A.; 34 Digest 686, *800.*

Popplewell v. *Hodkinson* (1869), L.R. 4 Exch. 248; 38 L.J.Ex. 126; 20 L.T. 578; 17 W.R. 806, Ex.Ch.; 19 Digest 167, *1162.*

Robinson v. *Kilvert* (1889), 41 Ch.D. 88; 58 L.J.Ch. 392; 61 L.T. 60; 37 W.R. 545, C.A.; 31 Digest (Repl.) 130, *2676.*

Newby v. *Sharpe* (1878), 8 Ch.D. 39; 47 L.J.Ch. 617; 38 L.T. 583; 26 W.R. 685, C.A.; 31 Digest (Repl.) 159, *2974.*

Davis v. *Town Properties Investment Corpn., Ltd.*, [1903] 1 Ch. 797; 72 L.J.Ch. 389; 88 L.T. 665; 51 W.R. 417; 47 Sol. Jo. 383, C.A.; 31 Digest (Repl.) 130, *2677.*

Raleigh v. *Goschen*, [1898] 1 Ch. 73; 67 L.J.Ch. 59; 77 L.T. 429; 46 W.R. 90; 14 T.L.R. 36; 42 Sol. Jo. 46; 38 Digest 63, *379.*

Trego v. *Hunt*, [1896] A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80, H.L.; 12 Digest (Repl.) 692, *5316.*

Mander v. *Falcke*, [1891] 2 Ch. 554; 65 L.T. 203, C.A.; 31 Digest (Repl.) 190, *3217.*

Sanderson v. *Berwick-Upon-Tweed Corpn.* (1884), 13 Q.B.D. 547; 53 L.J.Q.B. 559; 51 L.T. 495; 49 J.P. 6; 33 W.R. 67, C.A.; 31 Digest (Repl.) 141, *2801.*

Appeal from an order of Eve, J., in an action for an injunction.

At the date of the lease mentioned hereinafter the freehold lands known as Lanyon Farm and Trevaskis, at Gwinear, Cornwall, stood limited under the will of a testator, who died on June 29, 1868, to the use of trustees in trust for John Samuel Spry for life, with remainder to his daughter Gwavas May Spry in tail, subject to a lease dated June 10, 1853, between the testator's predecessor and Richard Rosewarne, whereby part of Trevaskis (except mines and minerals with liberty to work and win the same) was demised to Richard Rosewarne for ninety-nine years from Mar. 25, 1853, if certain persons in the lease mentioned should so long live. On the death of John S. Spry on May 22, 1915, Gwavas M. Spry became tenant in tail of Lanyon Farm and Trevaskis, and on May 30, 1917, disentailed the lands, which were granted to the use of or upon trust for Gwavas M. Spry, her heirs and assigns. By a lease dated Dec. 30, 1911, between John S. Spry (thereinafter called the landlord, which expression was to include the immediate reversioner for the time being expectant upon the terms thereby created), of the one part, and the plaintiff, therein described as an explosives merchant, trading as "James R. Watson & Co." (thereinafter called the tenant, which expression was to include his executors, administrators, and assigns), of the other part, it was witnessed as follows: By cl. 1 the landlord under the Settled Land Acts, 1882 to 1890, as tenant for life, demised unto the tenant a piece or parcel of land containing 7 perches or thereabouts situate on Lanyon Farm, together with the explosive magazine erected or in course of erection upon the piece of land by the tenant and together also with full right and liberty for the

tenant, his servants and workmen to pass with horses and vehicles for the purpose of carrying explosives and other goods to and from the highway and a piece of land over the roadway, to hold to the tenant as from Sept. 29, 1911, for the term of twenty-one years at the yearly rent as therein mentioned. The tenant covenanted with the landlord to use the demised premises only as an explosives magazine and not to use the same for the manufacture of explosives or for any purpose other than that of an explosives magazine without the previous consent in writing of the landlord. The landlord covenanted (cl. 3) with the tenant for quiet enjoyment of the demised premises during the term without any interruption by the landlord or any person lawfully claiming under or in trust for him or under the testator, provided that John S. Spry, his executors or administrators should not be liable for any breach of covenant which might happen after his death or determination of his estate, but in such case the covenant should be binding upon the immediate reversioner for the time being expectant upon the term thereby created.

The magazine demised by the lease of Dec. 30, 1911, referred to as the Lanyon magazine) had been used by the plaintiff as an explosives magazine in connection with another magazine and loading or packing shed (which magazine is referred to as the Trevaskis magazine) and were held by the plaintiff, as to the Trevaskis magazine, by a lease dated May 8, 1890, between Charles Richard Rosewarne, as lessor, and Theodore Bock and Charles Julius Bock, as lessees, the premises being described as "all that house or store" then "recently erected by the lessees on the site of the Engine Pool at Trevaskis Mine in Gwinear aforesaid" and being demised by the lessor unto the lessees for all the estate and interest of Charles R. Rosewarne (except the last two days), being the residue of the term of ninety-nine years determinable on lives granted on June 10, 1853, which had then become vested by assignment in Charles R. Rosewarne, at the yearly rent of £5. The lessees covenanted that they would during the term compensate the lessor and his tenants for damage in consequence of any explosion or accident. By an indenture dated April 7, 1891, the lessees assigned all the hereditaments and premises comprised in and demised by the underlease of May 8, 1890, unto the plaintiff for all the residue of the term granted thereby. The packing or loading shed was held by the plaintiff under a letter or agreement of tenancy dated Mar. 14, 1896, under the hand of Charles R. Rosewarne by which Charles R. Rosewarne agreed to the plaintiff erecting a shed on a site therein named at Trevaskis for packing explosives, provided it was not used for storing them, on the same terms and time as the underlease of the Trevaskis magazine of May 8, 1890, at a rent of 30s. a year.

The plaintiff was the holder of licences granted under the Explosives Act, 1875, viz.: As to the Lanyon magazine, a licence dated Feb. 5, 1913; as to Trevaskis magazine, a licence dated Nov. 22, 1889, and two amending licences dated respectively July 5, 1891, and Nov. 4, 1896; and as to the packing shed, a licence dated Sept. 18, 1896. The distances which ought according to the terms annexed to the licences to be maintained between the magazine and loading shed respectively and any room, workshop or shop, or any mineral or private railway or open place of resort for persons carrying on any trade or business, were:

Between	and		
—	Any room, workshop, or shop.	Any mineral or private railway.	Any open place of resort for persons carrying on any trade or business.
The Lanyon Magazine	355yds.	134yds.	134yds.
The Trevaskis Magazine	550yds.	160vds.	160yds.
The loading shed	100yds.	50yds.	50yds.

By an indenture dated June 3, 1919, between Gravas M. Spry, who was admitted to be the owner in fee simple of the premises comprised in the same indenture, and

the defendant company, Gwavas M. Spry granted and demised to the defendant company liberty and licence to enter upon Trevaskis and Lanyon Farm in the parish of Gwinear and there in such manner as not to interfere in any way with the explosives magazine of the plaintiff or the access thereto to dig, work, mine, and search for all mines, veins, and beds of tin and all other metals and (subject to easements and rights of others than the plaintiff) to erect all such buildings, machinery, and things, and to do such other acts and things upon, in, under, and about the premises as should be necessary or convenient for working and getting the mines and minerals, for the term of sixty years from Jan. 18, 1919. The defendant company, as they alleged under the powers conferred on them under the indenture of sett or lease dated June 3, 1919, was carrying on mining operations on Lanyon Farm and Trevaskis, including the opening up of two mine shafts, the erection of a tool house, office with stove and men's changing room, and the laying down of a light mineral railway along or near to the way to plaintiff's packing shed. These operations were alleged to be in contravention of the terms of the licences, which the plaintiff alleged would become forfeited and inoperative if the operations, buildings, and works were allowed to continue and remain. The defendant company had laid a light railway, or tramway, close to the loading shed, thereby blocking and interfering with the access thereto and, the plaintiff alleged, had undermined it and endangered its safety. All these matters were stated by His Majesty's Inspector of Explosives to contravene the licence granted to the plaintiff as being within the distances required to be maintained between the magazines and any room or open space of resort for trade purposes. The defendants alleged that there was no power to bind the lands on which the Trevaskis magazine and loading shed stood or in any way to restrict the user of adjoining land.

The plaintiff claimed an injunction to restrain the defendant company erecting, constructing, or sinking any buildings, sheds, railways, or other works, or conducting mining operations upon or under or otherwise using the land comprised in the lease of June 3, 1919, so as to interfere or make illegal the use of the magazines and loading shed pursuant to the licences, or so as to render inoperative or endanger the continuance of such licences, or so as to undermine the loading shed or interfere with the access thereto, and also an order that the company remove the buildings and railway and any buildings or erections within the limits prescribed by such licences, and damages. At the trial a plan was put in evidence showing an old shaft north of the Lanyon shaft which had been re-opened and the old engine-house shaft, also the defendants' tool house, office, and changing house distant 500 ft., 817 ft., and 950 ft. respectively from the Lanyon magazine. It was proved that the country in which the magazines were placed was mineralised, but the underlying tin before the defendants' operations had not been worked for sixty years. To some extent the packing shed was built on rubble. A large lode of tin about 60 ft. wide was found under the workings. There was a cart road down a gradient to and past the packing shed. The defendants, in order to make the slope even, dug about 2 ft. below the existing level, and laid a light tram-line with 2 in. rails down past the shed to the old workings. There was a hole excavated by the defendants underneath or near the packing shed. There were a large number of old shafts on the property. EVE, J., decided that the Acts relied on by the plaintiff did not show a derogation from grant and an infringement of the covenant of quiet enjoyment and gave judgment for the defendant company. The plaintiff appealed.

Gover, K.C. and *P.S. Stokes* for the plaintiff.

Courthope Wilson, K.C. and *F. Kendray Archer* for the defendant company.

Cur. adv. vult.

Nov. 12. The following judgments were delivered.

LORD STERNDALE, M.R.—This is an appeal from the decision of EVE, J., which raises, to my mind, a very difficult question. It arises under these circumstances. On Dec. 30, 1911, a gentleman of the name of Spry demised to Mr. Harmer,

A the plaintiff in the action as tenant, a plot of land described in the lease as of about 7 perches, for twenty-one years, together with the explosives magazine erected or in the course of erection upon the said piece of land, or upon some part thereof, by the tenant. He demised it for the purposes of being used as an explosives magazine, and among the tenant's covenants was a covenant to use the demised premises only as an explosives magazine and not to use the same for the B manufacture of explosives or for any purpose other than that of an explosives magazine without the previous consent in writing of the landlord. It was a very small piece of land, and the rent was in fact very small, although, being let for a special purpose, it naturally had a special rent higher than the rate of the agricultural rent which prevailed in the district. The district had been a good many years ago worked for mining. It was a mineral district, the land being in Cornwall, but C the minerals had not been worked for a great number of years. It is spoken of variously in the evidence as thirty, forty, fifty, and I think it is said to be as long as eighty years. But I think we may take it, in round figures at any rate, they had not been worked for fifty years, and there was no evidence of any immediate prospect of their being worked in the near future. Still it was a mineral district.

Before this lease was granted an application had been made on Sept. 7, 1911, to D the justices, who were for this purpose and in this district the authority under the Explosives Act, 1875, to fix a day for the hearing of an application for a licence to use this building as a magazine for explosives. The justices fixed Oct. 10 and ordered the necessary notices to be published in a newspaper. As a matter of fact the notices were at that time on Sept. 7 in that paper and in another paper. The application was heard, no objection was made, and the justices sanctioned the E licence on the terms which had been put before them by the plaintiff. The licence was issued on Feb. 5, 1913, and contained conditions requiring the intervening spaces between the magazine and other buildings to be of certain varying distances which are mentioned in the schedule to the licence. One of the terms of the licence was this:

F "(1) The site of the magazine shall be that shown on the plan signed by a government inspector, hereto attached, lettered A, at the place marked 'New proposed magazine.' (2) The distances to be maintained between the magazine and such building and works as are specified in the first schedule hereto shall be those set forth in the said schedule, and if at any time after the grant of this licence by reason of the approach of any such buildings or works, the magazine G ceases to be beyond the distances therein specified, this licence shall cease to authorise the use of the magazine for the keeping of explosives."

This being the state of things, in 1915 Mr. Spry died. He had left this property to a daughter, who disentailed and re-settled it, and on June 3, 1919, granted to the defendants a licence to get minerals, and also the usual surface rights which H accompany a licence to get minerals, on a part of the property adjacent to the magazine, though not under the magazine. The grant was to get these minerals in such manner as not to interfere in any way with the explosives magazine of James R. Watson & Co. or the access thereunto. The plaintiff is carrying on business as James R. Watson & Co. Soon after that the defendants re-opened some old workings. They re-timbered one or more of the shafts and they set up buildings I for the purpose of the working of minerals, two sheds, shelters for the men, and so on, and the shafts which they re-timbered and the buildings which they erected were within the specified distance, to which I have referred, in the licence. Therefore the licence, if the government chose to act upon it, became forfeited, for, in the conditions it was provided that the licence was to be forfeited if buildings were brought within the specified distance so that the storing of explosives by that would become illegal in the spot where the magazine stood. It is for these actions that the plaintiff is now asking for an injuction. He asks for it upon two grounds,

He says that what the defendants have done is a derogation of the grant to him by his lessor, and that it is a breach of the covenant for quiet enjoyment.

With regard to the law on the matter, I am content to refer to the passages from *Aldin* v. *Latimer, Clarke, Muirhead & Co.* (1) [1894] 2 Ch. at pp. 444, 447 and *Browne* v. *Flower* (2) [1911] 1 Ch. at p. 225, to which reference was made by EVE, J., in fact I am content to adopt the law as stated by EVE, J., and I do not think it necessary to discuss it any further. The question which we have to solve, adopting the law as so laid down, is this: Was there here an action by the defendants that constituted a derogation from the grant made by Mr. Spry in 1911? It is admitted that, for the purpose of the question of derogation from the grant, the defendants are in the same position as the original lessor. Therefore, one would approach the question from this point of view: Could the lessor, either immediately after the lease, or at any time after it during the term of twenty-one years, have done what the defendants have done without derogating from the grant that he had made of this land for the purpose of a magazine for explosives? It has been said that the surrounding circumstances must be looked at. I agree with that. It has been laid down on more than one occasion that you must look at the surrounding circumstances in order to help you to see what the grant in fact was. Two main objections—I do not say they are the only ones, but two main objections —were taken to the maintenance of this action. The first was that this was a mining district, and that it must be taken, because it was a mining district, that there was a reservation, or, at any rate, an implication, that the grant did not extend so far as to interfere with the lessor's right in his mining. I do not think that is sound. No doubt the fact that it was a mineral district must be taken into account. But I can see, nothing here to show that, if the lessor chose to re-open the mine and by doing so interfered with the enjoyment of the land for the explosives purposes, that was a thing which was contemplated by the parties.

It is quite true that the interference here is of a peculiar nature, but it is possible that although, in the course of mining operations, a person cannot work underneath a plot of land because he has not reserved the minerals, and, therefore, withdraw any of the subjacent matter, by working up to the boundary of the land, he might withdraw adjacent strata and so cause injury to building upon the land. Whether that is a thing that would happen, or might in the ordinary course happen, in the circumstances of this case, I do not know. But I think it is quite clear that to do anything of that kind would be a clear derogation from the grant, and I do not think that is contested. It was said that, if the lessee meant to guard himself against the resumption of mining operations, he should specially have stipulated for it, and it was also said, and I think it is correct, that he "took the risk." I can see no greater obligation upon the lessee to claim a special stipulation for his protection against the re-opening of the mines than I can upon the lessor to reserve his right of damaging the property which he had let by working the mines, if he intended to do so. In one of the cases which were cited to us it was held that the grant was subject to an interference with the user of the land by the use of the adjoining land by the grantor, which was a railway company, for railway purposes. It seems to me, if such a reservation is to be made, it should be made just as much on one side as on the other. If you are going to use the expression "took the risk," I think that both parties took the risk in this sense. The mines had not been worked for fifty years. I do not believe it was in the mind of either of the parties that there was any probability of their being re-opened in the near future. It was the extraordinary change in values by reason of the late war that induced the re-opening of these mines. That is a matter which neither party had in mind, and in that sense I think they both took the risk of it—that is to say, neither of them thought it a matter worth considering. I do not think there is anything in that point.

The next point, and a more difficult one, is that, granting that that was, as I said with regard to it, a physical interference not contemplated with the magazine, this

A is not a physical interference. It is only doing something which caused the prohibition of carrying on that business upon the demised premises by some third party. It was called a metaphysical interference. I am not quite clear what that means, but I am quite clear that the word "metaphysical" is not an apt word for describing what took place here. The question whether, in the circumstances of this case, the defendants doing what they did—doing, that is to say, that which, B ipso facto as soon as it was done caused the forfeiture of the licence and made it illegal to carry on the business in the premises, there was a derogation from the grant of the lessor. I agree with the learned judge in the court below that the question has never arisen in circumstances of this kind, and I have found it a very difficult case to decide, and, although I feel myself bound to differ from the conclusion at which the learned judge arrived, I have done so with great hesitation, be- C cause I think this is a case presenting novel circumstances. The defendants had to deal with the question of the mining situation. One question is: What knowledge has to be imputed to the lessor of the circumstances connected with a magazine for explosives. I am not at all sure that practically everything was not known to him. There were notices published of the application which was going to be made. The plaintiff has to deposit not only his application for a licence, but D the terms upon which he proposed to ask for it, and those terms are heard by the authority when the application comes before them. It is very difficult to me to suppose that all that was not perfectly well known to the lessor and his agents, but there is no evidence that it was, and I will assume, as the learned judge in the court below did, that he did not know all those particulars. I will not assume, as the learned judge did, that he must be taken to have known all the provisions of the E Explosives Act, 1875, but I think he must have known that a licence was necessary for the carrying on of this business. I think he must have known that that licence would contain some conditions. All the conditions I will assume he did not know. But I think he must be taken to have known that anything which violated the conditions of the licence would cause a withdrawal of the licence. As a matter of fact, according to the terms of the licence, it was ipso facto withdrawn on the acts which F happened.

In these circumstances, is there or is there not an implied agreement that the lessor will not do anything which would violate the conditions of the licence which is then in existence, or which will come into existence before the business can be carried on upon the premises? In my opinion, there must be some. I do not wish to go beyond that. It is not necessary to say, and I think it is a very much G more difficult point, whether that obligation extends to refraining from doing anything which may violate the conditions of any future licence that may be given upon very different terms imposed by an alteration of the Act and the authority which granted the licence. I think it is much better to confine myself to the question which is before us, namely, whether there is implied an obligation not to do anything to violate the conditions of the existing licence. In my opinion, there is such H an implied obligation. Therefore I think that what the defendants did here, which must be taken as done by the lessor, would be acts in derogation of the grant made by the lessor, and, therefore the plaintiff is entitled to the relief that he claims. This appeal should be allowed, and judgment entered for the plaintiff, with costs here and below.

I **WARRINGTON, L.J.**—The question is whether the principle that a grantor cannot be allowed to derogate from his own grant is applicable in the facts of the present case, so as to entitle the plaintiff to the injunction claimed by him, which has been refused by EVE, J.

The principle is now well ascertained, and I propose, in explanation of it, to read one or two passages from the judgment of PARKER, J., in *Browne* v. *Flower* (2). The statement of the principle by PARKER, J., is none the less valuable that, in the case in which he made it, he did not see himself in the position to grant the relief claimed

by the plaintiff. What the learned judge said was this ([1911] 1 Ch. at pp. 224, 225): A

> "The plaintiff's case relied on the maxim that no one can be allowed to derogate from his own grant. This maxim is generally quoted as explaining certain implications which may arise from the fact that, or the circumstances under which, an owner of land grants or demises property, retaining the remainder in his own hands. The real difficulty is in each case to ascertain how far such implications extend. It is well settled that such a grant or demise will (unless there be something in the terms of the grant or demise or in the circumstances of the particular case to rebut the implication) impliedly confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained corresponding to the continuous or apparent quasi-easements enjoyed at the time of the grant or demise by the property granted or demised over the property retained." B C

He went on to give examples of that portion of the principle and its application, and he proceeded thus:

> "Further, the circumstances of the case may be such that though at the time of the grant or demise there be no continuous or apparent quasi-easements enjoyed by the property granted or demised over the property retained, yet easements over the property retained may be impliedly created and become appurtenant to the property granted or demised." D

He gave examples of that branch of the principle, and proceeded:

> "But the implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus if a grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit, or materially less fit, for the particular purpose for which the grant or demise was made." E F

It is under that branch that the circumstances of the present case fall.

The material facts are quite simple. Some 7 perches of land, part of a considerable area of which the lessor was owner as tenant for life, were demised by one John Samuel Spry to the plaintiff for a term still unexpired at a rent of £7 per annum, equivalent to a rent of nearly £160 per annum per acre, a very substantial rent, to say the least of it. The lessee was described as an explosives merchant trading as James R. Watson & Co. The land was demised to him together with the explosives magazine erected or in course of erection upon the said piece of land or upon some part thereof by the tenant. The tenant covenanted with the landlord, among other things, to use the demised premises only as an explosives magazine, and not to use the same for the manufacture of explosives or for any purpose other than that of an explosives magazine, without the previous consent in writing of the landlord. The lease contained the usual covenant for quiet enjoyment. At the time the lease was granted the Explosives Act, 1875, was in operation, and that Act rendered it unlawful to use the building as an explosives magazine without licence from the Secretary of State. At the date of the lease an application for a licence was pending and, in pursuance of the Act, had been referred to the justices in petty session—the local authority in that part of the country for the purpose of the Act—and they in due course gave their assent to the application, and the licence was accordingly granted by the Secretary of State. Although the assent of the justices was prior to the granting of the lease, the actual licence itself is dated Feb. 9, 1913. Why there was that interval between the justices' assent G H I

A and the date of the licence is unexplained, and I do not attempt to form any conjecture as to what was the reason for it. The licence as granted was a licence authorising explosives to be kept in the magazine subject to the provisions of the Act and other things, and subject also to the terms hereunto annexed. Among the terms annexed was No. (2) which I propose to read:

B "The distances to be maintained between the magazine and such buildings and works as are specified in the first schedule, hereto shall be those set forth in the said schedule, and if at any time after the grant of this licence by reason of the approach of any such buildings or works the magazine ceases to be beyond the distances herein specified, this licence shall cease to authorise the use of the magazine for the keeping of explosives."

C In 1919 the successor in title of John Samuel Spry, and the then owner of the land of which the 7 perches formed a part, granted to the defendants the right to enter upon the land adjoining the 7 perches to dig for minerals, and with power, among other things, to erect buildings and construct works necessary for the purpose of the surface. The defendants have erected certain buildings and other works within the limits prescribed by the licence, and, accordingly, in the terms of the licence, by D reason of the approach of such buildings and works the magazine has ceased to be beyond the distances therein specified, the licence is thereby rendered of no effect, and the use of the building as an explosives magazine has become illegal.

The plaintiff thereupon commenced the present action, and he asks for an injunction restraining the defendants in effect from erecting buildings or works or doing other things upon the land so as to interfere with, prevent, or make illegal E the use of the said magazine for the purposes of keeping and storing explosives pursuant to the licence granted or being from time to time granted by one of His Majesty's Principal Secretaries of State under the provisions of the Explosives Act, 1875, or so as to render it inoperative or void or endanger the continuance of any such licence. It is that injunction which has been refused by EVE, J., and he also F refused a mandatory injunction claimed by the plaintiff for the removal of the defendants' buildings. It is admitted that the defendants are bound by such obligations as by the operation of the lease were imposed upon the original lessors; and we have, therefore, to deal with the question as if the original lessor were the defendant and had done the acts which are complained of by the plaintiff.

There is one question of fact which still has to be dealt with. What was the G knowledge of the lessor at the time of the lease as to the terms upon which this building would be licensed as an explosives magazine? There is no evidence as to the actual knowledge of Mr. Spry, but, in my opinion, we are justified in imputing to him knowledge of circumstances to which I will refer directly. The area in which the 7 perches were situated, the district in which it was situated, was a mining district. The magazine was obviously required—and I am quite satisfied H that Mr. Spry must be taken to have known that the magazine was so required—for the storage of explosives to be used for the purposes of mining somewhere in the district. The land which is in question in this action contains lodes of tin, but those lodes were either supposed to be worked out, or had been so far worked that their further working was regarded as unprofitable, and for about half a century there had been no mining workings there at all. In these circumstances I am satis- I fied that we are entitled to impute to the owner of this land knowledge that an explosives magazine could not be used without the licence of the Secretary of State, and, owing to the nature of the purposes for which the building was to be used—that of the storage of explosives—I think we may further impute to him the knowledge that any such licence would lay down limits within which buildings and works such as those erected by the defendants could not lawfully be erected, or at least, if they were within those limits, the terms of the licence would be infringed. I do not mean to say that we can impute to him knowledge of the actual limits which would be laid down, and, if there had been anything unusual or extravagant in the

distances specified in the licence, difficult questions might have arisen. But there is no suggestion that these limits were either unusual or extravagant, and I think, therefore, we are quite safe in imputing to the lessor—either himself or through his agents—knowledge that the explosives magazine could not be used if the buildings came within the distances actually so specified. A

In these circumstances, is there an implied obligation, arising from the purpose for which these premises were demised, that the lessor would not do anything which should render the premises unfit or materially less fit for the purpose for which they were demised ? That they have become unfit, not physically, but by reason of the circumstances in which they are now situated, is quite plain. But it is contended that, when it is laid down that the lessor is under an obligation not to render the demised premises unfit for the purpose for which they were demised, all that is meant is that he must not do anything which renders them physically unfit. Undoubtedly, this is the first case in which the particular question has arisen, but I confess I can see no reason why the principle should be limited in the way contended for by the defendants. The premises have become unfit. They are unfit because it is no longer legal to use them for the purpose. They have become so unfit by the acts of the defendants. I cannot see why, if the acts of the defendant should by some physical change cause the premises to be so unfit, it should not have the same effect where the change brought about by them is not a physical change in the condition of the demised premises themselves, but is a change in their condition brought about by an act rendering it illegal to use them for that purpose. B C D

The only case which comes anywhere near the present is *Browne* v. *Flower* (2). But that case is, in my judgment, clearly distinguishable from the present. The learned judge there refused the injunction asked for because, in his opinion, the acts of the lessor had not rendered the premises unfit or materially less fit for the purpose, for which they had been demised. E

The premises had been demised as a residential flat, and what the defendants had done had not in any way interfered with the use of the premises as a residential flat except that they had made them less pleasant for the particular purpose. It had rendered it necessary to curtain or veil a certain window looking out in a particular direction, and so forth. But the premises were there and were capable of being used and were fit to be used as a residential flat. All that the lessor had done was to interfere with one of the amenities which the flat had enjoyed at the time when the lease was granted. The important part of that decision is that it is rested by Parker, J., upon the point that the demise had not been rendered unfit or materially less fit by what the defendants had done. In the present case these premises have been rendered, not only materially less fit, but absolutely unfit for the purposes for which they were demised. F G

One other question was raised by the defendants. They said that in the circumstances of the present case, seeing that the area out of which the 7 perches were taken was a mining area, another implication must be inserted in the lease, namely, that the lessor reserved to himself power to do what he might think fit for the purpose of working the minerals under the land. On that point I agree with what has been said by the Master of the Rolls. If it may be regarded as reasonable that he should imply a reservation of that sort, it is equally reasonable that the tenant should seek to imply such a obligation as that on which he is now insisting. I think both took the risk of circumstances arising in which these long unworked minerals should become profitable to work. Those circumstances did arise as the result of conditions which neither of them foresaw, and I think they both took the risk. But the main principle that the lessor shall not be allowed to derogate from the terms of the grant which he has made by the lease seems to me to be clearly applicable. H I

With regard to the terms of the injunction, I think that it ought to be confined to the facts of which we have actual knowledge, that is to say, to restrain the defendants from doing that which will render it illegal to maintain this building as a magazine for explosives under the existing licence. It cannot be extended, as the

plaintiff seeks by his statement of claim, to any future licence which may be granted by the Secretary of State. Subject to that, with possibly some modification in the terms of the injunction, the plaintiff is, in my opinion, entitled to the injunction refused by EVE, J. This appeal must be allowed, and allowed with costs here and below.

YOUNGER, L.J.—The question here is how far the original lessor was, or whether the defendants as now claiming under him are, bound to restrict the user of their adjoining land so as not to render illegal the only user of the demised premises which the lessee under his lease is entitled to make. Or, putting the question in another way: Was the lessor, or are the defendants, as now claiming under him, entitled to use their adjoining lands in such a way as that for the convenience of such user and for protection of his or their own premises he or they were using them to denude the lessee of the user of the demised magazine, so that its user will become a statutory offence? If these questions are to be answered in a sense favourable to the lessee, it must be on the principle that a grantor shall not derogate from his grant—a principle which merely embodies in a legal maxim a rule of common honesty. A grantor having given away a thing with one hand, as BOWEN, L.J., put it in *Birmingham, Dudley, and District Banking Co.* v. *Ross* (3) (38 Ch.D. at p. 313), is not to take away the means of enjoying it with the other. If A. lets a piece of land to B., as LORD LOREBURN stated it in *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.* (4) ([1907] A.C. at p. 481) and acts so as to frustrate the purpose for which, in the contemplation of both parties, the land was hired, the rule is clear. But the difficulty is, as always, in its application, because the obligation laid upon the grantor is not unqualified. If it were, that which was imposed in the interest of fair dealing might, in unscrupulous hands, become a justification for oppression, or an instrument of extortion. The obligation, therefore, must in every case be construed fairly and strictly, if not narrowly. It must be such as in view of the surrounding circumstances was within the reasonable contemplation of the parties at the time when the transaction was entered into, and was at that time within the grantor's power to fulfil. But, so limited, the obligation imposed may, I think, be infinitely varied in kind, regard being had to the paramount purpose for the exercise of which it is imposed.

If, for instance, the purpose of a grant would be in a particular case frustrated by some act of the lessor on his own land which, while involving no physical interference with the enjoyment of the demised property, would yet be completely effective to stop or render unlawful its continued user for the purpose for which alone it was let and demised, I can see no reason at all in principle why ut res magis valeat quam pereat that act should not be prohibited, just as clearly as an act which, though resulting less effectively, should prevent the user of the premises which did involve physical interference. There can, in my judgment, be no valid principle in the contention which was addressed to us in this case on behalf of the defendants, that, while in the lease of 1911 you can construe the obligation of doing or permitting nothing on the adjoining land which would make the explosives magazine less fit for use as a magazine—that is to say, more likely to blow up—it did leave the lessor perfectly free to use his land for his own convenience in any way he chose, even although the result of his doing so would ipso facto make the continued user of a powder magazine as such a statutory offence. If that contention were to be established, it would enable this grantor, if so minded, in pure caprice to sterilise the whole purpose of the grant and keep the property useless for every purpose, while himself remaining entitled to the rent reserved for the whole term. In my judgment the principle here applicable is far too great to be in effect destroyed, in the case of such a property as this, by introducing this distinction, which, so far as I can see, has no intelligible principle on which to rest. I do not read and I do not think either my Lord or WARRINGTON, L.J., reads the learned judge's judgment as dissenting from any of these views. The facts did not, in his opinion, call for

their application. In this court, however, a different complexion has been placed upon those facts, and the question is whether, as understood by us, they do not bring the case precisely within the principle which I have endeavoured to enunciate, and oblige us to answer the question involved in the appeal in favour of the plaintiff.

This was, in effect, a lease of a powder magazine which at the date of the lease was in course of erection by the lessee at his expense. The lease was dated Dec. 30, 1911. Before it was in fact granted, the local inquiry prescribed by the Explosives Act, 1875, had been held, and an order had been obtained at petty sessions approving in terms of the licence which was granted in February, 1913. After that licence had been so aproved at petty sessions no alteration in it under the statute was possible. To that licence the approval of the Secretary of State had been given before it was submitted to the justices in petty sessions, and, after it had been approved by the justices, the obligation under the Act of the Secretary of State to issue the licence becomes imperative. That licence, I do not doubt, was prepared by the lessee. The application for it, as appears by the statute of 1875, involved the statement of the precise situation and plan of the magazine, and also the boundaries of the land forming the area of the magazine, and in this case the distances to be maintained between the magazine or any part thereof and other buildings or works. These matters could not properly be described by the lessee without the knowledge and approval of the lessor or his representative, on whose land the magazine was to be erected. Further, the lessor and his representatives were resident in the county of Cornwall; the proceedings at petty sessions were notorious. The lessor himself is now dead, but no one was called from the office of his solicitor or others concerned in the transactions on his behalf to give evidence at the trial. To my mind, no evidence to the contrary being forthcoming, I should be prepared, I think, to go further than my learned brothers, because it appears to me that, in the circumstances I have stated, the inference is really irresistible that knowledge of the terms of the proposed licence at the date of the lease was actually possessed by the lessor or his representative, and that the whole transaction, including the erection of the magazine at the lessee's expense, went through on the footing of it. But, if I have gone further in making the inference than the facts properly justify, then I think that at least it ought clearly to be inferred that the erection of the magazine by the lessee on the lessor's land, followed by its demise for that purpose alone, was carried out with the knowledge, common to both parties, that the lessor's adjoining land in the physical condition in which it then stood permitted the lawful user of the magazine as a magazine in accordance with the original official requirements.

Must not there, then, on either hypothesis, be taken to be imposed upon the lessor an obligation not to act in the use of his own land during the term of the lease in such a way as to make observance by the lessee of the conditions of that original licence in that respect impossible? When, then, the position of the land and the nature of the necessary obligations so imputed to the lessor are considered, I can have no doubt that this obligation must be taken to have been impliedly assumed by the lessor. For sixty years, or possibly longer, the mineral workings upon the lessor's property had been abandoned. There is, so far as I can see, no reason to suppose that, apart from the shortage and the high prices of minerals resulting from the world war, the resumption of these workings would have been attempted. As viewed from a business point of view in the case of a mineralised property, it is, as it strikes me, much more unlikely that abandoned workings will be resumed than that, never having been begun, they will be opened. In the same direction, too, is the fact that the mineralised character of this land was not regarded as a serious factor, although I agree with junior counsel for the defendants that that is not of very great importance. Still, under the lease of 1911 the minerals are not reserved. Accordingly in my judgment, so far as opening the mine is concerned, there is nothing in the surrounding circumstances which negatives the implication of an obligation on the part of the lessor not to resume

mining throughout the duration of the grant in such a manner as to make the continued user of the magazine unlawful as being contrary to the original conditions imposed upon the lessor, and it was not ultimately, seriously contended that an obligation imposed upon the lessor not to erect or permit the erection of any agricultural buildings on his land within the limits prescribed by the original licence would not most reasonably be within the contemplation of both parties. The truth is, I think, that the land here is wild moorland country; the rent for the 7 perches, although only £7, was a high rent. A building worth some hundreds of pounds was to be erected by the tenant and, at the end of the lease, retained upon the property for the use of the landlord, and the obligations impliedly imposed upon the landlords or lessor if limited by the terms of the original licence, as I think they ought to be, were or must have seemed to be practically non-existent on any reasonable anticipation of future rents, but, like my Lord and WARRINGTON, L.J., I am not prepared to imply any obligation in excess of the terms of the original licence. I cannot see that anything further can reasonably be presumed to have been contemplated. The limited obligations referred to, however, must, I think, be implied to be binding upon the lessor and upon the defendants as holding under him, and the plaintiff, in my judgment, is entitled to relief on that footing.

Appeal allowed.

Solicitors: *Edwin Cobbing; Poole & Robinson.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

BEHREND & CO., LTD. *v.* PRODUCE BROKERS' CO., LTD.

[KING'S BENCH DIVISION (Bailhache, J.), July 7, 1920]

[Reported [1920] 3 K.B. 530; 90 L.J.K.B. 143; 124 L.T. 281; 36 T.L.R. 775; 15 Asp. M.L.C. 139; 25 Com. Cas. 286]

Sale of Goods—Rejection—Agreement to deliver two parcels of goods—Delivery of only part—Subsequent tender of balance—Right of buyers to reject undelivered goods and to repayment of price attributable to them—Sale of Goods Act, 1893 (56 *& 57 Vict., c.* 71), *s.* 30 (1).

By two contracts in writing, dated July 8 and Sept. 12, 1919, the sellers agreed to deliver alongside the buyers' craft in London two parcels of cotton seed to be shipped at Alexandria, payment to be made against shipping documents. With the buyers' consent the sellers appropriated in part fulfilment of each contract a quantity of cotton seed on board a named ship, and on arrival of the ship in London the buyers paid for the seed against the shipping documents and began to take delivery. The ship, however, delivered only a small quantity of each parcel and left London with the bulk of the seed on board, promising to return and deliver it later. When the ship returned to London and tendered delivery of the remainder of the seed the buyers refused to accept it on the ground that the sellers had broken the contracts. They retained the quantity delivered, and claimed the repayment of the price paid for the undelivered quantity.

Held: as each parcel of seed was indivisible, as soon as delivery had begun the buyers were entitled to delivery of each parcel on board the ship before she left the port to deliver elsewhere, and, consequently, the buyers' rights were governed by s. 30 (1) of the Sale of Goods Act, 1893, under which they

had the option either to reject the whole of the seed and recover the price, or to keep the seed delivered, reject the rest, and be repaid the balance of the price attributable to the undelivered portion.

Notes. Applied: *Barrow Lane and Ballard, Ltd.* v. *Phillip Phillips & Co., Ltd.*, [1928] All E.R. Rep. 74.

As to delivery and buyer's right to reject see 29 HALSBURY'S LAWS (2nd Edn.) 120 et seq., and for cases see 39 DIGEST 559–561, 586 et seq. For the Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Case referred to:

(1) *Devaux* v. *Conolly* (1849), 8 C.B. 640; 19 L.J.C.P. 71; 14 L.T.O.S. 546; 137 E.R. 658; 39 Digest 681, *2677*.

Also referred to in argument:

Jackson v. *Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937; 80 L.J.K.B. 38; 103 L.T. 411, C.A.; 39 Digest 588, *1895*.

Sargant & Sons v. *East Adriatic Co., Ltd.* (1915), 85 L.J.K.B. 277; 32 T.L.R. 119; 21 Com. Cas. 344; 39 Digest 547, *1570*.

Bowes v. *Shand* (1877), 2 App. Cas. 455; 46 L.J.Q.B. 561; 36 L.T. 857; 25 W.R. 730; 5 Asp. M.L.C. 461, H.L.; 39 Digest 425, *564*.

Special Case stated by an arbitrator for the opinion of the court.

By a contract in writing, dated July 8, 1919, Messrs. Behrend & Co., Ltd. (hereinafter called the sellers) sold to the Produce Brokers Co., Ltd. (hereinafter called the buyers) 200 tons of Sakellarides Egyptian cotton seed to be shipped per steamer from Alexandria and/or Port Said and/or Ismailia during August and/or September, 1919, at £32 per ton. By a similar contract, dated Sept. 12, 1919, the sellers sold to the buyers about 500 tons of Tayumi Egyptian cotton seed at £26 per ton to be shipped per steamer from Alexandria and/or Port Said and/or Ismailia during October, 1919, to London. By a letter of Sept. 15, 1919, the buyers gave to the sellers the option of shipping the 500 tons in September, 1919. Each of the contracts provided that the seed was to be delivered in London to buyers' craft alongside; that particulars of shipment were to be declared in London within twenty-four hours after receipt of documents in England; that payment was to be made in London in fourteen days from the seed being ready for delivery by net cash in exchange for shipping documents and/or delivery order; that the seed was to be received (during custom house hours) immediately it was ready for delivery from the steamer. Each of the contracts further provided that any dispute arising thereout should be referred to arbitration in accordance with the rules endorsed thereon. Copies of the contract notes and letters were attached to and formed part of the Case. By two letters dated Oct. 6, 1919, the sellers gave notice to the buyers that they appropriated in part fulfilment of the contract of July 8, 1919, 176 tons per steamship *Port Inglis* bill of lading dated Sept. 20 and in part fulfilment of the contract of Sept. 12, 1919, 400 tons per the same steamer, bills of lading dated Sept. 19, which appropriations were accepted by the buyers. The quantities of 176 tons and 400 tons had been in fact shipped at Alexandria on the steamer under the bills of lading. The steamer docked at Regent's Canal Dock, London, on Oct. 13, 1919, and on the following day the buyers paid the sellers for the 176 tons and 400 tons, and took up the bills of lading therefor. The steamer commenced her discharge on Oct. 14, 1919. The buyers duly presented the bills of lading, and were ready and willing to take delivery of the whole bill of lading quantity. The steamer, however, failed to deliver, and the buyers were unable to obtain more than (about) 15 tons of Tayumi seed and (about) 22 tons of Sakellarides seed, which were discharged on Oct. 17 and 18. The steamer then left for Hull, having still on board the balance of about 384 tons and 153 tons of seed. By letter of Oct. 21, 1919, the buyers gave to the sellers notice of arbitration and contended that the vessel had completed her voyage and that the contracts

were at an end, and requested the return of the amounts paid against the undelivered quantities. On Nov. 3, 1919, the steamer again docked in the Regent's Canal Dock, London, and on Nov. 5, 1919, began to discharge the balance of the seed. The discharge was completed on Nov. 11. On Oct. 28, 1919, it had been agreed between the parties that the buyers should take delivery of the balance of the seed in the steamer on her arrival in London, and the buyers accordingly took delivery without prejudice to their rights under the contracts.

The dispute which had arisen between the sellers and the buyers was referred to arbitration according to the terms of the contracts. The umpire appointed by the two arbitrators, who were unable to agree, awarded that the sellers committed a breach of the contracts by failing to deliver the balance of the seed in accordance with the contracts and that the sellers should pay to the buyers the sum of £6 per ton on the quantity of Tayumi seed and the sum of £13 per ton on the quantity of Sakellarides seed respectively delivered to the buyers on or about Nov. 5 to 11, 1919, and the costs of the reference and award. The Special Case stated by the umpire, at the request of the sellers, for the opinion of the court was as follows:

"The sellers contended before me: (a) that the sellers had completed their obligations by delivering documents against payment. (b) That the buyers' rights (if any) were in any case limited to recovering damages for breach of contract. (c) That the sellers had not been guilty of any breach of contract, and were not responsible for the acts of the shipowner in proceeding to Hull before delivering the balance of the goods. (d) That even if the sellers had been guilty of a breach of contract that such breach did not justify the buyers in claiming to reject part of the goods or to claim repayment of any appropriate amount. (e) That if the sellers had been guilty of any breach of contract the damages were limited to the cost of insuring the then undelivered balance from London to Hull and back, together with interest on the proportionate purchase price during the delay consequent thereon.

"The buyers contended: (a) that it was the duty of the sellers to deliver the cotton seed in London to buyers' craft in sound and merchantable condition. (b) That by the long-established custom and usage of the trade payment is made on advice from the sellers of arrival of ship net cash in exchange for shipping documents, and/or delivery order, and that such payment is without prejudice to the duty of the seller to deliver the goods into buyers' craft in sound and merchantable condition. (c) That the buyers paid for the said documents on the basis detailed above. (d) That the sellers failed to deliver the said goods in accordance with the said contract, and only delivered 22 tons (about) under the contract of July 8, 1919 and 15 tons (about) under the contract of Sept. 12, 1919. (e) That the ship then abandoned the voyage and sailed away to another port; that the buyers were thereupon entitled to claim a refund of the amounts paid by them for the cotton seed which the sellers so failed to deliver and the brokerage which they thus failed to earn.

"In addition to the facts set out in paras. 1 to 10 of the Special Case, I find: (i) that on Oct. 18, 1919, and at the time of delivery of the balance of the said seed to the buyers, the market price of the said seed was below the contract price. (ii) That the steamer did not discharge the balance of 384 tons and 153 tons on her first visit to London because other goods were loaded above, and the object of her proceeding to Hull was to discharge such other goods. She returned to London without undue delay after finishing the discharge of such other goods. (iii) That in so far as it is a question of fact, the voyage of the said steamer ended at London before she commenced to discharge on Oct. 14, 1919, and that the buyers were then entitled to delivery.

"The question for the opinion of the court is whether upon the facts above stated the buyers were legally bound under the contracts to take delivery of the balance of 384 tons and 153 tons of seed loaded on the steamer on her return

to London on Nov. 3, 1919. If the court shall be of opinion that the said question should be answered in the negative, then my award is to stand. If the court shall be of opinion that the said question should be answered in the affirmative, then I award that the buyers are not entitled to recover anything from the sellers, and that the buyers paid to the sellers one-third part of the said costs of the reference and award."

R. A. Wright, K.C. and *W. A. Jowitt* for the sellers.
Stuart Bevan, K.C. and *F. van den Berg* for the buyers.

Cur. adv. vult.

July 7. **BAILHACHE, J.**—In this case the sellers, by two contracts of sale, and in the events which happened, bound themselves to the buyers to deliver in London, on the steamship *Port Inglis*, to the buyers' craft alongside, two separate parcels of cotton seed, one of 176 tons and the other of 400 tons. The buyers, on their part, had to pay for these parcels against shipping documents, and to send craft to receive the goods. The buyers fulfilled both these obligations, and received from the *Port Inglis* some 15 tons of one parcel and 22 tons of the other. When these had been delivered it was discovered that the rest of the seed was lying under cargo for Hull, and the *Port Inglis* stopped delivery and left for that port, promising to return and deliver the rest of the seed. She returned in about a fortnight's time, and the seed was tendered to the buyers, but they had meantime informed the sellers that they regarded the departure of the *Port Inglis* with the remainder of their seed on board as a failure to deliver and a breach of contract. They kept so much of the seed as had been delivered to them, and demanded repayment of so much of the contract price as represented the seed undelivered. The umpire has decided in favour of the buyers, and I am asked to say whether he was right.

Everything depends upon whether the departure of the *Port Inglis* for Hull with the greater part of both parcels of seed on board was a failure to deliver, notwithstanding the promise to return and complete delivery. Both contracts between the parties are in the same terms, and neither has any express provision on the subject. In my opinion, the buyer under such a contract, and where each parcel of goods is indivisible, as here, has the right to have delivery on the arrival of the steamship, not necessarily immediately or continuously; he must take his turn, or the goods may be so stowed that other goods have to be discharged before the whole of the buyers' parcel can be got out. To such delays and others which may occur in the course of unloading the buyer must submit, but in the absence of any stipulation to the contrary the buyer, being ready with his craft, is entitled to delivery of the whole of an indivisible parcel of goods sold to him for delivery from a vessel which has begun delivery to him before she leaves the port to deliver goods elsewhere. If this is so, the rest of the case is covered by s. 30 of the Sale of Goods Act, and the buyer can either reject the whole of the goods, including those actually delivered, in which case he can recover the whole of his money or he may keep the goods actually delivered and reject the rest, in which case he must pay for the goods kept at the contract price, and he can recover the price paid for the undelivered portion: see *Devaux and Conolly* (1). I think that the award is right.

Solicitors: *Walton & Co.; Thomas Cooper & Co.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

JEFFERSON AND OTHERS v. DERBYSHIRE FARMERS, LTD.

[Court of Appeal (Bankes, Warrington and Atkin, L.JJ.), February 3, 1920]

[Reported [1921] 2 K.B. 281; 90 L.J.K.B. 1361; 124 L.T. 775]

Master and Servant—Liability of master for act of servant—Negligence of servant—Servant employed in drawing motor spirit from drum into tin—Lighted match thrown away after lighting cigarette—Garage burned down.

The first plaintiff, the owner of a motor garage, leased it to the second plaintiffs, a firm of motor engineers, who agreed with the defendants to garage the defendants' lorries in it. An employee of the defendants, while in the garage and drawing motor spirit from a drum into a tin, lit a cigarette and threw the lighted match on the floor, setting alight some oil and petrol lying on the floor, which spread to the motor spirit flowing from the drum, with the result that a fire began and the garage was burnt down. In an action by the plaintiffs against the defendants for damages for the negligence of the defendants' servant,

Held: the servant, being engaged in performing an act in the course of his employment which required special care, was negligent in performing that act, and, therefore, the defendants were liable for the damage which resulted.

Notes. Followed: *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491. Referred to: *Crook* v. *Derbyshire Stone, Ltd.*, [1956] 2 All E.R. 447; *Staton* v. *National Coal Board* [1957] 2 All E.R. 667. As to liability of master in tort for acts of servant in course of employment see 22 Halsbury's Laws (3rd Edn.) 539–541, and for cases see 34 Digest 127–129.

Cases referred to:

(1) *Williams* v. *Jones* (1865), 3 H. & C. 602; 13 L.T. 300; 29 J.P. 644; 11 Jur. N.S. 843; 13 W.R. 1023; 159 E.R. 668, Ex.Ch.; 34 Digest 138, *1077*.

(2) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest 23, *29*.

(3) *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359; 25 T.L.R. 831, P.C.; 36 Digest (Repl.) 36, *176*.

(4) *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43; 88 L.J.K.B. 915; 120 L.T. 601; 35 T.L.R. 299; 63 Sol. Jo. 353, C.A.; 36 Digest (Repl.) 285, *345*.

(5) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

Also referred to in argument:

Dyer v. *Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306, C.A.; 34 Digest 130, *996*.

Bayley v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1873), L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 366, Ex.Ch.; 8 Digest (Repl.) 124, *801*.

Appeal by the defendants from the judgment of Horridge, J., sitting without a jury at Derby and London.

The first plaintiff owned a motor garage at Ashbourne in Derbyshire. By an indenture of May 2, 1919, he demised the garage to the plaintiffs, A. R. Atkey & Co., Ltd., motor engineers, for twenty-one years from Mar. 25, 1919, at the rent of £220 a year, there being a proviso that the rent should be suspended if the premises should be rendered uninhabitable by fire. By an agreement of Aug. 12, 1919, made between Atkey & Co. and the defendants, Atkey & Co. agreed to garage for one year from the date thereof such of the defendants' motor lorries and Ford car as should be sent to them for that purpose (the lorries not to exceed four in number at any one time) for the sum of £93 per annum. The agreement provided:

"Messrs. A. R. Atkey & Co., Ltd. to provide heating in the winter, a petrol store for keeping oil and sundry parts, and use of water supply for washing. The Derbyshire Farmers, Ltd. not to store motor spirit in drums in the garage. All motor spirit to be stored in the petrol shed provided. The said A. B. Atkey & Co., Ltd. shall incur no liability with respect to damage to any of the said motor lorries and Ford car through fire while the same are on their premises."

On Aug. 13, 1919, a boy named Booth, a loader in the employ of the defendants, was instructed by one of the defendants' drivers to fill some tins with benzol. He rolled a drum of benzol inside the garage and raised it on to a thrall, the tap being already in the drum. He proceeded to turn the tap in order to fill a 2 gallon tin. In his evidence at the trial he said: "I was lighting a cigarette; I threw the match down on the floor; it lit some petrol on the floor and then spread to the benzol in the barrel." As a result the garage and its contents were consumed. Jefferson sued the defendants to recover damages for the loss of his building, and Atkey & Co. sued for the loss of a motor cab and other personal property and for having been deprived of the use of the garage for the purposes of their business. It was agreed that, if the defendants were liable to both plaintiffs, Jefferson should recover £450 and Atkey & Co. £309. HORRIDGE, J., held that *Williams* v. *Jones* (1) prevented the plaintiffs from contending that Booth, in lighting the cigarette and throwing down the match, was acting within the scope of his employment. But he held that to bring a drum of motor spirit into the garage, and to fill tins there, was a storing of motor spirit in a drum in the garage and a breach of the agreement of Aug. 12, 1919, and upon this ground he gave judgment for the plaintiffs. The defendants appealed.

Disturnal, *K.C.* and *Joy* for the defendants.
Cautley, *K.C.* and *T. N. Winning* for the plaintiffs were not called upon to argue.

BANKES, L.J.—This appeal raises questions of some importance in view of modern conditions. The facts are not disputed. The plaintiff Jefferson had let a motor garage to the plaintiffs, Atkey & Co., Ltd., for a term of years, and was the owner of the reversion expectant on the determination of the lease. Atkey & Co., Ltd., contracted in writing with the defendants to house the defendants' motors at an inclusive price per annum. On Aug. 13, 1919, a boy aged sixteen years named Booth, who was employed in and about the garage by the defendants, was emptying a drum of motor spirit into tins in the garage. As he began he lit a cigarette and threw the match on the floor, which was covered with petrol and oil, which were set alight by the match; the floor took fire, and, the motor spirit continuing to pour from the drum, the garage was burnt down. The respective plaintiffs, Jefferson and Atkey & Co., sued the defendants, basing their claim on two grounds: first, that the defendants were liable to both of them by reason of the negligence of their servant Booth in the course of his employment; and, secondly, they contended that the act of Booth in emptying the drum in the garage was a breach of the contract between Atkey & Co. and the defendants. HORRIDGE, J., found for the defendants on the first point. On the second point he found for both the plaintiffs, holding that there had been a breach by the defendants of the contract between them and Atkey & Co. In no circumstances could Jefferson recover for a breach of the contract between the defendants and Atkey & Co., to which he was not a party, and that part of the judgment cannot stand. But as between the defendants and Atkey & Co., it is still necessary to consider whether HORRIDGE, J., was right in his construction of the clause in the contract as to storing motor spirit in drums within the garage. I cannot take the view of this stipulation which the learned judge took. The contract, which was in writing and dated Aug. 12, 1919, provided that Atkey & Co. should garage for one year such of the defendants' motor lorries and Ford car as should be sent to them

A for that purpose, and that Atkey & Co. should provide a petrol store for keeping oil; that the defendants should not store motor spirit in drums in the garage, but that all motor spirit should be stored in the shed provided. There cannot be found in the express words of the contract any prohibition against taking a drum which had been stored and removing it into the garage. The prohibition is against storing. In my opinion, to take a drum into the garage and there empty it is not B to store motor spirit in a drum in the garage. The only question is whether it is possible to imply from the express words a contract that the defendants would not empty a drum in the garage. There is something to be said for this contention, as the obligation concerning motor spirit in drums and petrol is imposed by two separate portions of the agreement. But I do not think this is enough to warrant the inference that the parties must have intended to prohibit the emptying of C drums in the garage. Therefore I cannot agree with the learned judge as regards that part of his judgment. As to the other point, that upon which the defendants succeeded, we have heard much discussion as to how far smoking can be said to be within the scope of a servant's employment. Fortunately it is not necessary to give any decision on that question, because this case can be disposed of on much more satisfactory grounds. It is not disputed that it was in the scope of D Booth's employment to empty motor spirit from drums into tins and to do that in the garage. That act being by its nature within the scope of his employment, it was his duty to do that part of his work with reasonable care. To smoke and throw a lighted match on the floor while doing this work was not to do the work with reasonable care, and therefore a cause of action which avails both the plaintiffs arose.

E The learned judge decided this case mainly on a point of law, deeming himself bound by *Williams* v. *Jones* (1). There is this distinction between that case and the present. In the present case the negligent act of the boy was in itself a negligent performance of the work he was employed to do. In *Williams* v. *Jones* (1) the negligent act of the carpenter was not connected with the work he was employed F to do. The judges did not differ on any question of law, but as to the proper inference to be drawn from the fact that the man lit his pipe while working at a sign-board. KEATING, J., who delivered the judgment of the majority of the court, based it upon the opinion of those judges that the act of the workman was so exceptional that it was comparable with the act of firing off squibs at intervals during his work and could be placed in the same category as a mere pastime. A master cannot be made responsible for what a workman does while engaged in G acts of that kind. BLACKBURN, J., however, took a different view. After stating the rule governing the liability of masters for the torts of their servants in the course of their employment, and citing a passage from the judgment of PARKE, B., in *Quarman* v. *Burnett* (2), he said (6 M. & W. at p. 509):

> "In the present case the difficulty is to apply these rules to the facts. It is H said that Davies, the servant, was not employed by his master to smoke or to light his pipe, and that is no doubt true; but the act of lighting a pipe was in itself a harmless act; it only became negligent and a breach of duty towards the plaintiff because it was done when using his shed and working there amongst inflammable materials. Had the action been brought against Davies himself, it could not have been maintained for merely lighting his pipe, but I that under the circumstances would have been evidence that he failed to take reasonable care when using the plaintiff's shed and working there, which would have been the true ground of action."

In my view that case depended upon the inference which the majority of the judges drew from the facts, and, so far from being an authority in favour of the defendants, I think it leads to the conclusion that in this case the court would have held the defendants liable. For these reasons, which are not the reasons given by the learned judge, I think that this appeal must be dismissed.

WARRINGTON, L.J.—I agree. The plaintiffs based their claims on two alternative grounds: (i) on the express terms of the contract between Atkey & Co. and the defendants, and (ii) on a breach of that obligation which a person undertakes, who is using the property of another, towards that other and towards third persons who may be injured by the user. The learned judge decided in favour of the plaintiffs upon the first branch of the claim. I say no more than this, not having heard counsel upon the point, that I can see no reason for holding that the plaintiff Jefferson can have any ground of claim upon the contract to which he was no party. As to the plaintiffs Atkey & Co., I am not satisfied that the learned judge was right in holding that any breach of contract had been committed in moving a drum of motor spirit from the shed into the garage and filling a tin from it there.

As to the second point, there was no difference of opinion among the judges in *Williams* v. *Jones* (1) as regards the duty which the law imposed upon the defendant. I take the statement of BLACKBURN, J., as a correct description of the duty, only substituting the garage in this case for the shed in that case. The duty which the law casts on a person using the garage is to take reasonable care that no damage or injury should be occasioned by the use thereof by him and his servants. Have the defendants in this case taken reasonable care? Their servant Booth was employed to pour benzol from drums into tins, which is an operation involving danger from fire unless precautions are taken. There is no doubt or question that the fire was caused by the negligent act of Booth. It would have been a negligent act to smoke at all in the immediate neighbourhood of the spirit. Still more was it a negligent act to light a match while the spirit was flowing from the drum. HORRIDGE, J., decided in favour of the defendants on this point on the ground that what the boy did in lighting and throwing away the match was not in the scope of his employment. In one sense it was not; he was not employed to light the match and throw it away; but that is not the right way to approach the question. It was in the scope of his employment to fill the tins with motor spirit from the drum—a work requiring special precautions. The act which caused the damage was done while he was engaged in this dangerous operation, and it was an improper act in the circumstances. The boy was doing the work of his employers in an improper way and without taking reasonable precautions; and in that case the employers are liable. *Williams* v. *Jones* (1) can be distinguished because the making of a sign-board is not per se a dangerous operation requiring the exercise of any precautions. The act of the carpenter in lighting his pipe had nothing to do with the work he was employed to perform. That act was no breach of any duty to exercise due care and caution in the work on which he was engaged, because the work on which he was engaged was not dangerous. But the work on which Booth in the present case was engaged was dangerous, which makes all the difference. I think the learned judge came to the right conclusion, though not for the reasons he assigned.

ATKIN, L.J.—I am of the same opinion. Apart from authority I think the liability of the defendants in this case rests on a very simple principle. A master is liable for the negligent acts of his servant in the course of his employment. Whether an act is negligent depends on the circumstances of the case. The servant must exercise reasonable care and skill in the circumstances in which he is called upon to act, and this duty is more imperious when the servant is handling articles dangerous in themselves such as loaded fire-arms, poisons, explosives, or the like: *Dominion Natural Gas Co.* v. *Collins and Perkins* (3) ([1909] A.C. at p. 646). It could not be denied that benzol is such an article. In dealing with these and the like substances there is a special duty to take precautions that no damage shall accrue either to bystanders or to adjoining property by reason of explosion, fire, or other injury. If this boy had commenced doing the dangerous act which he was authorised to do, drawing benzol from a drum, with a stranger standing

A close by him and smoking, that would have been a want of due care on the part of the boy; and a fortiori if, instead of another person smoking, he was himself smoking while pouring out the benzol. It is immaterial to consider whether he was authorised by his employers to smoke. He was authorised to draw the benzol, and he was doing that act negligently, for the evidence shows that tapping the drum and lighting the cigarette were contemporaneous acts. He was therefore B guilty of a negligent act within the scope of his employment.

The only remaining question is whether that act directly contributed to the loss. It is established as a matter of fact that it did. The learned judge has found the defendants liable for a breach of their contract not to store motor spirit in drums within the garage. He must therefore have found that the act which in his view was a breach of contract, but which I think was a tort, directly contributed to C the loss. It follows that both plaintiffs are entitled to succeed. In *Williams* v. *Jones* (1) there was little difference among the learned judges as to the law; the difference was as to the proper inference from the acts. The majority of the court held the opinion that in making the sign-board, the act which Davies, the defendant's servant, was employed to do, he was guilty of no negligence, but that the act of smoking was a negligent act. Thence the inference was easy that smoking D was not in the scope of Davies's employment. But apart from that case, I find it impossible to distinguish the present case from *Musgrove* v. *Pandelis* (4), where it was held that a motor car charged with petrol and ready to start was a dangerous object which came within the principle of *Rylands* v. *Fletcher* (5). In my opinion, a drum of benzol being tapped in a garage is equally within the principle of that case. As to the other points raised, I doubt whether there was any breach of E the contract made between Atkey & Co. and the appellants; and even if there was, I cannot, as at present advised, see how the plaintiff Jefferson could recover for the breach.

Appeal dismissed.

Solicitors: *Pattinson & Brewer*, for *Flint, Son & Marsden*, Derby; *Hamlins, Grammer & Hamlin*, for *Bendle W. Moore*, Derby.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

CROCKER *v.* CROCKER

[Court of Appeal (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), November 26, 29, 1920]

[Reported [1921] P. 25; 90 L.J.P. 136; 124 L.T. 493; 37 T.L.R. 137; 65 Sol. Jo. 153]

Divorce—Condonation—Need for reinstatement of wife—Offer of husband to condone adultery—Withdrawal before wife's reinstatement.

Forgiveness of an adulterous wife does not amount to condonation unless the wife is reinstated in her former position.

Where, therefore, a husband whose wife had committed adultery wrote to her offering to forgive her, and the wife wrote accepting the offer, which the husband subsequently by letter withdrew, **held:** there was no condonation since the wife had not been restored to her former position.

Keats v. *Keats and Montezuma* (1) (1859), 1 Sw. and Tr. 334, and *Campbell* v. *Campbell* (2) (1857), Dea. and Sw. 285, applied.

Contract—Consideration—Nudum pactum—Offer by husband not to sue wife for divorce—Acceptance of offer by wife—Withdrawal of offer by husband.

The husband wrote to his wife offering to stay the divorce proceedings which he was contemplating. The wife wrote accepting his offer, but the day after she posted her letter she received another letter from the husband in which he withdrew his offer. Subsequently, he filed a petition for divorce.

Held: on the facts the letters were not intended to create a legally binding contract, but, even if they were, since there was no consideration moving from the wife, the agreement was not binding on the husband.

Notes. Applied: *Fearn* v. *Fearn* [1948] 1 All E.R. 459. Referred to: *Cramp* v. *Cramp and Freeman*, post p. 164; *Germany* v. *Germany*, [1938] 3 All E.R. 64; *Hockaday* v. *Goodenough*, [1945] 2 All E.R. 335.

As to condonation see 12 Halsbury's Laws (3rd Edn.) 302 et seq., and for cases see 27 Digest (Repl.) 395 et seq.

Cases referred to:

(1) *Keats* v. *Keats and Montezuma*, [1859] 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 5 Jur. N.S. 176; 7 W.R. 377; 164 E.R. 754; 27 Digest (Repl.) 395, *3260*.

(2) *Campbell* v. *Campbell* (1857), Dig. & Sw. 285; 29 L.T.O.S. 150; 3 Jur. N.S. 845; 5 W.R. 519; 164 E.R. 578; 27 Digest (Repl.) 516, *4598*.

(3) *Hall* v. *Hall and Kay* (1891), 64 L.T. 837; subsequent proceedings, 60 L.J.P. 73, C.A.; 27 Digest (Repl.) 395, *3259*.

(4) *Bernstein* v. *Bernstein*, [1893] P. 292; 69 L.T. 513; sub nom. *Berstein* v. *Berstein, Turner and Sampson*, 63 L.J.P. 3; 9 T.L.R. 639; 37 Sol. Jo. 730, 6 R. 609, C.A.; 27 Digest (Repl.) 403, *3320*.

Appeal by the wife from a decision of Sir Henry Duke, P.

The husband petitioned for the dissolution of his marriage on the ground of the adultery of his wife. The wife admitted adultery, but pleaded condonation. This the petitioner denied. The evidence of adultery was the birth of a child of which the petitioner could not have been the father. The petitioner, then a soldier on active service had, with knowledge of the adultery, written a letter offering to forgive the wife and stay the divorce proceedings he was contemplating on a condition, which she by her reply accepted. But the day after that on which she posted her reply she received another letter from the petitioner withdrawing his offer of forgiveness. Before making his offer of forgiveness the petitioner had stopped the wife's allowance, and had deprived her of the custody of the children, and he had done nothing between his offer of forgiveness and its retraction to alter the position

as to these matters. On Jan. 28, 1920 the petition came on to be heard before SIR HENRY DUKE, P., when his Lordship decided that there cannot, in view of the decision of the full court in *Keats* v. *Keats and Montezuma* (1), be condonation by mere words of forgiveness, whether spoken or written, but that to constitute condonation there must be such conduct as in the circumstances of the parties amounts to re-instatement of the offending spouse. Condonation, therefore, was not established. His Lordship decided also that the letters relied on by the wife did not for want of consideration moving from the wife constitute a contract binding the petitioner not to institute divorce proceedings. From that decision the wife now appealed.

Humphrey Paul for the wife.

Geoffrey C. Tyndale and W. Latey for the petitioner.

LORD STERNDALE, M.R. [stated the facts and the question raised, and continued:] That was the question that was before the old court, then existing as the Court of Appeal in Matrimonial Causes, in *Keats* v. *Keats and Montezuma* (1). It was the summing up of the learned Judge Ordinary that was in question; and DR. PHILLIMORE, in moving for a new trial, said (1 Sw. & Tr. at p. 348) that:

> "as to misdirection, the definition given by the judge ordinary to the jury of condonation is incorrect, and, if incorrect, there must be a new trial. He defined it as 'a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she occupied before the offence was committed.' The part of the definition sought to be impugned is that which makes the restoration of the offending party to his or her former position indispensable to condonation. This doctrine is novel to our matrimonial law, is inconsistent with the established principles of condonation as recognised in our Ecclesiastical Courts, and if admitted would lead to mischievous consequences."

There is no doubt whatever that the exception to the direction was on the ground that the principle stated by the direction was not in any way dependent on the actual facts of the particular case. Upon that the full court, in a judgment delivered by LORD CHELMSFORD, L.C., held that that direction was right. And I do not think it necessary to read the judgment, which is somewhat long. They took the exception which I have read and discussed, and came to the conclusion that there was no objection that could be taken validly to the learned Judge Ordinary's summing up; that is to say, they held that those last words

> "so as to restore the offending party to the same position as he or she occupied before the offence was committed"

were necessary words or proper words to express the elements that were necessary in order to constitute condonation. And I notice that in the judgment of LORD CHELMSFORD, L.C., he used this language:

> "I am willing to adopt an expression which was happily used by WIGHTMAN, J., in the course of the argument, and to say that in my judgment there can be no condonation which is not followed by 'conjugal cohabitation.' This is clearly the opinion of DR. LUSHINGTON in the case of *Campbell* v. *Campbell* (2) (Dea. & Sw. at p. 288). To say that condonation requires conjugal cohabitation or connubial intercourse leaves the nature of the cohabitation or intercourse to be adapted to the varying conditions and circumstances of the different parties."

I take it there that the Lord Chancellor meant that he was not adopting a meaning of conjugal cohabitation which necessarily meant sexual intercourse. That is what I think he was dealing with in those last words. But it meant the resumption, according to him, of conjugal cohabitation in such a way as, using the words of the judge ordinary, "Would restore the offending party to the same position as he or she occupied before the offence was committed." That decision was given in 1859, and is, therefore, over sixty years old; and, as far as I know, it has never been

questioned; no case has been quoted to us in which it has been questioned. There is more than one case in the Court of Appeal in which it has been mentioned, and in which the Court of Appeal has expressed its approval of it. There was *Hall* v. *Hall and Kay* (3), to which we were referred; and there is the case of *Bernstein* v. *Bernstein* (4), to which the learned president referred in his judgment.

On what grounds are we to say that that is wrong? It seems to me that it is quite impossible to say it is wrong, especially when we are told, whatever you may imply or seek to imply from dicta in the Ecclesiastical Courts, most of which were before the court in *Keats* v. *Keats and Montezuma* (1), that there still is no case in which the exception to the Judge Ordinary's direction has been upheld; that is to say, there is no case in which it has been held that a mere condonation in words is sufficient.

Having said that, it is quite clear in my mind what the principles are to be applied to this particular case. In this particular case on the facts, I do not think I take quite such a favourable view to the appellant as was taken by the learned president. The respondent was a soldier on active service. While he was away his wife committed adultery, with the result that she had a child of which he was not the father. He wrote two letters to her. The first one I do not think I need trouble to read at length, that is not the one which is relied on as condonation. He then wrote this letter in July which is relied upon as condonation, coupled with her alleged acceptance of the terms mentioned in it. He had received, also, letters from his son, which no doubt worked upon his mind and his affections and helped to induce him to write the letter. [His Lordship read the letter, and continued:] It is quite clear from that letter that the petitioner was willing not only to forgive his wife and to take her back again, but he was willing actually to take charge of the illegitimate child which had been born; but it is all: "If you will do so and so; if you will promise not to do such a bad thing again; if you will do this, if you will do that, I will forgive you and I will stop the proceedings." Or, at any rate, he says: "I am willing to stop the proceedings." She wrote in answer to that a long letter of July 14 in which she said that she would do what he wished. But before he received that letter apparently he had got some letters from his relations, and he had written another letter to her in which he refused to have anything more to do with her. It is said upon those letters that there is condonation. But, in my opinion, they do not constitute condonation at all. He is expressing his wish and willingness to take her back again in his letter, on a number of conditions; some of them, practically all of them, she in her letter of the 14th accepts. But the children were never taken back to her. The allowance and the payment of it were never restored to her. And she certainly was not by those letters, and could not by those letters alone be, restored to the position in which she was before. I do not think it is necessary, any more than the Judge Ordinary in *Keats* v. *Keats and Montezuma* (1) thought it was, to say whether the mind of man could possibly devise reconciliation in words which would restore a guilty spouse to his or her former position. It is difficult to imagine. But it is quite enough to say, in my opinion, that these letters do nothing of the kind. The wife is not in any way restored to the position in which she was. Therefore, to my mind, the president was quite right in saying, on the authority of the decisions as they stand, that there was no condonation in the present case.

Then there is the second branch of the case. It is said that the letters, read together, constitute a binding agreement not to take proceedings, if such an agreement can be made. It is said it is made here. It seems to me that there is no ground for that statement. These persons did not think they were making an agreement, they did not try to make an agreement in the sense of a binding contract on which either of them could sue. Such a thing never entered their minds. Besides that, when one looks at the letters, I think it is right to say there is no consideration moving from the wife. The terms of the letters do not constitute

anything like a binding agreement. I think, therefore, that this appeal fails on those two points and must be dismissed.

WARRINGTON, L.J.—I so entirely agree with the judgment of the lord president and the Master of the Rolls that I do not think it is necessary to add anything.

SCRUTTON, L.J.—I agree.

Solicitors: *W. Drake; Lovell Son & Pitfield*, for *F. A. Johns*, Bournemouth.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

R. *v.* WOOD

[Court of Criminal Appeal (Earl of Reading, C.J., Darling and Sankey, JJ.), March 1, 1920]

[Reported [1920] 2 K.B. 179; 89 L.J.K.B. 435; 123 L.T. 335; 84 J.P. 92; 64 Sol. Jo. 409; 26 Cox, C.C. 617; 14 Cr. App. Rep. 149]

Criminal Law—Evidence—Cross-examination of prisoner as to character—Cross-examination as to previous offence—Previous offence committed after offence for which prisoner now on trial—Criminal Evidence Act, 1898 (61 & 62 *Vict.*, *c.* 36), *s.* 1 (*f*) (*ii*).

Where the accused has put his character in issue within s. 1 (f) (ii) of the Evidence Act, 1898, and is called as a witness, the prosecution is entitled to cross-examine him as to a previous conviction for an offence committed subsequent in date to the offence for which he is being tried.

Notes. As to cross-examination of accused as to character see 10 Halsbury's Laws (3rd Edn.) 449–451, and for cases see 14 Digest (Repl.) 514, 515. For the Criminal Evidence Act, 1898, s. 1, see Halsbury's Statutes (2nd Edn.) 613.

Appeal on a point of law against a conviction at the Middlesex Sessions for indecent assault. The indictment against the appellant contained two counts. The first count charged him with indecent assault on a woman at 8 p.m. on Nov. 29, 1919. The trial on this count took place on Feb. 7, 1920, and resulted in a conviction. The appellant was charged on the second count in the indictment on Feb. 9, 1920, before a different jury, and on this count he was convicted of an indecent assault on another woman at 7 p.m. on Nov. 29, 1919. At the second trial on Feb. 9 counsel for the appellant cross-examined a witness for the prosecution as to the character of the appellant prior to Nov. 29, 1919. Counsel for the Crown thereupon cross-examined the appellant and succeeded in obtaining evidence of his conviction on the first count for an indecent assault subsequent to the indecent assault an hour before on the same day, and for which he was then being tried.

F. J. Newman for the appellant.

Roland Oliver and *G. D. Roberts*, for the Crown, were not called upon to argue.

EARL OF READING, C.J., delivered the following judgment of the court.—Counsel for the appellant in this case has raised the point that on the second trial evidence was admitted that the appellant had been convicted of an offence subsequent in point of time to the offence for which he was then being tried. It is

contended that the cross-examination was irregular. But we are of opinion that the cross-examination was perfectly legitimate, and was permissible under s. 1 of the Criminal Evidence Act, 1898. The legislature intended to give to an accused person the advantage of being tried as if he were a person against whom nothing was known. For the first time under the Act of 1898—speaking generally—an accused person was allowed to give evidence, and the section was passed to protect the accused from cross-examination as to credit, admissible in other cases, for testing the credibility of the accused. But if the defence choose to adduce evidence tending to show that the accused is a man of good character, where the reverse is the fact, they are putting the case before the jury on a false basis, and the prosecution are not only entitled but are bound to show that the assumed good character of the accused cannot be sustained. It is said that the cross-examination of the accused in the present case related to an offence subsequent in time to the offence for which he was then being tried. The answer to that objection is that the cross-examination was directed to show that the accused was not a man of good character at the time of the trial, which is the material time. No real ground of complaint can be made with regard to the trial, and the appeal fails.

Appeal dismissed.

Solicitors : *Breeze & Wyles; Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

Re REES. JONES *v.* EVANS

[Chancery Division (Sargant, J.), April 22, 1920]

[Reported [1920] 2 Ch. 59; 89 L.J.Ch. 382; 123 L.T. 567]

Charity—Religion—Gift for "missionary purposes"—Ambiguity—Admissibility of evidence to show sense in which words used.

By her will the testatrix devised and bequeathed all the residue of her estate to G.F. "for missionary purposes."

Held: the expression "missionary purposes" was sufficiently ambiguous to permit the admission of evidence to show that the expression was used in the narrow sense of Christian missionary work, and on that evidence the gift was not void for uncertainty but was a valid charitable gift.

Re Kenny, Clode v. *Andrews* (1) (1907), 97 L.T. 130, applied.

Notes. Considered : *Re Bain, Public Trustee* v. *Ross* [1929] All E.R. Rep. 387. Distinguished : *Re How, How* v. *How*, [1929] All E.R. Rep. 354. Applied : *Re Simpson's Estate, Fowler* v. *Tinley*, [1946] Ch. 299; *Re Moon's Will Trusts, Foale* v. *Gillians*, [1948] 1 All E.R. 300.

As to admissibility of extrinsic evidence of the objects of a charitable trust see 4 Halsbury's Laws (3rd Edn.) 223, 277, 278; and for cases see 8 Digest (Repl.) 406 et seq.

Cases referred to :

(1) *Re Kenny, Clode* v. *Andrews* (1907), 97 L.T. 130; 8 Digest (Repl.) 389, *829.*

(2) *Scott* v. *Brownrigg* (1881), 9 L.R.Ir. 246; 8 Digest (Repl.) 386, **252.*

(3) *Re Davidson, Minty* v. *Bourne*, [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222; 24 T.L.R. 760; 52 Sol. Jo. 622, C.A.; 8 Digest (Repl.) 396, *883*.
(4) *Dunn* v. *Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 28 T.L.R. 257; 56 Sol. Jo. 324, P.C.; 8 Digest (Repl.) 392, *858*.

Originating Summons to which the testatrix's heir-at-law and one George Jeffrys and the Attorney-General were respondents, asking whether the gift in the testatrix's will was for Jeffrys' own personal use, or for the church of which he was pastor, or for some other charitable object.

The following facts are taken from the judgment: Jane Rees, a widow, by her will, dated Oct. 31, 1917, appointed Isaac Jones executor thereof, and, after specifically giving real and personal property and bequeathing pecuniary legacies, left all her other property of whatever description "for missionary purposes" to George Jeffrys, of Highbury Gardens, 3, University Avenue, Belfast, and appointed him to be residuary legatee of all that might remain out of the estate after payment of all debts and legacies. The testatrix died on Nov. 5, 1917. The evidence showed that Jeffrys went to Ireland in 1915, and that he had ever since carried on work as pastor of a church in Belfast known as Elim Christ Church, belonging to a body which was created about 1915 solely for evangelistic purposes, and known as the "Elim Pentecostal Alliance." The central office of the alliance was at Highbury Gardens, 3, University Avenue, Belfast, and was supported by voluntary contributions. There was evidence that Jeffrys often met the testatrix at conferences of Christian workers in 1914 and 1915, and discussed religious subjects with her, and that she sent him considerable sums of money for his work.

Sir Denham Warmington for the plaintiff, the executor.
Galbraith, K.C. and *Hannan* for George Jeffrys.
J. Austen-Cartmell for the Attorney-General.
G. D. Johnston for the heir-at-law and the next of kin of the testatrix.
Alexander Grant, K.C., *Hildyard, K.C.*, and *J. G. Wood* for other persons not interested in this question.

SARGANT, J. (after stating the facts and the question involved).—The question lies between the legatee George Jeffrys and the Attorney-General, on the one hand, and the heir-at-law and next of kin of the testatrix, on the other hand. On behalf of the former, it was contended that the gift was made to Jeffrys for missionary work, and it seems to be reasonably clear that the residue was given for missionary work, and that Jeffrys was to have the carrying out of such work. On behalf of the heir-at-law and next of kin, however, it was urged that, as the object of the gift was expressed in such very wide terms, the case was like the Irish case of *Scott* v. *Brownrigg* (2), where the gift was, as here, for "missionary purposes," and it was held that the gift was void as being too vague and uncertain.

The expression "missionary purposes" is ambiguous, and, as it may comprise objects which are not charitable, in the absence of sufficient indication that the expression refers to missionary work in the narrower or popular sense the gift is void for uncertainty. But in *Re Kenny* (1), by the decision in which I am bound, it was held that, although the term for "missionary purposes" was in itself ambiguous, it was not too wide in the presence of evidence—which was held to be admissible—showing that the testator used the expression in the popular sense of Christian missionary work. The admission of such evidence seems to me to be reasonable and sensible, and, in the case now before me, the evidence tendered as to the missionary work carried on by George Jeffrys and the knowledge of the testatrix of that work, and of the desire she had expressed to aid him in that work after death as she had been doing in her lifetime, make the case even stronger than *Re Kenny* (1). It was further said that *Re Kenny* (1) was inconsistent with *Re Davidson* (3), and that the gift was void for uncertainty on the principle of that case and of *Dunne* v. *Byrne* (4), but in each of those cases the language referring to

the objects of the gift was unambiguous. On that ground those cases are distinguishable from *Re Kenny* (1), as was pointed out by LORD MACNAGHTEN in *Dunne* v. *Byrne* (4), when he said:

> "It is difficult to see on what principle a trust expressed in plain language, whether the words be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee."

I therefore hold that the gift to Jeffrys was a valid charitable bequest, and I direct payment of the residue to be made to him, and to be held by him for the purposes of his missionary work.

Solicitors: *Hicks, Arnold & Bender; Helder, Roberts, Giles & Co.; Cartwright, Cunningham & Co.; Solicitor to the Treasury.*

[Reported by L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

R. *v.* TWYNHAM

[COURT OF CRIMINAL APPEAL (Earl of Reading, C.J., McCardie and Swift, JJ.), July 12, 1920]

[Reported 90 L.J.K.B. 586; 124 L.T. 286; 85 J.P. 48; 26 Cox, C.C. 678; 15 Cr. App. Rep. 38]

Criminal Law—Appeal—Sentence—Commuted sentence—Death sentence commuted to penal servitude—Extension of time to appeal—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*c*), *s.* 7 (1).

The appellant was convicted of murder and sentenced to death, but the sentence was commuted to penal servitude [abolished by s. 1 of the Criminal Justice Act, 1948] for life. He applied under s. 3 (c) of the Criminal Appeal Act, 1907, for leave to appeal against that sentence, and under s. 7 (1) of the Act, for leave to extend the time given for notice of appeal.

Held: the commuted sentence was not a sentence of law but the exercise of the prerogative of mercy which rested with the Sovereign, and, therefore, there could be no appeal against the commuted sentence nor leave to extend the time in which to apply for leave to appeal.

Notes. The death penalty for murder was abolished by s. 7 of the Homicide Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 172), except in those cases falling within ss. 5 and 6 of the Act, and even in those cases no sentence of death can be recorded against a person convicted if at the time of the offence he was under the age of eighteen years: see s. 53 (1) of the Children and Young Persons Act, 1933 as substituted by s. 9 (3) of the Homicide Act, 1957.

Followed: *R.* v. *Collins*, [1943] 1 All E.R. 203.

As to right of appeal and extension of time for leave to appeal see 10 HALSBURY'S LAWS (3rd Edn.) 491, 521 et seq., and for cases see 14 DIGEST (Repl.) 599 et seq., 611 et seq. For the Criminal Appeal Act, 1907, see 5 HALSBURY'S STATUTES (2nd Edn.) 926.

Application for extension of time to apply for leave to appeal against conviction and sentence.

The appellant was convicted of murder before SCRUTTON, L.J., at Warwick

Assizes on Nov. 11, 1912, and sentenced to death. The sentence was afterwards commuted to one of penal servitude for life.

The appellant appeared in person.

EARL OF READING, C.J., delivered the following judgment of the court.—The appellant was convicted of murder in November, 1912, and sentenced to death. The sentence was subsequently commuted to a sentence of penal servitude for life. An application was made by the appellant last month for extension of time to apply for leave to appeal against conviction and sentence, and directions were then given that the application should be put in the list so that the matter might be dealt with in open court. As regards the conviction, s. 7 (1), of the Criminal Appeal Act, 1907, provides as follows:

> "Where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such a manner as may be directed by rules of court within ten days of the date of conviction . . . Except in the case of a conviction involving sentence of death the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal."

It follows, therefore, that this court can extend the time within which notice of appeal or notice of application for leave to appeal may be given, except in the case of a conviction involving sentence of death; it equally follows that where there is a conviction of murder and a sentence of death this court has no power to extend the time. There is a reason why the legislature should make a provision of this kind, because the mere giving of a notice of appeal or a notice of application for leave to appeal against a conviction for murder or high treason has the effect of postponing the date of the execution. When once notice has been given, the execution cannot take place until a certain time has elapsed after the hearing of the appeal. If the time could be extended, a murderer, having failed on one appeal, could give notice asking for an extension of time within which to bring some other matter before this court, or he could abstain from giving notice until the last moment, so as to provide for a further extension of time. It is for these reasons that the legislature has said that an appeal from a conviction involving a sentence of death must be made within a certain time. This court, therefore, has no jurisdiction to extend the time for appealing or applying for leave to appeal against such a conviction.

As regards the sentence, it is provided by s. 3 of the Criminal Appeal Act, 1907, that

> "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal . . . (c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

On a conviction of murder the sentence is fixed by law; therefore, in this case again there is no right of appeal. It must also be remembered that the commutation of the sentence to penal servitude for life is not a sentence of law. It is the exercise of the prerogative of mercy which rests in the Sovereign. In the present case the Sovereign commuted the sentence on the recommendation of the Home Secretary, and there is, therefore, no appeal nor any power to extend the time. For the future this court will direct that an application for extension of time to apply for leave to appeal against a conviction of murder cannot be entertained after the time fixed by the section. In any future case similar to the present the registrar of the court will, by the direction of the court, refuse to receive the application or put it in the list.

Application refused.

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

SAUNT *v.* BELCHER AND GIBBONS, LTD.

[KING'S BENCH DIVISION (Bailhache, J.), December 6, 1920]

[Reported 90 L.J.K.B. 541; 125 L.T. 283; 26 Com. Cas. 115]

Sale of Goods—Rejection—Defective quality—Failure of buyer to inspect goods at place of delivery—Place of delivery to seller's knowledge not ultimate destination of goods—Suitability of place of delivery for inspection—Right of buyer to reject.

In a contract for the sale of goods the place of inspection is the place of delivery even when, to the seller's knowledge, that place is not the ultimate destination of the goods, and the inspection is not moved from that place unless inspection cannot reasonably be had there, either because it is unsuitable in itself or the nature or packing of the goods make inspection at that place unreasonable. Where, therefore, the seller delivered goods to the buyer at the agreed place of delivery, at which inspection could easily have been made, and which, to the seller's knowledge, was not the ultimate destination of the goods, and the buyer, without inspecting them, shipped them to a sub-purchaser, **held:** the buyer had lost the right to reject.

Van den Hurk v. *R. Martens & Co., Ltd.* (1), [1920] 1 K.B. 850, explained and distinguished.

Sale of Goods—Contract—Breach—Measure of damages—Nominal damages—Sale by sample—Goods not equal to sample—Mistake of buyer in buying wrong commodity for re-sale—Both goods and sample worthless to buyer.

The buyer contracted to deliver to a sub-purchaser a quantity of coke breeze, but not being familiar with this commodity, he bought from sellers fine pan breeze as per sample. On delivery of the first instalment the buyer shipped the goods to the sub-purchaser who rejected them as not in accord with the contract description. The buyer then discovered that the goods were not equal to the sample by which he bought, and he refused to accept further deliveries and claimed special damages for breach of contract.

Held: the buyer was justified in refusing to accept further deliveries, but, since both the goods and the sample were worthless to him, he was entitled to nominal damages only.

Notes. Referred to: *E. Hardy & Co. (London), Ltd.* v. *Hillerns and Fowler*, [1923] 1 K.B. 658.

As to place of examination of goods and right to reject see 29 HALSBURY'S LAWS (2nd Edn.) 146, 227, 228, and for cases see 39 DIGEST 585 et seq.

Case referred to:

(1) *Van den Hurk* v. *R. Martens & Co., Ltd.*, [1920] 1 K.B. 850; 89 L.J.K.B. 545; 123 L.T. 110; 25 Com. Cas. 170; 39 Digest 481, *1027*.

Action in the Commercial List tried by BAILHACHE, J., without a jury.

The buyer had a contract with a French customer for delivery to him of coke breeze, and he bought from the sellers a quantity of fine pan breeze as per sample. The sellers had bought the goods from another firm, who, in their turn had bought them from a gas company. The goods were to be delivered to the plaintiff at Deptford. The defendants knew that the pan breeze was to go to France. They were coal and coke merchants, and expressed the opinion that the pan breeze would burn and they hoped that it would pass muster in France. The buyer knew nothing about pan breeze, and the sellers had not dealt in pan breeze before, and they told the buyer they knew nothing about it. Pan breeze was an entirely different thing from coke breeze, and when the first instalment of the pan breeze had been delivered by the sellers at Deptford and thence sent to France by the buyer, it was rejected by the French buyer as not in accordance with the contract description. The buyer thereupon claimed to reject against the sellers. The pan breeze sent to France was not the same as the sample on which the buyer had bought from

A the sellers, for the gas company had made up the cargo by mixing some pan breeze of a coarser kind with the fine pan breeze as per sample. The buyer had not agreed, nor had anyone on his behalf agreed, that there should be any mixture. The buyer had paid the sellers for the pan breeze and, without inspecting it, had shipped it to his French buyer. The buyer claimed from the sellers the price of a cargo of goods described as pan breeze, together with the cost of freight from B England to France and certain other expenses. He further claimed to reject the cargo, as not being equal to sample, and damages on the same grounds and the further grounds that the goods were not of the contract description and were not merchantable. The sellers pleaded that the goods were equal to sample and were merchantable, that the buyer had inspected, or had had an opportunity of inspecting the goods, and had accepted them and had sent them on to his buyer without C complaint. They counter-claimed damages for the buyer's refusal to take delivery of the balance of the goods after the first instalment.

Neilson, *K.C.*, and *S. L. Porter* for the buyer.
MacKinnon, *K.C.*, and *C. Herbert-Smith* for the sellers.

D **BAILHACHE, J.,** after referring to the facts, said: It is argued that, because the sellers knew that the breeze was to go to France, the place of examination and acceptance must be extended from Deptford, the place where the sellers were to deliver the goods, to France. In support of this contention, *Van den Hurk* v. *Martens & Co., Ltd.* (1) was cited as showing that where goods are sold by a seller who has to deliver them at a destination which to his knowledge is not their E final destination, but only a place from which there is to be a further transit, the place of inspection and acceptance is removed from the place at which the seller has to make his delivery to the place which is the ultimate destination of the goods. But that proposition is not universally true. It depends upon whether the place at which the seller has to deliver the goods, although it is not the ultimate destination of the goods, is a place where, having regard to the nature of the F goods and the way in which they are packed, inspection can reasonably be had. In *Van den Hurk* v. *R. Martens & Co., Ltd.* (1) I referred to both those points, but counsel for the buyer treats that case as an authority for his proposition that it is sufficient that the original vendor should know that the place of delivery is not the final destination of the goods. But the other point which I also stated in that case is equally essential. In *Van den Hurk* v. *R. Martens & Co., Ltd.* (1) G the goods being sodium sulphide packed in drums, I came to the conclusion that, with goods of that description, packed in that manner, when it was known that they were to be sent abroad, it was not reasonable to suppose that the drums were to be opened and the goods inspected at the place where the original vendor was to deliver. In my opinion, in order to postpone the place for inspection, it is essential that the two elements already mentioned should be present. First, H the original vendor must know that the goods are going to another destination and, secondly, the place at which the original vendor is to deliver the goods must either be unsuitable in itself or the nature or packing of the goods must make inspection at that place unreasonable. Applying those two principles to the present case, I find that although the sellers knew that the goods were to go to France, yet the place at which the sellers were to deliver the goods, and the nature of I the goods were such as that inspection could quite reasonably have been had at Deptford, the sellers' place of delivery. I have come to the conclusion, therefore, that the buyer lost his right to reject by his failure to inspect the goods at Deptford, where, in the circumstances, inspection and acceptance ought to have taken place if the buyer's right to reject was to be kept alive.

But although the buyer has lost his right to reject, he is still entitled to damages if the goods delivered by the sellers were in fact of less value than the sample, but as both the sample as well as the goods delivered were in fact worthless, the buyer

has only suffered nominal damages and as he does not claim nominal damages, but special damages, the action fails. The sellers counterclaim for the buyer's refusal to take delivery of the balance of the goods under the contract. If the pan breeze delivered was equal to sample, the buyer would, in normal circumstances, have been bound to take delivery of the balance and make the best of it. But after this dispute had arisen, the sellers wrongly maintained that the pan breeze which they had delivered was in fact equal to sample and contract description, and the fair inference is that the sellers were claiming the right to deliver other goods of the same character as the first instalment, which was not in accordance with the sample and contract description. Therefore, the buyer was justified in refusing to take further deliveries. In the result, both claim and counterclaim fail, and each party must pay his own costs.

Solicitors: *William Sturges & Co.; Peacock & Goddard.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

RICHARDS *v.* DAVIES

[Chancery Division (P. O. Lawrence, J.), July 14, 15, 16, 1920]

[Reported [1921] 1 Ch. 90; 89 L.J.Ch. 601; 124 L.T. 238; 65 Sol. Jo. 44]

Agriculture—Agistment—Letting of grass keep by tenant of farm—Breach of covenant not to underlet or permit use of land—Right of grantee of keep to mow grass and remove from land.

Landlord and Tenant—Covenant—Breach—Sub-letting without consent—Agistment—Letting of grass keep by tenant of farm.

The letting by a tenant of a farm of grass keep thereon permits the grantee of the keep to use and occupy part of the farm, and so constitutes a breach of the tenant's covenant "not to underlet or permit any other person to use or occupy any part of the buildings, lands or premises."

Quaere: whether the grantee of the grass keep on a field has the right to mow the herbage and take it off the land.

Semble: agistment would not have been a breach of the above covenant.

Notes. As to covenants against assignment or underletting see 23 Halsbury's Laws (3rd Edn.) 629–637; as to agistment see 2 ibid. p. 681, and as to exclusion of the customary right to sell or let grass keep see ibid. p. 259. For cases on these subjects see respectively 31 Digest (Repl.) 412–419 and 2 ibid. pp. 68 and 338–341.

Cases referred to:

(1) *Crosby* v. *Wadsworth* (1805), 6 East, 602; 2 Smith, K.B. 559; 102 E.R. 1419; 2 Digest (Repl.) 34, *155*.

(2) *Masters* v. *Green* (1888), 20 Q.B.D. 807; 59 L.T. 476; 52 J.P. 597; 36 W.R. 591, D.C.; 31 Digest (Repl.) 107, *2497*.

(3) *Wellaway* v. *Courtier*, [1918] 1 K.B. 200; 87 L.J.K.B. 299; 118 L.T. 256; 34 T.L.R. 115; 62 Sol. Jo. 161, D.C.; 2 Digest (Repl.) 39, *190*.

(4) *Cox* v. *Glue*, *Cox* v. *Saint*, *Cox* v. *Mousley* (1848), 5 C.B. 533; 17 L.J.C.P. 162; 10 L.T.O.S. 374; 12 Jur. 185; 136 E.R. 987; 43 Digest 389, *134*.

(5) *Peebles* v. *Crosthwaite* (1897), 13 T.L.R. 198, C.A.; 31 Digest (Repl.) 417, *5458*.

A Also referred to in argument:

Tompkinson v. *Russell* (1821), 9 Price, 287; 147 E.R. 95; 2 Digest (Repl.) 39, *191.*

James v. *Morgan* (1918), June 25, Monmouthshire Assizes, unreported.

R. v. *Inhabitants of Croft* (1819), 3 B. & Ald. 171; 106 E.R. 625; 42 Digest 664, 737.

B *Greenslade* v. *Tapscott* (1834), 1 Cr. M. & R. 55; 4 Tyr. 566; 3 L.J.Ex. 328; 149 E.R. 991; 2 Digest (Repl.) 68, *386.*

Witness Action for an injunction.

In May, 1919, the defendant advertised in a local newspaper an offer to let the whole of the grass keep on the Parsonage Farm, Llanddiwr Skyrred, near Abergavenny, Monmouthshire, of which he was tenant under an agreement dated C July 12, 1916, and which tenancy was about to expire on Sept. 29, 1919. The tenancy agreement contained a clause numbered 14 which provided that the tenant should not underlet or permit any other person or persons to use or occupy any part of the buildings, lands, or premises without the written consent of the landlord or his agents. The plaintiff, who was the defendant's landlord, saw the advertisement, and on May 28, 1919, commenced this action, claiming an injunction to restrain the defendant from letting the grass keep on the Parsonage Farm D on the ground that such letting would constitute a breach of cl. 14 of the tenancy agreement. On the same day as the issue of the writ the plaintiff obtained an ex parte injunction over June 6 on which day the defendant gave an undertaking over June 20. The defendant's tenancy expired on Sept. 29, 1919, and owing to the action the defendant did not let the grass keep. The plaintiff now claimed costs of the action on the ground that he was justified in commencing it. The defendant E resisted this claim, counter-claimed for damages, and asked for an inquiry as to damages under the undertaking given by the plaintiff in the orders containing the ex parte injunction and the undertaking given by the defendant, contending that the plaintiff ought to pay the costs of the action and counterclaim.

Owen Thompson, *K.C.* and *G. H. Devonshire* for the plaintiff.

F *Jenkins*, *K.C.* and *Mackay* for the defendant.

P. O. LAWRENCE, J.—The sole question which I have to decide is whether on the true construction of cl. 14 of the tenancy agreement a letting of the grass keep on the Parsonage Farm without the consent of the plaintiff is prohibited. In order to solve this question, it is essential in the first place to ascertain what is G the true effect of letting the grass keep. The evidence has established that such letting is common in Monmouthshire in the case of an outgoing tenant, and that it is indifferently called selling or letting the grass keep, which expressions mean the same thing. The sale or lease of the grass keep on pasture land for a period is not to be confounded with agistment or "tacking," as it is locally termed. The latter consists of the taking in by the farmer of another man's sheep or cattle H (usually at so much per head per week), without binding himself to depasture them on any particular part of the farm, whereas the former consists of a grant for a definite period (usually in consideration of a lump sum) of the growing grass crops on a specified field or fields. There is no question that a grantee of the grass keep on a field has the exclusive right to take the herbage on that field by the mouths of his sheep and cattle. The question whether he also has the right I to mow the herbage and take it off the land is not material to be decided on the present occasion, though I think that, regard being had to the evidence given on that point, the better opinion is that he has no such right.

It is settled by authority which binds me that the grantee of the herbage has a particular right in the land in respect of which he can maintain an action for trespass quare clausum fregit, and that a contract for the sale of such a right is a contract for sale of an interest in or concerning land within s. 4 of the Statute of Frauds: see COKE UPON LITTLETON 4b, *Crosby* v. *Wadsworth* (1), *Masters* v. *Green* (2), and *Wellaway* v. *Courtier* (3). *Cox* v. *Glue* (4) and *Cox* v. *Mousley* (4)

show that a grant of a right to take the herbage on a certain field by the mouths of the grantee's sheep and cattle involves the grantor parting with the right of possession of the surface of that field during the time of the exercise of such right of pasturage, and that he cannot during that time bring an action for trespass against a person riding over that field, although he may bring an action of trespass against a person driving stakes into the subsoil of that field. In my opinion, it is difficult to see how a grantee of the grass keep on a certain field can enjoy the subject matter of the grant without occupying the field by his sheep or cattle and without using the field for the purpose of depasturing his sheep and cattle upon it.

In my judgment, such a grant of necessity involves permission being given by the grantor to the grantee to use and occupy the field during the period of the grant. Evidence has been adduced on behalf of the defendant to show that it is the custom in Monmouthshire that (in the absence of an express bargain to the contrary) the grantor of the grass keep attends to the sheep and cattle after the grantee has turned them into the field the grass keep on which has been granted to him. Counsel for the defendant contends that this evidence shows that in Monmouthshire at all events the grantor of the grass keep does not give up possession of the field to the grantee, and that the latter does not occupy the field. I do not agree that the mere fact that the grantor waters and generally looks to the safety and well being of the sheep and cattle determines the question as to whether the grantee is or is not using or occupying the field. But, apart from that, the evidence is conflicting, and on the whole I have come to the conclusion that the true result of the evidence on this point is that it is a matter of bargain and arrangement between the grantor and grantee as to who is to look after the sheep and cattle. In any event I think that it is clear that any services rendered by the grantor in this respect are services rendered to and on behalf of the grantee, and do not in any way affect the occupancy or the legal rights of the grantee under his grant.

The main defence to this action relied upon by counsel for the defendant, however, is that, taking the tenancy agreement as a whole, the defendant by granting the grass keep on the pasture fields of the Parsonage Farm to a pasturer does not permit the grantee to use or occupy those fields within the meaning of cl. 14 of the agreement. He contends first that the prohibition against permitting any other person to use or occupy any part of the land is equivalent to a prohibition against parting with the tenant's entire interest in any part of the land, and that the grant of the herbage does not involve the grantor parting with his entire interest in any part of the land, but only with a particular interest in the pasture fields, namely, his interest in the herbage growing on those fields. In support of this construction he has referred me to *Peebles* v. *Crossthwaite* (5). This case, so far from helping his contention, in my opinion shows that a clear distinction ought to be drawn between the expression "shall not permit any other person to use or occupy" and the expression "shall not part with the possession of," and I conclude that if the latter expression had occurred in the lease in that case, ROMER, J., would have decided it the other way. Counsel's next contention is that the expression "use and occupation" of land has acquired a technical meaning and involves the taking of exclusive legal possession of the land by some person in such circumstances as that (in the absence of an agreement that the possession shall be held gratuitously) the person taking possession renders himself legally liable to pay for his use and occupation of the land, and that the utmost that can be said in the present case is that the grantee of the grass keep would have the use and occupation of the herbage, i.e., the use and occupation of an interest in the land and not of the land itself. In my judgment this contention is not sound. In the first place the expression used in cl. 14 is "use or occupy" and not " use and occupy," and in the second place I do not consider that in this clause the words "use or occupy" have any such technical or restricted meaning as is sought to be placed upon them by counsel. I have already held that a grant of the grass

keep on a certain field necessarily involves permision being given by the grantor to the grantee both to "use" and to "occupy" the field in the ordinary acceptation of those terms, and I see no reason for not giving effect to cl. 14 in that sense. Even if, however, contrary to my opinion, the words in question ought to be construed as bearing the technical and restricted meaning contended for, yet it seems that according to *Cox* v. *Glue* (4) and *Cox* v. *Mousley* (4) the grant of the grass keep would confer such a right of possession as would satisfy the test contended for by counsel for the defendant. In the result I hold that the plaintiff was justified in bringing the action, and that the defendant must pay the costs of the action. The counterclaim will be dismissed with costs.

Solicitors: *Hopgood, Mills, Steele & Co.*, for *Gabb, Price & Fisher*, Abergavenny; *Smythe & Brettel*, for *Gardners, Heywood & Grey*, Abergavenny.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

KEEN *v.* MEAR

[CHANCERY DIVISION (Russell, J.), June 11, 12, 21, 1920]

[Reported [1920] 2 Ch. 574; 89 L.J.Ch. 513; 124 L.T. 19]

Estate Agent—Authority—Authority to make binding contract to sell at stated price—Authority to make contract containing conditions of title.

Partnership—Authority of one partner to bind firm—Usual business of firm—Instructions to agent to sell partnership property, at fixed price—Contract in name of instructing partner only made and signed by agent—Repudiation of contract by other partner—Lack of sufficient memorandum of agreement—Partnership Act, 1890 (53 *& 54 Vict., c.* 39), *s.* 5—*Statute of Frauds*, 1677 (29 *Car.* 2, *c.* 3), *s.* 4.

Although the mere employment of an estate agent to dispose of a house confers no authority on the agent to make a contract on behalf of his principal, an agent who is instructed to sell at a fixed price is thereby authorised to make and sign a binding open contract, but not a contract containing conditions as to title.

Hamer v. *Sharp* (1) (1874), L.R. 19 Eq. 108, *Wilde* v. *Watson* (2) (1878), 1 L.R. Ir. 402, *Shadburn* v. *Moore* (3) (1892), 67 L.T. 257, *Rosenbaum* v. *Nelson* (4), [1900] 2 Ch. 267, and *Thuman* v. *Best* (5) (1907), 97 L.T. 239, considered.

S. M. and W. M. carried on business as builders as partners, the course of their business being to buy land upon which houses were built, and when built were sold or let. S. M. conducted these transactions, but the price or rent was always agreed upon between the two partners. In 1918 S. M. instructed C., a house agent, to sell a house built by the partners at a certain price. W. M. was not informed of this. In December, 1918, C. agreed with K. for the sale of the house at the price fixed by S. M., and on Dec. 17 an agreement was signed by C. as agent of S. M. and by K. for such sale to be completed on Mar. 25, 1919, and a deposit was paid. The agreement contained provisions as to the title to be shown by the vendor, and as to the house being subject to the restrictive covenants of a building estate, which did not exist. S. M. saw the contract and expressed his satisfaction at the amount of the deposit, but desired completion to be postponed until June 24, to which K. agreed. When W. M. was informed of the contract he refused to agree to the sale. K. then brought an

action against S. M. and W. M. for specific performance and damages, contending that the contract of sale was an act by S. M. "for carrying on in the usual way business of the kind carried on by the firm" of which he was a member within the Partnership Act, 1890, s. 5, and so bound his partner W. M. In their defence S. M. and W. M. relied inter alia on the provisions of s. 4 of the Statute of Frauds [now s. 40 (1) of the Law of Property Act, 1925] and contended that there was no sufficient memorandum of the alleged contract of sale.

Held: (i) S. M. had approved and adopted the contract, and so was bound by it, even though an estate agent had no authority to enter into such a contract; (ii) parol evidence could not be given to vary the contract signed by the agent by substituting two vendors for one and the adding of the name of the second vendor, and so there was no sufficient memorandum of the agreement; s. 5 of the Partnership Act, 1890, did not override s. 4 of the Statute of Frauds; and, therefore, W. M. was not bound by the contract and specific performance would not be ordered against him: *Jarrett* v. *Hunter* (6) (1866), 34 Ch.D. 182 and *Lovesey* v. *Palmer* (7), [1916] 2 Ch. 233, applied; (iii) the contract had gone off owing to the inability of S. M. to make a good title, but S. M. had acted in good faith and done his best to persuade W. M. to sell, and so he was not liable to pay K. damages for loss of bargain, costs (except the costs of investigating title), or interest in respect of the balance of the purchase money placed by K. on deposit at K.'s bank.

Rule in *Flureau* v. *Thornhill* (8) (1776), 2 Wm. Bl. 1078, and *Bain* v. *Fothergill* (9) (1874), L.R. 7 H.L. 158, applied; *Re Daniel*, *Daniel* v. *Vassall* (10), [1917] 2 Ch. 405, distinguished.

Notes. That part of s. 4 of the Statute of Frauds considered in this case has been repealed, and replaced by the similar provision as to contracts for the sale of land of s. 40 (1) of the Law of Property Act, 1925.

Considered: *Ryan* v. *Pilkington*, [1959] 1 All E.R. 689. Referred to: *Wragg* v. *Lovatt*, [1948] 2 All E.R. 968.

As to the implied authority of estate agents see 1 HALSBURY'S LAWS (3rd Edn.) 166, and for cases see 1 DIGEST 374. As to the memorandum in writing of a contract for the sale of land see 29 HALSBURY'S LAWS (2nd Edn.) 240–243, and ibid., vol. 8 (3rd Edn.) pp. 87–109, and for cases see 40 DIGEST (Repl.) 21–38. For the Law of Property Act, 1925, s. 40, see 20 HALSBURY'S STATUTES (2nd Edn.) 500. As to a purchaser of land's measure of damages for the vendor's breach of contract see 29 HALSBURY'S LAWS (2nd Edn.) 390, 391, and for cases see 40 DIGEST (Repl.) 284–291. As to the power of one partner to find the firm, see 28 HALSBURY'S LAWS (3rd Edn.) 503–512, and for cases see 36 DIGEST (Repl.) 460–480. For the Partnership Act, 1890, see 17 HALSBURY'S STATUTES (2nd Edn.) 579.

Cases referred to:

(1) *Hamer* v. *Sharp* (1874), L.R. 19 Eq. 108; 44 L.J.Ch. 53; 31 L.T. 643; 23 W.R. 158; 1 Digest 378, *833*.
(2) *Wilde* v. *Watson* (1878), 1 L.R. Ir. 402; 1 Digest 378, *833xi*.
(3) *Chadburn* v. *Moore* (1892), 61 L.J.Ch. 674; 67 L.T. 257; 41 W.R. 39; 36 Sol. Jo. 666; 1 Digest 379, *834*.
(4) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; 69 L.J.Ch. 569; 82 L.T. 658; 48 W.R. 522; 44 Sol. Jo. 485; 1 Digest 285, *165*.
(5) *Thuman* v. *Best* (1907), 97 L.T. 239; 1 Digest 326, 426.
(6) *Jarrett* v. *Hunter* (1886), 34 Ch.D. 182; 56 L.J.Ch. 141; 55 L.T. 727; 51 J.P. 165; 35 W.R. 132; 3 T.L.R. 117; 40 DIGEST (Repl.) 29, *136*.
(7) *Lovesey* v. *Palmer*, [1916] 2 Ch. 233; 85 L.J. Ch. 481; 114 L.T. 1033; 12 Digest (Repl.) 163, *1045*.
(8) *Flureau* v. *Thornhill* (1776), 2 Wm. Bl. 1078; 96 E.R. 635; 40 Digest (Repl.) 284, *2358*.

A (9) *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261, H.L.; 40 Digest (Repl.) 287, *2392*.

(10) *Re Daniel*, *Daniel* v. *Vassall*, [1917] 2 Ch. 405; 87 L.J.Ch. 69; 117 L.T. 472; 33 T.L.R. 503; 61 Sol. Jo. 646; 40 Digest (Repl.) 285, *2372*.

(11) *McGrory* v. *Alderdale Estate Co.*, [1918] A.C. 503; 87 L.J.Ch. 435; 119 L.T. 1; 62 Sol. Jo. 518, H.L.; 42 Digest 556, *1196*.

B (12) *De Bussche* v. *Alt* (1878), 8 Ch.D. 286; 47 L.J.Ch. 381; 38 L.T. 370; 3 Asp. M.L.C. 584, C.A.; 1 Digest 387, *906*.

Also referred to in argument:

Wylson v. *Dunn* (1887), 34 Ch.D. 569; 56 L.J.Ch. 855; 56 L.T. 192; 51 J.P. 452; 35 W.R. 405; 40 Digest (Repl.) 25, *110*.

C *Saunderson* v. *Griffiths* (1826), 5 B. & C. 909; 8 Dow. & Ry. 643, 4 L.J. O.S.K. 318; 108 E.R. 338; 1 Digest 409, *1076*.

Day v. *Singleton*, [1899] 2 Ch. 320; 68 L.J.Ch. 593; 81 L.T. 306; 48 W.R. 18; 43 Sol. Jo. 671, C.A.; 40 Digest (Repl.) 258, *2161*.

Witness Action.

D Two brothers, Samuel Mear and Walter Mear, carried on business as builders at Burnham-on-Sea, in the county of Somerset, as partners without any deed or written agreement. Their partnership began in 1902, and they found the necessary capital and divided the profits in equal shares. The course of their business was to buy land on which they built houses, which were either sold or let. It appeared that Samuel Mear usually conducted all negotiations, but E Walter Mear stated in evidence that the partners always agreed on the price at which houses were to be sold or let. In 1915 both partners became engaged in war work, and no business was transacted except as to houses already built, but there was no formal dissolution of the partnership. What business was done was transacted by Samuel Mear, who was at work at Bristol—not far from Burnham-on-Sea—but Walter Mear stated that he was always consulted as to selling price. F In 1911 the partners had bought a freehold piece of land in Jaycroft Road, Burnham, which was conveyed to them as tenants in common in equal shares. Upon this piece of land there was built a house called Croft Cottage, which in September 1911 was leased to one Smith for seven years, terminable at the end of three or five years. In 1914 Smith terminated the lease and became a yearly tenant of the partners. In January, 1918 Thomas Cox, a house agent in Burnham-on-Sea, who had previously G let houses for the partners, wrote to Samuel Mear asking whether he had any houses to sell in Jaycroft Road, as he had inquiries for one. Samuel Mear was not then at Burnham, but on Jan. 19 Mrs. Samuel Mear, by her husband's instructions, called on Cox and gave him particulars of Croft Cottage, stating the price at £515. It did not appear that Samuel Mear had consulted his brother as to the price. Nothing was done about the houses until December, 1918, when Robert John Kelway Keen H entered into negotiations with Cox for its purchase and offered £500. Cox had an interview with Samuel Mear, who said that he would only sell for £500 clear of Cox's commission. Keen, therefore agreed to give £515 to cover the commission, and Cox drew up an agreement which was signed on Dec. 17 by Cox as agent for Samuel Mear and Keen, and was in the following terms:

I "Memorandum of agreement made and entered into on the 17th day of December, 1918 whereby Thomas Cox, agent for S. C. Mear (hereinafter called the vendor), agrees to sell and Robert John Kelway Keen of the Chestnuts Meare hereinafter called the purchaser) agrees to purchase all that freehold house and premises in Jaycott-road, Burnham-on-Sea, called and known as Croft Cottage, for the sum of £515, of which a deposit of £50 shall be paid to Thomas Cox of the Mart, Burnham-on-Sea, on the signing of this agreement, the receipt of which deposit is hereby acknowledged, and the balance of the purchase money shall be paid and the sale completed at the office of the vendor's solicitors on the

25th day of March, 1919. A good and sufficient title shall be given to the said property and shall be the title under which the vendor purchased, and the property is sold subject to the restrictive and other covenants (if any) of the building estate of which the property formed part, and an abstract of the title shall be supplied to the purchaser's solicitors. Further conditions (if any): The property is sold subject to the existing tenancy. Purchase money, £515; deposit, £50; balance to be paid on completion, £465."

Cox admitted in his evidence that he knew nothing of the title or of any restrictive covenants, which did not, in fact, exist, and that the clause as to this was put in as an usual clause generally employed. Some difficulty had arisen as to Smith's tenancy, so that the provision as to taking subject to the tenancy was agreed to by keen, who did not require possession until March, 1920. Cox, as Samuel Mear's agent, subsequently at Keen's request, gave notice to Smith to determine the tenancy. On Dec. 18, 1918, Cox wrote to Samuel Mear that he had sold Croft Cottage to Keen for £515, for which a contract had been signed, that a deposit of £50 had been paid, and that the purchase was to be completed on Mar. 25, subject to Smith's tenancy, and asking Samuel Mear to look in when passing. The letter also referred to two other houses belonging to the partnership which were on Cox's list. Cox stated in his evidence that he knew of the partnership and the business which it carried on, and believed that Samuel Mear always carried out the sale or letting of the partnership property. It was shown that in the actual leases of partnership houses carried out by Cox's agency both partners had signed the leases. Samuel Mear did not reply to Cox's letter, but called on Cox on Jan. 13, 1919, when Cox showed him the contract, which he read, and expressed his satisfaction at the amount of the deposit, and raised no objection to the terms of the contract, except that he expressed a desire that the purchase should not be completed until June 24, 1919. Keen subsequently agreed to this. Samuel Mear also stated that he did not wish to employ a solicitor, but that the deeds of the property were at the bank, and the purchaser's solicitors could see them there. On or about Jan. 13, Mrs. Samuel Mear, by her husband's directions, called on Cox and asked him to pay over the deposit to her which he declined to do.

It did not appear that Samuel Mear informed his brother of the sale of Croft Cottage until February, 1919, when he at once objected, as he did not consider that the price was sufficient, and on Feb. 16 he wrote to Cox a letter in which he stated that he knew nothing of the sale, nor had the least idea that the property was in the market, and that he did not intend to give his consent to the house being sold, as there was no necessity for the partners to sell the house. It appeared that Samuel Mear did his best to persuade Walter Mear to consent to the sale, but he would not do so. Samuel Mear made no communication to Cox, Keen, or Keen's solicitors until April 25, when he wrote to the solicitors that Cox knew that the house could not be sold without Walter Mear's consent, and that he refused to agree to the sale, and that, therefore, he (Samuel Mear) had no authority to allow the house to be sold.

On May 20, 1919 Keen commenced an action against Samuel Mear for specific performance of the agreement of Dec. 17, 1918, and for damage. By his defence Samuel Mear pleaded that he was unable to sell more than one undivided half of the property, and denied that he had entered into any binding agreement, and pleaded the Statute of Frauds. On Jan. 19, 1920, the writ was amended by adding Walter Mear as a defendant, and amended pleadings were delivered. By his amended defence Samuel Mear denied that he had any authority from Walter Mear to sell the house, or that there was any partnership under which he had authority to sell, and also pleaded that any partnership which had existed came to an end in 1915, and that there was then a verbal agreement between himself and Walter Mear, that no assets of the partnership should be realised without the consent of both the partners, and that any attempted sale was not, in fact, in the course of

A the ordinary business of the partnership. The defence of Walter Mear raised the same pleas as the amended defence of Samuel Mear. In both defences the Statute of Frauds was pleaded.

At the trial Samuel Mear did not give evidence, but Cox gave evidence for the plaintiff, and Walter Mear stated in his evidence that it was always the custom of himself and his brother to discuss the price of any of the partnership houses before B they were sold, which was not done in this case, and that, except in the present case, none of the partnership houses had ever been sold through a house agent.

By the Partnership Act, 1890, so far as material:

Section 5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm C of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in this particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Section 6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the D firm, by any person thereto authorised whether a partner or not, is binding on the firm and all the partners: Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Section 38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of E the partnership, and to complete transactions begun and unfinished at the time of the dissolution, but not otherwise.

F. L. Errington for the plaintiff.

M. Beebee for the defendant.

Cur. adv. vult.

F June 21. **RUSSELL, J.,** read this judgment, in which he stated the facts and continued: As against Samuel Mear, the contract is, on its face, a good enforceable contract entered into on his behalf by his agent. He is unable to carry it out, and specific performance of it cannot be decreed, because, in fact, he is not the sole owner of the premises, and his co-owner refuses to concur. In these circumstances, is he bound by the contract and liable to the plaintiff for breach of it? It G is said on his behalf that he is not liable at all, because Cox, the alleged agent, had no authority to make a contract on his behalf, and had certainly no authority to make this particular contract on his behalf. *Hamer* v. *Sharp* (1), *Wilde* v. *Watson* (2), *Chadburn* v. *Moore* (3), *Rosenbaum* v. *Belson* (4) and *Thuman* v. *Best* (5) were cited to me. The result of those cases is, in my opinion, this: That the mere employment by an owner of an estate agent to dispose of a house confers no authority H to make a contract; the agent is solely employed to find persons to negotiate with the owner; but, if the agent is definitely instructed to sell at a defined price, those instructions involve authority to make a binding contract and to sign an agreement. In the case before me the evidence shows that on Dec. 14, 1918 Samuel Mear called on Cox, and Cox told him he had a purchaser who, he thought, would buy for £500, and that thereupon Samuel Mear definitely instructed him to sell for £500 clear of I Cox's commission. Acting on these instructions, Cox signed a contract for the sale to the plaintiff for £515. In these circumstances Cox had, in my opinion, authority to sign an open contract on behalf of Samuel Mear to sell the property for that sum. But had he authority to sign the particular contract here in question? I think not. It contains a special condition as to title, which might or might not be less favourable to a vendor than the title under an open contract: as to this, see Lord Finlay's statement of the law in *McGrory* v. *Alderdale Estate Co.* (11) ([1918] A.C. at p. 508). It is no part of an estate agent's duty to deal with title; indeed, as a rule

(as was the fact in the case before me) the estate agent would know nothing about the title to the property which is placed in his hands for sale. Notwithstanding this, Samuel Mear became bound by the contract, because he subsequently approved of it and adopted it. On Jan. 11, 1919 Samuel Mear called on Cox, read the contract, and expressed himself very pleased with the deposit, told Cox to write to the purchaser's solicitors to say that the title deeds were at the bank, and that he would prefer to complete in June rather than March. On Jan. 18, 1919 his wife called on Cox on his behalf to try and obtain the £50 deposit. Until litigation supervened, he never suggested that the contract was not binding on him, and he has not been called before me to suggest that when he read the document he did not know and approve of its contents. In these circumstances, I hold that he was satisfied, and adopted the contract entered into on his behalf by Cox, and is liable for breach of it; nor does *De Bussche* v. *Alt* (12) which was cited on behalf of the defendants, affect the conclusion at which I have arrived on this branch of the case.

As regards the defendant Walter Mear, he never, in fact, authorised the sale, but repudiated it as soon as he heard of it. He relies, as a defence, on the Statute of Frauds, s. 4. In order to render him liable, it is necessary to find an agreement, or some memorandum or note thereof in writing, signed by him or some other person thereunto by him lawfully authorised. There is no agreement or memorandum signed by him or by anyone authorised by him: primâ facie the Statute of Frauds affords him a complete defence. It is, however, said that this defence is answered and destroyed by reason of s. 5 of the Partnership Act, 1890. [His Lordship read the section and continued:] It is said that Samuel Mear has effectually bound himself by the contract signed by Cox to sell and convey to the plaintiff, and that this act of Samuel Mear is an act for carrying on in the usual way business of the kind carried on by the firm, which binds his partner, Walter Mear. It was attempted to prove that, by the practice of the partners, the selling of the partnership houses was entrusted solely to Samuel Mear, but Cox's evidence on this point failed to establish the fact, and I accept Walter Mear's statement that he and his brother always agreed together as to price before any partnership house was sold, and that no partnership house had ever been sold through a house agent. That statement was, of course, subject to the exception of the one case involved in this action. Assuming that that state of affairs does not bring the case within the exception contained in s. 5 of the Partnership Act, 1890, I am, nevertheless, of opinion that the Statute of Frauds affords Walter Mear a good defence. Section 5 of the Partnership Act was not intended to and does override s. 4 of the Statute of Frauds. If Samuel Mear could bind the firm under s. 5 of the Partnership Act, and there existed a memorandum signed by him, it may well be that Walter Mear could not rely on the Statute of Frauds; but all that we have here is a memorandum signed by Cox as agent for one vendor—Samuel Mear. In effect, the plaintiff asks me to vary the memorandum by establishing by parol evidence (a) the existence of two vendors, and (b) the name of the second vendor. That is just what the Statute of Frauds prevents me from doing. *Jarrett* v. *Hunter* (6), *Lovesey* v. *Palmer* (7) are authorities for the proposition that a memorandum which can only be made sufficient by parol evidence is not a memorandum within the statute, and all the more so where the effect of the parol evidence would be, as here, not to supplement but to vary or contradict the statement in the memorandum that Cox was acting for a single vendor.

The result is that as against the defendant Walter Mear the plaintiff fails; and as against the defendant Samuel Mear the plaintiff is entitled to recover some damages. The question remains, what damages? The purchase has gone off owing to the inability of Samuel Mear to make a title. I am satisfied that Samuel Mear acted in perfect good faith, that he considered the price satisfactory, and that he did his best to induce his brother to complete the sale. In these circumstances, the case falls within the rule in *Flureau* v. *Thornhill* (8) and *Bain* v. *Fothergill* (9). *Re Daniel. Daniel* v. *Vassell* (10), was a case of a contract for the sale of a property

free from incumbrances by the vendor, who must have known that he could not pay off a mortgage on the property, sold with other property, if the mortgagees refused, as in fact they did, to release the property sold from their security. It does not apply to the case before me. The plaintiff is not entitled to damages for loss of bargain, nor is he, in my opinion, entitled either (a) to any part of the costs of his litigation as damages, or (b) to any interest in respect of the balance of purchase money which he placed on deposit at his bank. He is entitled to (a) interest at five per cent. on the deposit of £50 from Dec. 17, 1918, (b) such costs, if any, as he may have been put to in investigating title, and (c) a sum of 7s. 6d. which he paid to insure the property on the faith of the contract, and before the contract had been repudiated by Walter Mear. As against the defendant, Samuel Mear, there will be a declaration that the plaintiff is entitled to a return of the deposit and either an order on him to pay the sums (a) (b) and (c) above mentioned, or, if the parties are unable before the order is drawn up to agree a sum in respect of these matters, there must be an inquiry as to damages, with an order on that defendant to pay the sum certified on such inquiry to be due. As against the defendant Walter Mear, the action will be dismissed.

In regard to costs the plaintiff will neither pay costs to nor receive any from the defendant Samuel Mear. The defendants' costs of action, as from and including the application for leave to amend (but excluding any costs incurred by the defendant Samuel Mear, separately, and apart from his co-defendant), will be taxed, and the plaintiff will pay to the defendant Walter Mear one half of the costs so taxed.

Solicitors: *Bridges, Sawtell & Co.*, for *Gould & Swayne*, Glastonbury; *Haslewood, Hare Co.*, for *Geo. T. Cooke, Son & Pointer*, Bristol.

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

R *v.* GOVERNOR OF BRIXTON PRISON. Ex parte BLOOM

[King's Bench Division (Earl of Reading, C.J., Darling and Sankey, JJ.), December 1, 2, 1920]

[Reported 90 L.J.K.B. 574; 124 L.T. 375; 85 J.P. 87; 19 L.G.R. 62; 26 Cox, C.C. 687]

Alien—Deportation—Powers of Home Secretary—Need to prove deportation expedient for safety of realm—Review by court of Home Secretary's decision to make order—Aliens Restriction Act, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1 (1)—*Aliens Restriction Amendment Act*, 1919 (9 & 10 *Geo.* 5, *c.* 92), *s.* 1 (1)—*Aliens Order*, 1920, *art.* 12.

The Home Secretary, in acting under the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920, art. 12, may deport an alien who has been guilty of offences under the Acts whether or not his deportation is necessary or expedient for the safety of the realm. The court has no power, save in most exceptional circumstances, to review a decision of the Home Secretary to make an order for deportation.

Notes. Article 12 of the Aliens Order, 1920, has been replaced by art. 20 of the Aliens Order, 1953 (S.I. 1953, No. 1671).

As to deportation of an alien see 1 Halsbury's Laws (3rd Edn.) 520 et seq., and for cases see 2 Digest (Repl.) 190 et seq. For the Aliens Restriction Acts, 1914

and 1919, see 1 HALSBURY'S STATUTES (2nd Edn.) 691, 693, and for the Aliens Order 1953 see 2 HALSBURY'S STATUTORY INSTRUMENTS. A

Case referred to:

(1) *R.* v. *Governor of Brixton Prison, Ex parte Sarno*, [1916] 2 K.B. 742; 86 L.J.K.B. 62; 115 L.T. 608; 80 J.P. 389; 32 T.L.R. 717; 14 L.G.R. 1060; 2 Digest (Repl.) 191, *143*. B

Rule nisi to the governor of Brixton Prison for a writ of habeas corpus.

The applicant for the rule, Adolph Bloom, was a Russian Jew who had come to England in 1907, and had been in England ever since, and had no intention of returning to Russia. He stated, in his affidavit in support of the rule, that he had always been industrious and had never been charged with any offence against English law until Oct. 14, 1920, when he was charged before a metropolitan C magistrate with the following offences: Assaulting the police, failure to notify his change of residence in October, 1918, failure to have an identity book duly filled up, and failure to notify a change of his business address in 1917. The applicant pleaded guilty to all these charges, and the magistrate sentenced him to fourteen days' imprisonment and gave a certificate recommending him for deportation. The fourteen days' imprisonment expired on Oct. 28, 1920, and D the applicant was then removed to Brixton Prison to await deportation. On Oct. 29, 1920, the Home Secretary made, under the Aliens Restriction Acts, 1914 and 1919, and art. 12 of the Aliens Order, 1920, an order that the applicant should be deported from the United Kingdom, and that he should thereafter remain out of the United Kingdom, and that, until he could be conveniently conveyed to and placed on board the ship on which he was to leave the United Kingdom, and E whilst he was being conveyed to the ship, and until the ship finally left the United Kingdom, he should be kept in custody. In accordance with the general practice, the deportation order was not issued to the police for service pending the completion of the arrangements for the applicant's deportation. On Oct. 29, 1920, a letter, stating that the applicant would be deported, was also written from the Home Office to the applicant's then solicitor. F

By the Aliens Restriction Act, 1914, s. 1 (1):

"His Majesty may at any time when a state of war exists between His Majesty and any foreign Power, or when it appears that an occasion of imminent national danger or great emergency has arisen, by Order in Council impose restrictions on aliens, and provision may be made by the order . . . (c) for the deportation of aliens from the United Kingdom . . . (k) for any other G matters which appear necessary or expedient with a view to the safety of the realm."

By the Aliens Restriction (Amendment) Act, 1919, s. 1 (1):

"The powers which under sub-s. (1) of s. 1 of the Aliens Restriction Act, 1914 . . . are exercisable with respect to aliens at any time when a state of war exists H between His Majesty and any foreign Power, or when it appears that an occasion of imminent national danger or great emergency has arisen, shall, for a period of one year after the passing of this Act, be exercisable, not only in those circumstances, but at any time; and accordingly that sub-section shall, for such period as aforesaid, have effect as though the words 'at any time when a state of war exists between His Majesty and any foreign Power, I or when it appears that an occasion of imminent national danger or great emergency has arisen' were omitted."

The above Act was passed on Dec. 23, 1919.

By the Aliens Order, 1920:

"Art. 12 (1). The Secretary of State may, if he thinks fit, in any of the cases mentioned in this article make an order (in this order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the United

A Kingdom. (2) An order made under this article may be made subject to any condition which the Secretary of State may think proper. . . . (4) An alien with respect to whom a deportation order is made, or a certificate is given by a court with a view to the making of a deportation order, may be detained in such manner as may be directed by the Secretary of State, and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in B legal custody whilst so detained, and until the ship finally leaves the United Kingdom. . . . (6) A deportation order may be made in any of the following cases: (a) If any court certifies to the Secretary of State that the alien has been convicted either by that court, or by any inferior court from which the case of the alien has been referred for sentence or brought by way of appeal, of any of the offences specified in the third schedule to this order and that the C court recommends that a deportation order should be made in his case either in addition to or in lieu of sentence; or . . . (c) If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien."

The Solicitor-General (*Sir Ernest Pollock*, *K.C.*) and *G. A. H. Branson* showed D cause.

Artemus Jones, *K.C.*, and *S. P. J. Merlin* in support of the rule.

EARL OF READING, C.J.—The applicant, one Adolph Bloom, asks this court to order the issue of a writ of habeas corpus for the purpose of releasing him from custody in prison where he now is. He was brought before a metropolitan magistrate on charges of failing to notify a change of residence, failing to have an identity E book duly filled in, failing to notify a change of his business address, and assaulting the police. He pleaded guilty to all these charges, and the magistrate sentenced him to fourteen days' imprisonment and added a recommendation that the applicant should be deported from this country. That was on Oct. 14, 1920. On Oct. 28, 1920, the fourteen days' imprisonment expired. The applicant was still kept in prison, and on Nov. 16, 1920, an application was made to this court for F a rule nisi calling upon the governor of the prison to show cause why a writ of habeas corpus should not be issued. It now appears quite plainly that the Home Secretary did on Oct. 29, 1920, make the order for the deportation of this alien. On the application for the rule nisi it appeared as if no notice of the making of the order had been given until a letter of Nov. 15, 1920, which was received on Nov. 16, 1920, the day of the application for the rule nisi, and it seemed undesirable G that the applicant should be kept in prison seventeen or eighteen days without being informed that the Home Secretary had made an order for his deportation. But we have now ascertained that a letter was written on Oct. 29, 1920, from the Home Office in answer to a letter from the applicant's then solicitor, giving the information that the Home Secretary had determined to make an order for the applicant's deportation. Consequently any grievance that the applicant may have H appeared to have has now disappeared. Apart altogether from the legal aspect, I mention that matter because otherwise a wrong impression might have been created. It is quite clear that information was given by the Home Office on the day on which the Home Secretary determined that the applicant should be deported.

The applicant complains, first, that the order made by the Home Secretary was I ultra vires, and, secondly, that it was a misuse of his executive powers within the meaning of certain observations made by this court in *R.* v. *Governor of Brixton Prison*, *Ex parte Sarno* (1), and that therefore we ought to order the issue of a writ of habeas corpus. In my opinion there is no foundation for either of these contentions. The order was not ultra vires. It was made in pursuance of the powers conferred on the Home Secretary by Act of Parliament. The Act of 1919 received the Royal Assent on Dec. 23, 1919, and was limited in its operation to one year, and the reason for that is apparent when one looks at the history of the legislation. An Aliens Act was passed in 1905 which gave certain powers to

the Home Secretary. When in 1914 the war began, a statute was passed, which, as appears from its date, was an emergency statute, and which conferred very extensive powers upon the Home Secretary and enabled him to impose restrictions on the movements of aliens and on their stay in this country, and gave him the widest possible power to deport them. The powers so given are stated by the Act to be conditional on the existence of a state of war between His Majesty and any foreign Power, or of an occasion of imminent national danger or great emergency. That statute continued in operation until the Act of 1919 was passed at the end of that year. The Act of 1919 renewed the powers under the Act of 1914 with this important alteration, that it made it no longer necessary that there should be a state of war or an occasion of imminent danger or great emergency in order to entitle the Home Secretary to act. It appears clear to my mind, when I consider these various statutes, that the true position is that in 1919 Parliament thought it necessary to pass a new Act so as to define more precisely the powers of the Home Secretary at a time when there was no war and when there was not the same national emergency. The powers were conferred by that Act on the Home Secretary for one year, so as to enable him to clear up, as it were, the conditions which had been left when the armistice was made and when the war had come to an end for all practical purposes, but when, nevertheless, matters had not settled down to what one might term the normal or peaceful state of things. So Parliament gave these very wide powers to the Home Secretary, but limited them to one year. During that one year the applicant was convicted of the four offences to which he pleaded guilty, and, on the recommendation of the magistrate, the Home Secretary, in pursuance of the powers conferred upon him, made an order that the applicant should be deported.

The only ground upon which it could be contended that the order is ultra vires is that we must construe all the provisions preceding para. (k) of s. 1 (1) of the Act of 1914 as ejusdem generis with the words of para. (k), "for any other matters which appear necessary or expedient with a view to the safety of the realm," and that therefore the Home Secretary could make the order only if it appeared necessary or expedient for the safety of the realm. That is the argument, as I understand it. But the difficulty of giving effect to the limitation contended for is that the enactment in para. (k) has disappeared by reason of the Act of 1919. As the Act of 1914 originally stood the Home Secretary could use his powers only when there was a state of war or imminent national danger or emergency, and the words of para. (k) were intended to include any possible matters which might not have been dealt with under the preceding paragraphs, in order that the Home Secretary might have the fullest powers to provide for the national safety and might make a deportation order for reasons which appeared necessary or expedient with a view to the safety of the realm. In this case, when we bear in mind that we are dealing with an Act which conferred powers upon the Home Secretary, and struck out the limiting words of the previous Act, as to there being an occasion of national emergency or imminent danger or a state of war, it would be impossible to construe paras. (a) to (i) of s. 1 (1) of the Act of 1914 as if they were limited by the general language of para. (k). It seems to me that we must read the words of s. 1 (1) of the Act of 1914 as they now stand, namely,

> "His Majesty may at any time by Order in Council impose restrictions on aliens, and provision may be made by the order for the deportation of aliens from the United Kingdom."

I see no way of limiting the application of those words, particularly when there has been an inquiry and the magistrate has recommended the deportation. It is unnecessary to go through the various Acts, because this is the only point upon them that could be argued and it must be rejected.

The second point is one that may be dismissed in very few words. It is said that on the facts there was a misuse by the Home Secretary of his executive powers,

but, in my opinion, there is not the faintest ground for that suggestion, which was that there was a misuse of those powers in the sense to which I referred in using that expression in *Sarno's Case* (1). It was contended that the Home Secretary ought not to have exercised his discretion by making the order, but that is an appeal from the order. We have no right to sit on appeal from the Home Secretary when he has used the executive powers conferred upon him, provided that he has used them in a lawful way in accordance with the Act. If he has come to a conclusion from which we might differ (and there is no ground for suggesting that we should), we could not interfere. So far from there having been a misuse of the Home Secretary's powers, all that we have before us is that the applicant, it is said, seems to have lived peaceably and lawfully in this country until the offences in question were committed by him. We do not know for what reason the Home Secretary thought it right to make the order. He may have considered particular circumstances which are not present to our minds. He may have information which we have not. He may think that the condition of the country required him to take action, although on the facts before us we might not think so. It is sufficient to say that there is no evidence whatever of any misuse by the Home Secretary of his executive powers, and, therefore, the second ground fails. The result is that, in my opinion, the rule must be discharged with costs.

DARLING, J.—I agree.

SANKEY, J.—I agree.

Rule discharged.

Solicitors: *Treasury Solicitor; Stikeman & Co.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

R. *v.* LEMAN STREET POLICE STATION INSPECTOR AND SECRETARY OF STATE FOR HOME AFFAIRS. Ex parte VENICOFF

[King's Bench Division (Earl of Reading, C.J., Avory and Roche, JJ.), May 18, 19, 1920]

[Reported [1920] 3 K.B. 72; 89 L.J.K.B. 1200; 23 L.T. 573; 84 J.P. 222; 36 T.L.R. 677]

Alien—Deportation—Powers of Home Secretary—Need to hold inquiry or give person against whom order to be made opportunity to be heard—Aliens Order, 1919 (*S.R. & O.* 1919, *No.* 1037), *art.* 12 (1).

By art. 12 (1) of the Aliens Order, 1919 [now Aliens Order, 1953, art. 20 (2) (b)], the Home Secretary is empowered to make a deportation order against an alien if he "deems it to be conducive to the public good to do so."

In exercising this power the Home Secretary is acting in an executive, and not in a judicial, capacity, and, therefore, it is not necessary for him, before making an order, to hold an inquiry or give the person against whom he proposes to make the order an opportunity of being heard. Article 12 (1), so interpreted, was not ultra vires as being against natural justice.

Notes. Referred to: *R.* v. *Home Secretary, Ex parte Bressler*, [1924] All E.R. Rep. 668.

As to deportation of an alien see 1 Halsbury's Laws (3rd Edn.) 520 et seq., and

for cases see 2 DIGEST (Repl.) 190 et seq. For Aliens Order, 1953, see 2 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

(1) *R.* v. *Halliday, Ex parte Zadig*, [1917] A.C. 260; 86 L.J.K.B. 1119; 116 L.T. 417; 81 J.P. 237; 33 T.L.R. 336; 61 Sol. Jo. 443; 25 Cox, C.C. 650, H.L.; 2 Digest (Repl.) 184, *124*.

(2) *Russell* v. *Russell* (1880), 14 Ch.D. 471; 49 L.J.Ch. 268; 42 L.T. 112; 36 Digest (Repl.) 610, *1711*.

Also referred to in argument:

R. v. *Brixton Prison (Governor), Ex parte Sarno*, [1916] 2 K.B. 742; 86 L.J.K.B. 62; 115 L.T. 608; 80 J.P. 389; 32 T.L.R. 717; 14 L.G.R. 1060; 2 Digest (Repl.) 191, *143*.

R. v. *Home Secretary, Ex parte Duke of Château-Thierry*, [1917] 1 K.B. 922; 86 L.J.K.B. 923; 116 L.T. 226; 81 J.P. 125; 33 T.L.R. 264; 61 Sol. Jo. 367; 15 L.G.R. 351, C.A.; 2 Digest (Repl.) 191, *145*.

R. v. *Chiswick Police Station Superintendent, Ex parte Sacksteder*, [1918] 1 K.B. 578; 87 L.J.K.B. 608; 118 L.T. 160; 82 J.P. 137; 34 T.L.R. 279; 62 Sol. Jo. 363; 16 L.G.R. 335, C.A.; 2 Digest (Repl.) 192, *146*.

A.-G. for Canada v. *Cain, Same* v. *Gilhula*, [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 22 T.L.R. 757, P.C.; 2 Digest (Repl.) 180, *99*.

Rules nisi for habeas corpus and certiorari directed to the inspector of Leman Street Police Station and to the Home Secretary.

By an order date April 28, 1920, made under the powers conferred by the Aliens Restriction Act, 1914, and art. 12 of the Aliens Order, 1919, the Home Secretary ordered that Samuel Vanicoff, the applicant, a Russian subject, born in Russia, should be deported from the United Kingdom and remain thereafter out of the United Kingdom, and that, until he could be placed on board a ship, he should be kept in custody. The applicant had been brought as an infant to this country thirty years ago. He had a series of convictions against him in 1901, 1902, 1904, and 1908. In 1919 the applicant instituted proceedings for divorce, and in evidence taken on commission in those proceedings, which were still pending, a woman alleged that he had taken her and his wife to Buenos Aires in 1912 and there lived for some time on their immoral earnings. This allegation the applicant denied on affidavit, but it appeared that the Criminal Investigation Department, from investigations made by them towards the end of 1919, had formed the opinion that there were strong grounds for concluding that the applicant was still living on the immoral earnings of women. Acting on these statements the Home Secretary made the above order on the ground that he "deemed it to be conducive to the public good." The rules were then obtained on the grounds (i) that on the true construction of the article the Home Secretary had no power to make the order without giving the applicant an opportunity of knowing and challenging the grounds of the order; (ii) that if this was not the true construction of the article it was ultra vires; and (iii) that there were no grounds on which the Home Secretary could reasonably have believed it to be conducive to the public good to make the order.

By the Aliens Order, 1919 (made under the Aliens Restriction (Amendment) Act, 1919), s. 12 (1):

> "The Secretary of State may, if he deems it to be conducive to the public good, make an order (in this order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the United Kingdom. . . ."

G. A. H. Branson showed cause.

Compston, K.C. (*A. S. Comyns Carr* with him) in support of the rules.

EARL OF READING, C.J.—Both these rules must be discharged. The applicant has obtained rules nisi for a writ of certiorari and for a writ of habeas corpus,

calling upon the Home Secretary and an inspector of police to show cause why an order for his deportation should not be quashed and why he should not be discharged from custody, the fact being that an order for his deportation had been made against him as an alien with regard to whom the Home Secretary had deemed it to be conducive to the public good that he should be required to leave, and to remain thereafter out of, the United Kingdom.

The power to make the deportation order is derived from art. 12 of the Aliens Order, 1919, made by virtue of the Aliens Restriction (Amendment) Act, 1919, whereby Parliament gave power to His Majesty in Council to impose restrictions upon aliens and to make provision (inter alia) for the deportation of aliens from the United Kingdom. In pursuance of that power the Aliens Order, 1919, was made, and under art. 12 (1) the Secretary of State may, if he deems it to be conducive to the public good, make an order requiring an alien to leave and remain thereafter out of the United Kingdom. The Secretary of State did make such an order in this case, and it has been contended that the order is invalid on two grounds—(i) that he could not make such an order without holding an inquiry, and that that is the true meaning of the article because of the words to be found in it, "if he deems it to be conducive to the public good"; and (ii) that, if that construction is not right, the order is bad because the article is ultra vires.

In truth, the whole case depends on the meaning to be attributed to the words, "if he deems it to be conducive to the public good." Before dealing with those words it is necessary briefly to state the facts. The applicant was convicted in 1902, 1903, and 1904 of offences for which he received terms of imprisonment with hard labour. But it is right to say that according to the evidence before us he was then between seventeen and twenty years of age, and, save for a trifling offence of obstructing a railway policeman, no other conviction has been recorded against him, and I have no doubt that, if nothing further had been brought against him, no order for his deportation would have been made, but as to that I am only expressing my own opinion. Apparently, however, divorce proceedings were pending between the applicant and his wife and another person, and, according to the applicant's statement, during the course of taking evidence on commission in those proceedings, charges were made against him of living on the immoral earnings of his wife and another woman and of having taken them to Argentina for the purpose of exploiting their prostitution and deriving money from it. If those charges are true, they disclose acts by the applicant as degrading as one can well imagine. According to the evidence before us—and it was before the Home Secretary—there were made to the Criminal Investigation Department reports which indicated that since this visit to South America, which was in 1912, the applicant had still been living on the prostitution of women, and was, at the time when the deportation order was made, living on the immoral earnings of women. It cannot be argued that, if those reports are true, the Home Secretary would not have been justified, if he had power so to do under the Aliens Order, 1919, in making the deportation order. But it is said that these statements, upon which the Home Secretary acted, were made by persons interested in blackening the applicant's character for the purpose of prejudicing him in the divorce proceedings, and that the statements are utterly untrue. It is right to mention that, as that is the view taken in the affidavit of the applicant. The Home Secretary did not express a concluded opinion as to whether the statements were true, but he did say that there was strong ground for forming that conclusion, and there the matter was left.

The applicant says that in any event he ought to have had an opportunity of making representations to the Secretary of State before the order was made, or at least before it was put into operation. Sir John Pedder, on behalf of the Home Secretary, stated in his affidavit that if the applicant had applied to the Home Office and made representations they would have been considered and a conclusion upon them would have been arrived at, but that no such application was made

before the case came into court. During the course of the arguments counsel showing cause has stated on behalf of the Home Secretary (and, although there was no necessity for the statement, the court was glad to hear it) that the Home Secretary is ready even now to hear any representations which the applicant may choose to make to him, whatever the result of this case may be. That is only what is to be expected from the Home Secretary, who is merely concerned in coming to a conclusion for the public good. But this court has really nothing to do with the facts of the case, and I am making these observations merely because there has been considerable discussion about the matter, and it must not be assumed that we have come to any conclusion upon the facts. What the court has to do is to consider the statute, and the article of the order made under it, so as to ascertain what are the powers of the Secretary of State. It is not for this court to pronounce whether a particular order is or is not conducive to the public good. Parliament has expressly given the power to the Secretary of State, as an executive officer, to make an order for the deportation of aliens, and has not imposed any conditions. By the Aliens Restriction Act, 1914, power was given to the King in Council to make these regulations when a state of war existed between the King and any foreign Power, or when there was imminent danger or great emergency. Under the Aliens Restriction (Amendment) Act, 1919, the limitation of period in the Act of 1914 has disappeared, and there is power for one year from the passing of the Act of 1919 to make these regulations. It is not, however, material in the present case, and I merely mention it because it was referred to in argument.

That the Home Secretary had power to make the deportation order is, therefore, in my opinion, clear. The chief point that has been argued before us is whether he must hold an inquiry before making the order. Counsel in support of the rules has contended that by reason of the use of the word "deems" in art. 12 the Home Secretary must act as a judicial tribunal, and, therefore, could not make an order without hearing the party against whom it is made—in other words, that he must hold an inquiry. In my opinion, the Home Secretary is not a judicial tribunal for this purpose. He is an executive officer intrusted with a duty by Parliament. The legislature, in its wisdom, took from the courts during the war the power of inquiring into the particular facts of cases in respect of which orders might be made either under the Defence of the Realm Acts or the Aliens Restriction Acts and left it to the judgment of the Secretary of State. As was said in the House of Lords by LORD FINLAY in *R.* v. *Halliday* (1), dealing with reg. 14B of the Defence of the Realm Regulations, which, though different, was analogous: "The duty of deciding this question [as to internment] is by the order thrown upon the Secretary of State, and it is for him to decide it as Secretary of State." I cannot find anything which would lead to the conclusion that the word "deems" in art. 12 is to be construed as if it means that the Home Secretary can come to a conclusion only after he has held an inquiry. If that construction was adopted, the value of the order would be considerably impaired, for it might very well be that a person against whom it was proposed to make such an order would take care, if he had notice of such an inquiry, not to present himself, and, as soon as he knew that an inquiry would be held, would take steps to prevent his apprehension. In any event, however, I have come to the conclusion that the Home Secretary is not a judicial tribunal for this purpose, but is an executive officer bound to act for the public good, and it is left to his judgment whether, on the facts before him, it is desirable to make such an order. He must come to a conclusion on the facts before him, and the responsibility is upon him. Further, I can see in the language of the statute and the order made under it nothing which would lead me to conclude that the word "deems" is to be construed as SIR GEORGE JESSEL, M.R., construed it in *Russell* v. *Russell* (2) (14 Ch.D. at p. 479), which was a different class of case, namely, an action by a club committee which had power, in the event of their deeming that a member had been guilty of misconduct, to expel

A him, and in which it was said that they must come to a conclusion after holding an inquiry and applying the maxim, audi alteram partem.

It has also been contended that if the Home Secretary was not bound to hold an inquiry the article must be ultra vires because it would be against natural justice. I cannot agree with that view. As soon as we have come to the conclusion that this was an executive act left to the Home Secretary and not to a judicial tribunal B to decide, it follows that in the exceptional circumstances of emergency that had arisen and led to the passing of this legislation it was thought by Parliament that the matter should be left to the decision of an executive officer instead of a judicial tribunal. This has many times formed the subject of discussion in the courts during the war, and it led to the decision in *R.* v. *Halliday* (1), where the whole subject was considered. It is sufficient to say that this is emergency legislation, C and that the power which has been given is for the purpose of enabling the executive to act quickly and does not impose upon the executive the obligation of holding an inquiry. Parliament has done this deliberately, and the result is that the rules must be discharged.

AVORY, J.—I am of the same opinion. The application for these rules can D succeed in this case only if it is shown that the order for the deportation of the applicant was made without jurisdiction. It is not disputed that on the face of it the order is perfectly good, and the only ground for suggesting that it was made without jurisdiction is the use of the words, "if he [the Secretary of State] deems it to be conducive to the public good," implying, as is contended, that he must hold an inquiry and hear the person against whom it is proposed to make the E order. The only foundation for the argument that the word "deems" must be so construed is the decision of Sir George Jessel, M.R., in *Russell* v. *Russell* (2). But that learned judge never said that he thought that in every case where the word "deem" occurred in an Act of Parliament or in an Order in Council there must be a judicial inquiry. In my opinion, that case has no application to the word "deems" in this order. It seems to me that the very word itself is incon- F sistent with the idea of an inquiry or of a controversy between parties. The matter is entirely for the executive officer, and the whole foundation of the argument fails. I will only add that the applicant in his affidavit, without apparently much confidence in his legal submission, applied, in the alternative, that the operation of the order might be postponed until after the hearing of the proceedings for divorce. That is, however, a matter entirely for the Home Secretary. I agree G with everything that the Lord Chief Justice has said.

ROCHE, J.—I agree.

Rules discharged.

Solicitor: *Solicitor to the Treasury; Raphael, Zeffertt & Co.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

SIMMONDS *v.* COCKELL

[King's Bench Division (Roche, J.), February 9, 1920]

[Reported [1920] 1 K.B. 843; 89 L.J.K.B. 415; 123 L.T. 196; 36 T.L.R. 252; 25 Com. Cas. 167]

Insurance—Burglary—Housebreaking—Warranty that "premises are always occupied"—Temporary absence from premises.

The plaintiff, who carried on business as a ladies' outfitter, took out a policy of insurance, which was underwritten by the defendant, whereby the defendant agreed to indemnify the plaintiff against loss or damage by burglary, housebreaking or theft of the stock and contents of the plaintiff's premises. The policy contained the following clause: "Warranted that the said premises are always occupied." The plaintiff and his wife, but no one else, lived on the premises in question. During the currency of the policy, when the plaintiff and his wife were both absent for a few hours from the premises, thieves broke in and stole goods to the value of £475. On a claim by the plaintiff in respect of the loss, the defendant denied liability on the ground that, by leaving the premises unattended, the plaintiff had committed a breach of warranty, and, therefore, the defendant was not liable for the loss.

Held: the clause meant that the premises were to be used continuously and without interruption as a residence, and did not mean that at no time were they to be left unattended; therefore the plaintiff was entitled to recover.

Notes. As to burglary insurance see 22 Halsbury's Laws (3rd Edn.) 326, 327, and for cases see 29 Digest 415 et seq.

Case referred to:

(1) *Winicofsky* v. *Army and Navy General Assurance Association, Ltd.* (1919), 88 L.J.K.B. 1111; 35 T.L.R. 283; 29 Digest 418, *3262.*

Action in the Commercial List tried by Roche, J.

The plaintiff claimed for a loss under a Lloyd's policy of insurance against burglary, subscribed by the defendant and other underwriters, by which the stock and contents of the plaintiff's premises were insured against loss or damage by (inter alia) burglary, housebreaking, or theft. The plaintiff was a ladies' outfitter, who carried on business at Whitecross Street, London, E.C. The action was brought under a policy issued on May 1, 1919, to run from April 24, 1919, to May 23, 1920. The policy insured the plaintiff's stock on the premises of the plaintiff at Whitecross Street for £3,000 against loss or damage by burglary, housebreaking and theft. The policy contained a clause as follows: "Warranted that the said premises are always occupied." The defendant contended that the plaintiff had broken this warranty. The plaintiff and his wife and no other person resided on the premises. On June 22, 1919, during the currency of the policy, the plaintiff and his wife were both out and the premises were left unattended for a considerable interval of time. The plaintiff's wife attended a garden fête at Hackney, and was there from 2.30 until about 11.30 at night. The plaintiff was also out from 2.30 until about 11.30, except for a short interval between 6 p.m. and 7 p.m., when he went home to change his clothes before joining his wife at the fête. During the absence of the plaintiff and his wife the premises were broken into and the plaintiff's goods to the value of about £475 were stolen. The action was brought to recover that loss under the policy. The sole question before the court was whether, on the true construction of the warranty clause, there had been a breach of it on the part of the plaintiff.

E. Austin Farleigh for the plaintiff.

F. Van den Berg for the defendant.

ROCHE, J.—The plaintiff sues one of the underwriting members of Lloyd's, under a Lloyd's policy of insurance against burglary, housebreaking and theft,

dated May 1, 1919. During the currency of the policy the premises were broken into, and about £475 worth of the plaintiff's goods were stolen. The action is brought to establish the liability of the defendant and the other underwriters of the policy. The defence is a short one, and turns on one point only—not an easy one to decide.

The policy contains the following clause: "Warranted that the premises are always occupied." I have to decide whether that warranty has been broken by the plaintiff. It is alleged that the warranty has been broken in this case, and that therefore the underwriters are not liable. The facts are that on June 22 the premises were broken into. The plaintiff and his wife, who were the only persons resident on the premises, were absent from the premises on the afternoon of the day of the burglary. The plaintiff was away partly on business, and his wife spent the afternoon at a garden party and fête, where she was joined later by the plaintiff, and they both spent the evening at the fête. During their absence the shop and premises were left unattended between 2.30 p.m. and 11.30 p.m., except for an interval about seven o'clock p.m. when the plaintiff himself returned to change his clothes. If the warranty means, as the defendant contends, that the premises are never to be left unattended, and that there must be some continuous attendance on the premises, then there has undoubtedly been a breach of the warranty for both the plaintiff and his wife were absent from the premises for some hours on the day in question. But, in my judgment, that is not the meaning of the warranty. I think it means that the premises are to be used, continuously and without interruption, for occupation, that is to say, as a residence, and not merely as a lock-up shop which is left unoccupied after business hours. That is the construction I should put on the words, and I am fortified in arriving at this conclusion by the judgment of BRAY, J., in *Winicofski* v. *Army and Navy General Assurance Association, Ltd.* (1), and by the American decisions cited by counsel for the plaintiff, most of which are collected in MR. MACGILLIVRAY'S most useful book on INSURANCE LAW, at p. 887.

But the matter does not rest there, for if the warranty does not bear the meaning which I have given to it, I should hold, that the language used is very ambiguous; and it is a well-known principle of insurance law and of other matters, that if the language of a clause drawn by a party himself for his own protection is ambiguous it must be construed against him, and if the words of a warranty in a policy are ambiguous they must be construed against the underwriter who has inserted the warranty in it for his own protection. Therefore the defence, on the whole, fails. The only materiality which attached to the question whether the plaintiff returned to the premises about seven o'clock is that it fixes the time when the burglary happened, because the premises were all right then. It was contended for the defendant that if the warranty is to be construed in the way I suggest, it affords very little protection to the underwriters. I do not agree. If the premises are used for residential as well as for business purposes, it is obvious that a thief would never know at what moment the occupier might return from a temporary absence and disturb his operations. It is that kind of occupation which this warranty requires and which has been secured. The defendant has not stipulated for the continuous presence of some one in the premises, which he could have done by providing that the premises were never to be left unattended. I therefore give judgment for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors: *Osborn & Osborn; Windybank, Samuell & Lawrence.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

CRAMP *v.* CRAMP AND FREEMAN

[Probate, Divorce and Admiralty Division (McCardie, J.), February 13, 17, 19, 27, 1920]

[Reported [1920] P. 158; 89 L.J.P. 119; 123 L.T. 141; 36 T.L.R. 333]

B

Divorce—Condonation—"Conditional reinstatement of offending spouse"—Intercourse by husband with wife after knowledge of her adultery—No statement of forgiveness.

Condonation is not the conditional forgiveness, but the conditional reinstatement, of the offending spouse, and a husband who has had sexual relations with his wife after knowledge of her adultery must be conclusively presumed to have condoned her offence. Forgiveness in the sense of pardon and the cessation of resentment against an offending spouse is not essential to the existence of condonation. A truer definition of condonation is that it is a conditional waiver of the right of the injured spouse to take matrimonial proceedings.

C

D

Notes. Followed: *Turnbull* v. *Turnbull and Coats* (1925), 41 T.L.R. 507. Considered: *Fearn* v. *Fearn*, [1948] 1 All E.R. 459; *Perry* v. *Perry*, [1952] 1 All E.R. 1076. Referred to: *Henderson* v. *Henderson and Crellin*, [1944] 1 All E.R. 44; *Maslin* v. *Maslin*, [1952] 1 All E.R. 477; *Burch* v. *Burch* [1958] 1 All E.R. *848*.

As to condonation see 12 Halsbury's Laws (3rd Edn.) 302–307, and for cases see 27 Digest (Repl.) 395 et seq.

Cases referred to:

E

(1) *Dent* v. *Dent* (1865), 4 Sw. & Tr. 105; 34 L.J.P.M. & A. 118; 13 L.T. 252; 164 E.R. 1455; 27 Digest (Repl.) 399, *3283*.

(2) *Peacock* v. *Peacock* (1858), 1 Sw. & Tr. 183; 27 L.J.P. & M. 71; 31 L.T.O.S. 302; 6 W.R. 866; 164 E.R. 684; 27 Digest (Repl.) 402, *3314*.

(3) *Blandford* v. *Blandford* (1883), 8 P.D. 19; 52 L.J.P. 17; 48 L.T. 238; 31 W.R. 508; 27 Digest (Repl.) 397, *3269*.

F

(4) *Keats* v. *Keats and Montezuma* (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 5 Jur. N.S. 176; 7 W.R. 377; 164 E.R. 754; 27 Digest (Repl.) 395, *3260*.

(5) *Ellis v. Ellis and Smith* (1865), 4 Sw. & T. 154; 34 L.J.P.M. & A. 100; 13 L.T. 211; 11 Jur. N.S. 610; 13 W.R. 964; 164 E.R. 1475; 27 Digest (Repl.) 402, *3315*.

G

(6) *Crocker* v. *Crocker* (1920), 122 L.T. 749; 36 T.L.R. 216; affirmed ante, p. 134; [1921] P. 25; 90 L.J.P. 136; 124 L.T. 493; 37 T.L.R. 137; 65 Sol. Jo. 153, C.A.; 27 Digest (Repl.) 397, *3273*.

(7) *Bernstein* v. *Bernstein*, [1893] P. 292; 69 L.T. 513; sub nom. *Bernstein* v. *Bernstein, Turner and Sampson*, 63 L.J.P. 3; 9 T.L.R. 639; 37 Sol. Jo. 730; 6 R. 609, C.A.; 27 Digest (Repl.) 403, *3320*.

H

(8) *D'Aguilar* v. *D'Aguilar* (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E.R. 748; 27 Digest (Repl.) 487, *4256*.

(9) *Houghton* v. *Houghton*, [1903] P. 150; 72 L.J.P. 31; 89 L.T. 76; 52 W.R. 272; 19 T.L.R. 505; 47 Sol. Jo. 548; 27 Digest (Repl.) 410, *3390*.

(10) *Copsey* v. *Copsey and Erney*, [1905] P. 94; 74 L.J.P. 40; 91 L.T. 363; 20 T.L.R. 728; 27 Digest (Repl.) 410, *3391*.

I

(11) *Price* v. *Price and Brown*, [1911] P. 201; 80 L.J.P. 145; 105 L.T. 441; 27 T.L.R. 560; 55 Sol. Jo. 689; 27 Digest (Repl.) 411, *3393*.

(12) *Collins* v. *Collins* (1884), 9 App. Cas. 205; 32 W.R. 501, H.L.; 27 Digest (Repl.) 410, *3388*.

(13) *Rose* v. *Rose* (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 31 W.R. 573, C.A.; 27 Digest (Repl.) 433, *3616*.

(14) *Rowell* v. *Rowell*, [1900] 1 Q.B. 9; 69 L.J.Q.B. 55; 81 L.T. 429; 16 T.L.R. 10, C.A.; 27 Digest (Repl.) 244, *1977*.

(15) *Hall* v. *Hall and Kay* (1891), 64 L.T. 837; subsequent proceedings, [1891] P. 302; 60 L.J.P. 73; 65 L.T. 206; 7 T.L.R. 590, C.A.; 27 Digest (Repl.) 395, *3259*.

(16) *Roberts* v. *Roberts and Temple* (1917), 117 L.T. 157; 33 T.L.R. 333; 61 Sol. Jo. 492; 27 Digest (Repl.) 399, *3281*.

(17) *Durant* v. *Durant* (1825), Hag. Ex. 733; 162 E.R. 734; 27 Digest (Repl.) 396, *3265*.

(18) *Turner* v. *Turner* (1854), 2 Ecc. & Ad. 201, n.; 164 E.R. 387; 27 Digest (Repl.) 401, *3308*.

(19) *Beeby* v. *Beeby* (1799), Hag. Ecc. 789; 1 Hag. Con. 142, n.; 162 E.R. 755; 27 Digest (Repl.) 399, *3280*.

(20) *Snow* v. *Snow* (1842), 2 Notes of Cases, Supp. i; 6 Jur. 285; 27 Digest (Repl.) 404, *3339*.

(21) *Newsome* v. *Newsome* (1871), L.R. 2 P. & D. 306; 40 L.J.P. & M. 71; 25 L.T. 204; 19 W.R. 1039; 27 Digest (Repl.) 410, *3387*.

(22) *Campbell* v. *Campbell* (1857), Dea. & Sw. 285; 29 L.T.O.S. 150; 3 Jur. N.S. 845; 5 W.R. 519; 164 E.R. 578; 27 Digest (Repl.) 516, *4598*.

(23) *Wakefield* v. *Mackay* (1807), 1 Hag. Con. 394; 1 Phillim. 134, n.; 161 E.R. 593; 27 Digest (Repl.) 37, *138*.

(24) *Swift* v. *Kelly* (1835), 3 Knapp. 257; 12 E.R. 648, H.L.; 11 Digest (Repl.) 462, *960*.

(25) *Moss* v. *Moss*, [1897] P. 283; 66 L.J.P. 154; 77 L.T. 220; 45 W.R. 635; 13 T.L.R. 459; 27 Digest (Repl.) 36, *131*.

Also referred to in argument:

Dance v. *Dance* (1799), 1 Hag. Ecc. 794, n.; 162 E.R. 757; 27 Digest (Repl.) 400, *3296*.

Everett v. *Everett and McCullum*, [1919] P. 298; 88 L.J.P. 130; 121 L.T. 503; 35 T.L.R. 613; 63 Sol. Jo. 682, C.A.; 27 Digest (Repl.) 439, *3690*.

Husband's Petition for divorce on the ground of the wife's adultery with the co-respondent. Both the wife and the co-respondent by their answers admitted adultery, but pleaded condonation, and the wife further alleged that the husband had himself on several occasions been guilty of adultery. The husband in his evidence denied that he had ever had sexual intercourse with the wife after he was aware of her misconduct. The wife in her evidence, while maintaining that the husband had had intercourse with her on several occasions with knowledge of her adultery, admitted that he had never forgiven her.

Cotes-Preedy (with him *Fisher*) for the wife and the co-respondent.
Tyndale (with him *W. Latey*) for the husband.

Cur. adv. vult.

Feb. 27.—**McCARDIE, J.,** read the following judgment.—This petition compels, with grave directness, an inquiry into the law of condonation. The husband asks for a dissolution of his marriage on the ground of his wife's adultery with a man named Freeman. The adultery is admitted. Both the wife and the co-respondent plead condonation. They also allege that the husband himself committed adultery with several females. I need only say that these charges are not established.

The circumstances of the case can be briefly stated. I will first mention the undisputed facts. The marriage took place in 1906. There are several children. The husband joined the army in 1916. During his absence adultery took place between his wife and the co-respondent. Pregnancy resulted from the illicit intimacy. The husband came home on leave on Dec. 22, 1917. He observed the pregnancy of his wife. She confessed her sin, and said that Freeman had seduced her. The husband then said that she must leave him, and that he should divorce her. Within the next day or two he took away the children. On Dec. 23 he went to stay with his mother and there resided with the children. On Dec. 24 he caused the cessation of the army allowance to his wife. From this time forward

he paid nothing to her. The spouses never met after Dec. 30. His wife then left the house as a dismissed woman, and has since earned her own living. Her child, by the co-respondent Freeman, was born within a few weeks of the separation. Such are the undisputed facts, and taken alone they certainly tend to negative condonation. But further facts must be stated. On the night of Dec. 22 the husband, who was greatly fatigued with his journey home and with the events of the day, slept at his house. He asserts that he went to bed with one of the children, fell asleep, and found, in the early morning, that his wife had come to bed. He denies that intercourse took place. His wife, on the other hand, alleges that they went to bed together and that connection took place in the course of the night. The husband admits that during the week following the discovery of his wife's misconduct he paid several visits to the house during the daytime. I do not doubt that he paid such visits for the purpose of making arrangements for a separation. He took no meals at the house, but on the last visit he took tea with his wife. The wife alleges that on each occasion of these visits sexual intercourse occurred. This is wholly denied by the husband. He says that no intercourse took place after the discovery of his wife's infidelity. After careful consideration I feel no hesitation in accepting the evidence of the wife. I am satisfied that she was a truthful witness, and that connection took place as she asserts. But the evidence of the wife herself gives rise to the difficulty which has led me to reserve my judgment. She states with conspicuous frankness that her husband never forgave her. This she admitted twice in the clearest manner. In examination in chief she said: "He did not forgive me, although we parted on affectionate terms." In cross-examination she again said: "My husband never forgave me, but he had connection with me." In her subsequent letter to her husband she never suggested that she had been forgiven. She accepted the position of a dismissed wife. Upon the evidence before me I am compelled to find that the husband never announced any forgiveness to the wife, but intended throughout to divorce her, and that the wife never asked for forgiveness, or believed that she had received it. I use the word "forgiveness" in its ordinary conversational sense. These findings of fact require me to consider the essential features of the law of condonation as administered by this court.

Condonation is a doctrine established by the old ecclesiastical courts. The phrase does not occur in the civil law. It was introduced into the English courts from the canon law. If condonation be established before me, then I am bound by ss. 29 and 30 of the Matrimonial Causes Act, 1857 [see now s. 4 (2) (b) of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388)], to dismiss the petition. Now, condonation is usually described as the conditional forgiveness of a known matrimonial offence, the implied condition being that no further matrimonial offence shall be committed. By the matrimonial law of this country the offence of every married person is recorded on tablets which do not perish. If condonation takes place, the record is not blotted out, but over it is placed an obscuring veil. Until a new matrimonial sin occurs the merciful barrier to sight remains. If, however, a further offence be committed, then the injured spouse may lawfully raise the veil and point with rigorous finger to the record of offence, which had previously been hidden from view. No matrimonial offence is erased by condonation. It is obscured, but not obliterated. It may be revived after many years. Such is the doctrine which has been impressed on the matrimonial law of England, and the principle is one which deepens the duty of continued good behaviour on the spouse who has once offended. This doctrine, I may observe, is not the Christian doctrine of forgiveness. It is wholly different, e.g., from the meaning of the word "forgiveness" in St. Luke, chap. 7, v. 47, where the great words appear: "Her sins which are many are forgiven." Nor is it the lay doctrine of forgiveness. I need only cite the famous line of POPE in his Essay on Criticism (Part 2, line 325): "To err is human—to forgive divine."

The doctrine of condonation is peculiar in its origin, peculiar in its feaures, but,

perhaps, most peculiar in its notion of forgiveness. It seem to me to be vital to remember that the forgiveness of condonation may be a wholly different thing from the forgiveness spoken of by ordinary men and women. As Sir Cresswell Cresswell said in *Dent* v. *Dent* (1):

> "Condonation is a technical word. It had its origin and, so far as I know, its entire use in the ecclesiastical courts, and it means forgiveness with a condition."

This notion of forgiveness runs through most of the decisions. Thus in *Peacock* v. *Peacock* (2) Sir Cresswell Cresswell said:

> "Condonation signifies forgiveness of a conjugal offence with full knowledge of all its particulars."

So in *Blandford* v. *Blandford* (3) Lord Hannen says:

> "She forgave him on condition that he sinned no more, and that is the legal definition of condonation."

And in the famous case of *Keats* v. *Keats and Montezuma* (4) the word "forgiveness" continually occurs. Finally, I may cite *Ellis* v. *Ellis and Smith* (5) where the matter was put by Sir Cresswell Cresswell with a peculiar emphasis, when he said:

> "It is necessary to prove that he took his wife back with the intention of forgiving her, and believing her to be guilty."

I venture to think, with the utmost diffidence, that this emphatic use of the word "forgiveness" tends to obscure the true meaning of the doctrine of condonation, and to treat forgiveness in the lay or Christian view of that term as an absolute essential of condonation. In Murray's Dictionary the meaning of the word "forgive" is said to be: "To give up resentment against—to pardon." Forgiveness in this sense is not, in my humble opinion, essential to the proof of condonation. It is a most important circumstance, but not essential. It will be found, I think, that the truer definition of condonation is that it is a conditional waiver of the right of the injured spouse to take matrimonial proceedings, and is not forgiveness at all in the ordinary sense. As it is put in Shelford on Marriage and Divorce:

> "Condonation extinguishes the right of complaint except for subsequent acts, and is accompanied with an implied condition that the injury shall not be repeated, and that a repetition of the injury takes away the condonation, and operates as a revival of former acts."

In this passage, it will be observed, the word "forgiveness" does not appear. Perhaps I may use the language of an ecclesiastical jurist and say that condonation is a conditional concession of the jus divortii, or, in other words, a contingent remissio injuriæ. Not only is forgiveness, in the lay sense, not essential to condonation, but in itself it is not sufficient to prove condonation. This follows from the recent important decision of the President in *Crocker* v. *Crocker* (6), where Sir Henry Duke, after a careful examination of *Keats* v. *Keats and Montezuma* (4) and *Bernstein* v. *Bernstein* (7), expressed the view that letters which clearly showed forgiveness were not, unless followed by something in the nature of reinstatement or restoration, sufficient to establish a plea of condonation.

What, then, is the doctrine of condonation? It will aid an answer to the question if I mention two outstanding features of the doctrine before I further deal with the question of forgiveness. In the first place it is necessary that the spouse who condones should be substantially aware of the matrimonial sin committed. There cannot be condonation without knowledge. This is illustrated by the leading case of *Bernstein* v. *Bernstein* (7), where the Court of Appeal held that a husband, who condones his wife's adultery (of which he is aware) with one man, does not thereby

condone her adultery (of which he is not aware) with another man. This requirement of knowledge, however, must always be considered in connection with the words of SIR CRESSWELL CRESSWELL in *Keats* v. *Keats and Montezuma* (4), where he pointed out that a husband may be in doubt as to the wife's guilt, but may say: "Whether guilty or not, I will take her back, and she shall be restored to my bed." Secondly, condonation in the true sense is always conditional, as SIR CRESSWELL CRESSWELL puts it in *Dent* v. *Dent* (1): "The rule of law is that all condonation is conditional." This aspect of the matter was not, of course, dealt with by LOPES, L.J., in *Bernstein* v. *Bernstein* (7) when he said that: "Condonation means a full and absolute forgiveness." I venture respectfully to point out that this statement suggests the very opposite of condonation, which is essentially conditional and not unconditional. As LORD STOWELL had said in *D'Aguilar* v. *D'Aguilar* (8), "Condonation is not an absolute and unconditional forgiveness." This appears from all the authorities, and hence the only question in recent years has been as to the nature of the later offence, which will revive the earlier offence: see *Houghton* v. *Houghton* (9); *Copsey* v. *Copsey and Erney* (10); *Price* v. *Price and Brown* (11). I do not discuss the criticisms on the conditional nature of condonation which are contained in the observations and speeches in the House of Lords in the well-known case of *Collins* v. *Collins* (12). But I think it well to mention *Rose* v. *Rose* (13), which was referred to in the argument before me. In that case a separation deed with clear and specific covenants was entered into between husband and wife. The Court of Appeal held that the effect of the deed was to constitute what JESSEL, M.R., called "final condonation." But the decision turned on the special terms of the deed itself, and the court pointed out that in the old ecclesiastical courts condonation was never final. In view of the wording of the document, it was held that an offence by the husband after the deed did not revive the offence prior to the deed. I conceive that it would have been useless for the wife to assert in that case that she had never actually forgiven her husband. I desire also to mention here the important case of *Rowell* v. *Rowell* (14), to which my attention was called after the arguments in this suit. There the husband and wife entered into the usual deed of separation. While they were living apart acts of sexual commerce took place. It was held by the Court of Appeal that the fact that intercourse had taken place was not, of itself, conclusive evidence that the separation had come to an end, so as to make the deed of no effect. But in that case there was obviously no question of condonation, and the court held upon the evidence that, in spite of their sexual intercourse, the parties never really meant to be reconciled, and neither of them intended that the provisions of the deed should terminate.

Such are two emphatic features of condonation. The grave point before me, however, is whether sexual commerce by a husband with a wife known to be guilty of adultery is to be deemed conclusive evidence of condonation. In order to test this question it seems well to repeat the point that there can be no condonation without something in the nature of reinstatement of the offending spouse. It is clear that sexual commerce is not essential to such reinstatement. This appears from the judgment of LORD CHELMSFORD in *Keats* v. *Keats and Montezuma* (4). He says this:

> "It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. But it is obvious, without adducing instances to illustrate my meaning, that in some cases that may be a test wholly inapplicable."

By this he meant, I take it, that in some cases, e.g., physical reasons, may preclude the presumption of sexual commerce. He went on:

> "But I am willing to adopt an expression which was happily used by WIGHTMAN, J., in the course of the argument, and to say that in my judgment there can be no condonation which is not followed by conjugal habitation."

In order to see whether forgiveness in the lay sense is essential, I may take the case of a man who has full knowledge that his wife has been guilty of adultery, and who says to her: "For the sake of our children you shall remain at the head of my house; you shall manage domestic affairs; you shall appear to the world as my wife; no one shall know that I have discovered your sin; but I cannot forgive you, and I will no longer share your bed." Could he, after such a measure of restoration had continued for a substantial period, turn to his wife and say: "I will now petition for a divorce, for I have never really forgiven you?" In my opinion, the answer is clearly "No." The absence of the state of mind, which is called for forgiveness, would not outweigh his actual conduct of restoration. The court would surely look to acts rather than words. For, as Lord Chelmsford said in *Keats* v. *Keats and Montezuma* (4), she would, after the restoration have continued to live with him "as a wife although a degraded wife." I conceive that matrimonial cohabitation (which may vary with the circumstances and position of the parties) is merely one form of reinstatement, and even such cohabitation may be for so short a period, or of such a nature, as not to show condonation. Thus in *Hall* v. *Hall and Kay* (15) a jury (under the direction of Sir Francis Jeune) found that there was no condonation where a husband, after receiving a wife's confession of adultery, went home with her and occupied the same room for two nights while in a state of great mental distress, but then sent her away to her relations although parting on friendly terms. Here there was held to be no actual reinstatement or intention to restore. This decision was upheld by the Court of Appeal.

Now, if a restoration of conjugal cohabitation, as distinguished from sexual intercourse, will carry condonation with it, the question arises as to the effect of sexual commerce by a husband with a wife known by him to be guilty of adultery. This is a question of the first importance, and particularly so because I see that in *Roberts* v. *Roberts and Temple* (16), Hill, J., said this:

> "In my view the fact that a husband has had intercourse with a delinquent wife is not absolutely conclusive, and does not shut out entirely the inquiry whether there has been that forgiveness and blotting out of the offence which amounts to condonation."

I think it will be found that this dictum of Hill, J., is to be explained by the fact that in the case he was dealing with the wife had secured marital intercourse from her husband by the false representation that she was not pregnant from the adultery which had become known to the husband. The learned judge was dealing with a case of fraud. I will again refer to this decision later.

I find that the authorities draw a clear distinction between a wife who permits intercourse after knowledge of her husband's adultery, and a husband who has intercourse with his wife after he is aware of her infidelity. As to condonation by a wife Sir Cresswell Cresswell in *Keats* v. *Keats and Montezuma* (4) says this:

> "With reference to a wife to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress, she may not have the option of going away, she may have no place to go to, no person to receive her, no friends to support her; therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of a husband in renewing his intercourse with his wife."

This passage illustrates the view that the wife may be the passive rather than the active agent in the matter in question. It is in conformity with the other cases of *D'Aguilar* v. *D'Aguilar* (8), *Durant* v. *Durant* (17), and *Turner* v. *Turner* (18). The point was concisely put by Lord Stowell in *Beeby* v. *Beeby* (19):

> "It would be hard if condonation by implication was held a strict bar to the

wife. It is not improper she should for a time show a patient forbearance. She may find a difficulty either in getting a home or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife, but a woman may submit to necessity."

When a woman, therefore, submits to her husband's embraces, it is only evidence, strong indeed at the present day, but not necessarily conclusive, of condonation, see, e.g., per DR. LUSHINGTON in *Snow* v. *Snow* (20), 2 Notes of Cases, supp. at p. xiii; per LORD PENZANCE in *Newsome* v. *Newsome* (21), L.R. 2 P. & D. at p. 311. But the position of a husband is wholly different. As to him SIR CRESSWELL CRESSWELL says (see *Keats* v. *Keats and Montezuma* (4)):

"If the husband, knowing that his wife had been guilty of adultery, takes her to his bed again, he clearly being his own master in that particular and quite able to choose for himself, if he is so regardless of the wrong done to him as to take her back again, it is always held that this is such strong proof of condonation that it cannot be got over."

Upon the motion for a new trial in *Keats* v. *Keats and Montezuma* (4), LORD CHELMSFORD said (1 Sw. & Tr. at p. 356):

"The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation."

This cogently illustrates the view that the court looks rather to the acts themselves than to the state of mind or the employment of mere words. As SIR CRESSWELL CRESSWELL said in *Keats* v. *Keats and Montezuma* (4) (ibid. at p. 348):

"Certain acts are sufficient in themselves to prove condonation."

I deem it clear from *Keats* v. *Keats and Montezuma* (4) that LORD CHELMSFORD thought that marital intercourse by a husband after knowledge of the wife's delinquency was conclusive evidence of condonation. This view seems to be agreeable to the other leading decisions. Thus in OUGHTON'S ORDO JUDICIORUM (1738), titulus 214, the author treats sexual commerce with a known delinquent wife as sufficient of itself for condonation. He does not mention the word forgiveness. So, too, in *Beeby* v. *Beeby* (19) LORD STOWELL says

"Now condonation is forgiveness legally releasing an injury—it may be express or implied—as by the husband cohabiting with a delinquent wife, for it is to be presumed he would not take her to his bed again unless he had forgiven her."

So in POYNTER'S LAW OF MARRIAGE AND DIVORCE (1824), p. 232, it is said:

"Condonation is implied if the husband after reasonable notice of the infidelity of the wife continues to admit her as the partner of his bed."

In *Campbell* v. *Campbell* (22), DR. LUSHINGTON clearly thought that a single act of connection would suffice. He said this: "Condonation is connubial intercourse with full knowledge of all the facts." Finally, it seems reasonably clear from the judgment of the Court of Appeal in *Hall* v. *Hall and Kay* (15), that LINDLEY, L.J., was of the view that, although forgiveness was a feature of condonation, this would be conclusively assumed if sexual intercourse took place.

The truth of the matter appears to be that condonation is not conditional forgiveness, but a conditional reinstatement, of the offending spouse. The word "forgiveness" in the decisions must, I think, be regarded as employed in a technical sense with the juristic purpose of defining condonation, although it is frequently used in the judgments in the lay sense. The explanation of the use of the word "forgiveness" as a term of definition is well treated (in the light of English decisions) in the great work by J. P. BISHOP ON MARRIAGE AND DIVORCE (1881)—under the head Divorce, vol. 2, s. 36. He says this:

"Theoretically condonation, like connivance, is in the mind; the question is of

intent whether the party meant to forgive. But technical rules have been adopted for determining when condonation has taken place, and they, rather than the abstract doctrine, control the decisions. Thus the common case illustrative of the entire doctrine is where the husband comes into possession of the fact and proof that his wife has committed adultery. Then, if he has marital intercourse with her, the law presumes that he has condoned the offence, and refuses him divorce."

In s. 38 he says this:

"When we consider how fully the rights and consequences of marriage are regulated by law, how little is permitted to the parties, and especially how absolutely void are all private stipulations for divorce, the result seems inevitable that, in reason, on a question probably not adjudged, the presumption of condonation from cohabitation is, in the circumstances just explained, conclusive, so that it cannot be overcome by showing a concurrent agreement to the contrary:"

For "otherwise the marriage would thereafter be in the parties' own hands to dissolve or not, as they might at any time choose, contrary to the policy of law." And, in the words of Parsons, C.J.:

"It would be injustice to the wife and immoral in the husband to claim and enjoy as his peculiar marital right the society of his wife after knowledge of her offence and afterwards to cast her off for that same offence."

These are powerful words, and the decision of Hill, J., already referred to in *Roberts* v. *Roberts and Temple* (16) may perhaps be some day considered further in the light of them, and of such decisions with respect to fraud and inducing marriage as *Wakefield* v. *Mackay* (23), *Swift* v. *Kelly* (24), and *Moss* v. *Moss* (25). The body of rules which govern ordinary contracts cannot be rigorously applied to the grave subject of matrimonial status or to the interests of children, whether living or unborn. A man cannot, I think, use the body of his wife for sexual ends and announce to her at the same time that he will not forgive her adultery, but will present a petition to dissolve the marriage bond. Such acts of intercourse would be immoral, unless the woman he embraced were still his wife. If such conduct did not destroy his right to a divorce, then it would follow that he might indulge in sexual commerce with his wife not only until he presented his petition, but even until the grant of a decree nisi. Grave, indeed, would be the consequence of an opposite view, when it is remembered that a wife might become the mother of a child through the acts of a husband after the discovery of her sin. A man cannot at the same moment exercise the rights of a husband and claim the discontinuance of the marriage bond.

In my opinion, therefore, a husband who had sexual relations with his wife after knowledge of her adultery must be conclusively presumed to have condoned her offence. This is the rule of righteousness, and I am glad to think it is also the rule of law. To hold otherwise would be a blot on the jurisprudence of this country. I therefore, find in this case that condonation is established, and I, accordingly, dismiss the petition.

Solicitors: *T. H. Horwood & Co.; Peacock & Goddard.*

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

ALLISON AND OTHERS *v.* SCARGALL

[KING'S BENCH DIVISION (Salter, J.), June 9, 1920]

[Reported [1920] 3 K.B. 443; 89 L.J.K.B. 1084; 123 L.T. 815; 36 T.L.R. 708]

Landlord and Tenant—Notice to quit—Agreement by parties that tenancy be determinable by landlord in different way from that open to tenant.

By a tenancy agreement dated Feb. 17, 1915, the defendant agreed to become tenant of a farm belonging to the plaintiffs "from April 6 next . . . until April 6, 1916, or such later date, being April 6, immediately following the sale of the farm." The plaintiffs sold the farm in parts in August, September and October, 1919, and claimed that the defendant's tenancy expired on April 6, 1920, but the defendant refused to give up possession.

Held: there was nothing to prevent parties to a tenancy from year to year from agreeing that the notice to be given by one party should be unequal to the notice to be given by the other party; there was nothing ambiguous in or repugnant to such a tenancy if the tenant could only determine it by notice to quit while the landlord might determine it by notice or in some other way; therefore, the tenancy was duly determined on April 6, 1920, and the plaintiffs were entitled to possession.

Doe d. Warner v. *Browne* (1) (1807), 8 East, 165, distinguished.

Notes. Referred to: *Gray* v. *Spyer*, [1921] 2 Ch. 549.

As to tenancies from year to year, see 23 HALSBURY'S LAWS (3rd Edn.) 510 et seq., and for cases see 31 DIGEST (Repl.) 45 et seq.

Cases referred to:

(1) *Doe d. Warner* v. *Browne* (1807), 8 East, 165; 103 E.R. 305; 31 Digest (Repl.) 64, *2212*.

(2) *Great Northern Rail. Co.* v. *Arnold* (1916), 33 T.L.R. 114; 30 Digest (Repl.) 485, *1285*.

Action tried before SALTER, J., under Ord. 14, r. 8.

This action was brought to recover from the defendant possession of a farm called the Manor House Farm at Maltby-le-Marsh, Lincolnshire. The facts are set out in the judgment.

Hollis Walker, K.C., and *A. E. Woodgate* for the plaintiffs.

J. B. Matthews, K.C., and *A. Lawton* for the defendant.

SALTER, J.—In this case the plaintiffs were the owners of a farm which in 1914 was in the occupation of a Mr. Twigg as yearly tenant. He had been there many years, and his tenancy was expiring on April 6, 1915. The plaintiffs had advertised the farm for sale in August, 1914, but on the outbreak of war the sale of the farm was withdrawn. In February, 1915, the defendant negotiated with the plaintiff Allison, who was the solicitor acting for himself and his co-plaintiffs, for the tenancy of the farm. The result of the negotiations was that an agreement was signed by the defendant on Feb. 17, 1915, in these terms: The defendant agreed "to become tenant of the farm now occupied by Mr. Twigg from April 6 next at the same rent and upon the same terms as he is now tenant until April 6, 1916, or such later date being April 6 immediately following the sale of the farm." The farm was in fact sold in August, September, and October, 1919. According to the contention of the plaintiffs, the tenancy terminated on April 6, 1920. The defendant did not take that view, and these proceedings were begun by the plaintiffs to recover possession. The defendant was to be the tenant at the same rent and on the same terms as the preceding tenant, Twigg. I think the only material matters in Twigg's agreement are that it provides that he shall be tenant from year to year, and that it excludes the Agricultural Holdings (England) Act, 1883,

which requires one year's notice instead of six months' to terminate a yearly tenancy. He was, therefore, tenant from year to year, subject to the usual six months' notice terminating on April 6.

Therefore, the agreement which I have to construe provides that the defendant shall be a tenant from year to year until April 6, 1916, subject to the usual six months' notice, or such later date, being April 6 immediately following the sale of the farm. The result of that would be that the tenancy would exist until determined in one or other of three ways: First, six months' notice to quit expiring on April 6 given by the landlords. Second, six months' notice to quit given by the tenant expiring on that date. Third, the sale of the farm. The last of these three ways depends entirely on the discretion of the landlords. The tenant agrees that while he can only determine the tenancy on giving six months' notice to quit, the landlords may determine it by the usual six months' notice to quit or by selling the farm at any time. The result is that, while the landlords can always require six months' notice, the tenant may be turned out at very short notice.

I think the question is, as it was put by counsel for the defendant, whether the provision determining the tenancy on the sale of the farm is repugnant to the nature of a tenancy from year to year and ought to be disregarded, and the tenancy held to be a tenancy from year to year on the usual terms—namely, six months' notice to quit expiring on April 6, in any year. I do not think that much assistance is to be obtained from the old authorities with regard to want of certainty in the creation of terms of years. We are dealing here with a tenancy from year to year, which is essentially uncertain in duration, and I do not think the decision of ROWLATT, J., in *Great Northern Rail. Co.* v. *Arnold* (2), to which I was referred, has much bearing on the present case. The only case I need refer to is *Doe d. Warner* v. *Browne* (1). In that case, there was an agreement to let at a certain rent, and that the lessor should not turn out the tenant so long as he duly paid the rent quarterly, and did not sell any article that might be injurious to the lessor's business. It purported to be a tenancy from year to year determinable by the tenant in the usual way, but for an indefinite time not terminable by the landlord so long as the tenant complied with the conditions of the tenancy. The court held that, as this provision deprived the landlord of all right to put an end to the tenancy, it was inconsistent with a tenancy from year to year and repugnant to the nature of such a tenancy, and that the tenancy must be considered as a tenancy from year to year determinable in the usual way. I do not think that the present case falls within the principle of that decision. I know of nothing to prevent people, in arranging tenancies from year to year, from agreeing for a shorter notice to quit than the usual six months. There is nothing to prevent the owner and the intending tenant of land from agreeing that the notice to be given by one party shall be unequal to that to be given by the other. The tenancy agreement in the present case provides that, while the tenant shall only determine it in one way, the landlords may determine it in either of two ways, but I find nothing in this which is ambiguous or repugnant to a tenancy from year to year. The tenancy can be determined after April 6, 1916, by either party giving notice to determine it at the end of the year, and there is nothing repugnant to or inconsistent with a tenancy from year to year. I think, therefore, that, according to the terms of the agreement, the tenancy expired on April 6, 1920, and the plaintiffs are entitled to possession. Judgment must, accordingly, be given for them.

Judgment for plaintiffs.

Solicitor: *Edward Downes*, for *Allison & Staniland*, Louth; *R. Brooks*, for *S. B. Carnley*, Alford.

[*Reported by* FITZROY COWPER, ESQ., *Barrister-at-Law.*]

LAIDLER *v.* LAIDLER

[Probate, Divorce and Admiralty Division (McCardie, J.), March 24, 30, 31, 1920]

[Reported 90 L.J.P. 28; 123 L.T. 208; 36 T.L.R. 510]

Divorce—Collusion—"Initiation or conduct of suit procured by agreement"—Agreement merely to facilitate proof of matrimonial offence—Termination of collusive understanding—Right to decree.

If the initiation of a suit for divorce be procured, or its conduct (especially if abstention from defence be a term) provided for, by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld. But collusion must be distinguished from courtesy. Asperity of language, or the employment of offensive phrases, need not be a feature of matrimonial proceedings. A mere agreement between the parties not involving an imposition on the court, or a suppression of facts, but merely to facilitate the proofs and smooth the asperities of litigation is, though liable to be looked into by the court, not collusion or otherwise objectionable. An arrangement is not necessarily collusive even though it involves not only monetary conditions between the parties, but also an offer by the guilty respondent to supply the petitioner with information as to his or her misconduct if the petitioner will agree to present a suit for dissolution. Although collusion exists in a given suit, it is always open to the petitioner to abandon that suit and to commence fresh proceedings free from the collusive taint, and, although collusion may exist at a certain stage of the communications between the parties antecedent to the suit, it may be quite possible that those communications be wholly terminated, or the collusive understanding wholly spent, and that one of the parties may then present a petition which is innocent of the vice of collusive illegality.

Where, therefore, the court found on the evidence as a whole that the wife petitioner had requested her husband, not to commit adultery, but to supply her with evidence of the adultery which he had committed, and, in any event, if a collusive agreement ever existed, it was spent before any proceedings were begun,

Held: no collusion on the part of the wife had been proved, and she would be granted a decree nisi.

Notes. Referred to: *Sandler* v. *Sandler, Davies and Johnstone*, [1934] All E.R. Rep. 213; *Beattie* v. *Beattie*, [1938] 2 All E.R. 74; *Lowndes* v. *Lowndes*, [1950] 1 All E.R. 999.

As to collusion see 12 Halsbury's Laws (3rd Edn.) 300–302, and for cases see 27 Digest (Repl.) 388–395.

Cases referred to:

(1) *Gayer* v. *Gayer*, [1917] P. 64; 86 L.J.P. 73; 116 L.T. 322; 33 T.L.R. 182; 61 Sol. Jo. 251, C.A.; 27 Digest (Repl.) 530, *4750*.

(2) *R.* v. *Steventon* (1802), 2 East, 362; 102 E.R. 407; 15 Digest (Repl.) 843, *8068*.

(3) *R.* v. *Porter*, [1910] 1 K.B. 369; 79 L.J.K.B. 241; 102 L.T. 255; 74 J.P. 159; 26 T.L.R. 200; 22 Cox, C.C. 295; 3 Cr. App. Rep. 237, C.C.A.; 14 Digest (Repl.) 129, *908*.

(4) *R.* v. *Vreones*, [1891] 1 Q.B. 360; 60 L.J.M.C. 62; 64 L.T. 389; 55 J.P. 536; 39 W.R. 365; 7 T.L.R. 223; 17 Cox, C.C. 267, C.C.R.; 15 Digest (Repl.) 842, *8058*.

(5) *Churchward* v. *Churchward and Holliday*, [1895] P. 7; 64 L.J.P. 18; 71 L.T. 782; 43 W.R. 380; 11 T.L.R. 69; 11 R. 626; 27 Digest (Repl.) 392, *3234*.

(6) *Harris* v. *Harris and Lambert* (1862), 4 Sw. & Tr. 232; 31 L.J.P.M. & A. 160; 164 E.R. 1505; 27 Digest (Repl.) 395, *3252*.

(7) *Barnes* v. *Barnes and Grimwade* (1867), L.R. 1 P. & D. 505; 37 L.J.P. & M. 4; 17 L.T. 268; 16 W.R. 281; 27 Digest (Repl.) 394, *3243*.

(8) *Malley* v. *Malley* (1909), 25 T.L.R. 662; 53 Sol. Jo. 617; 27 Digest (Repl.) 391, *3228*.

(9) *Scott* v. *Scott*, [1913] P. 52; 82 L.J.P. 39; 108 L.T. 49; 29 T.L.R. 206; 27 Digest (Repl.) 390, *3225*.

(10) *Watkin* v. *Watkin and Malcolm* (1919), 122 L.T. 225; 27 Digest (Repl.) 389, *3217*.

Wife's Petition for dissolution of marriage on the grounds of her husband's statutory desertion and adultery.

These offences were proved, but a question of collusion arose on certain correspondence between the parties, which counsel for the wife brought to the notice of the court, and on this point judgment was reserved.

Willis for the wife.

Skinner, as amicus curiæ, mentioned a recent decision in *Watkin* v. *Watkin and Malcolm* (10).

Cur. adv. vult.

Mar. 31. **McCARDIE, J.,** read the following judgment. This is the petition of a wife for the dissolution of marriage on the grounds of adultery and desertion by her husband. The suit was undefended.

A serious question arises whether the doctrine of collusion precludes me from granting relief to the wife. It will be necessary briefly to consider that doctrine. In the year 1908 the parties met. The man who is now the husband induced the wife to go to Bideford. Here he got her a wedding-ring, and obtained a person to perform what purported to be a ceremony of marriage. The wife was then only seventeen years old. By this device he gained sexual intercourse with her. As a result a child was born in 1909. Soon afterwards the man deserted the wife, and he has never since maintained either her or the child. In 1910 she wrote to him that she would apply to the magistrates for an order for maintenance. He then told her that no legal marriage existed. In the year 1915 he proposed to join the army. He then told her that he desired to make amends for his conduct in the past. Thereupon the parties were legally married on Oct. 19, 1915. Ere many weeks had elapsed the husband deserted the wife. He has since never lived with her, and apart from one or two trifling sums he has contributed nothing to the support of wife or child. She has earned her own living and maintained the child. The husband is engaged on the music halls, and apparently earns about £14 or £15 a week. In November, 1918, she presented a petition for the restitution of conjugal rights. A decree was granted. The husband did not obey it. She now asks for a decree nisi for dissolution on the grounds of statutory desertion and of the husband's adultery. The desertion and the adultery are clearly proved. But ere I can grant a decree as asked it is necessary to consider whether certain correspondence, which has passed between husband and wife, is of such a nature as to require me to dismiss the suit by reason of ss. 29 and 30 of the Matrimonial Causes Act, 1857 [see now s. 4 (2) (c) of the Matrimonial Causes Act, 1950 (29 Halsbury's Statutes (2nd Edn.) 388)]. If collusion be established, it is imperative that this petition be rejected.

The doctrine of collusion is of grave importance to the administration of the law of divorce. The matrimonial relationship is the basis of national life. A rigorous law prescribes the formalities of that relationship. A strict and rigorous code safeguards the circumstances of its dissolution. Divorce by mutual consent is remote from the contemplation of English law. The marriage tie can only be dissolved under the conditions laid down by Act of Parliament. The doctrine of collusion exists to safeguard the administration of those conditions, and to

ensure, so far as possible, that nothing but the truth shall be laid before the court, and that no material fact shall be hidden from its consideration. To this object also exists the rule that the court is not bound by the mere admission of the parties, whether by pleading or otherwise, but must be guided by established facts. The point was well put by LORD COZENS-HARDY, M.R., in *Gayer* v. *Gayer* (1). He said ([1917] P. at p. 67):

> "The jurisdiction of the Divorce Court is purely statutory. It has existed for sixty years. It has many peculiar features. No judgment for divorce can be obtained by consent. Allegations by a petitioner, if not denied by the respondent, are not to be taken as true. The reason for these peculiarities is, I apprehend, that the legislature has recognised that the dissolution of a marriage involves considerations of a public nature, which do not exist when an ordinary contract between two persons is set aside."

The doctrine of collusion is wide in its scope and comprehensive in its effects. In order to enforce the doctrine the vigilance of the court will be aroused by slight circumstances, and a rigorous scrutiny will be effected. Collusion may be of so serious a nature as to amount to a criminal offence. If, e.g., a husband and wife agree that the husband shall appear only to commit adultery, but without actually committing that act, and thus deceive the court into granting a decree nisi, I conceive that this would amount to a criminal conspiracy. It would be a conspiracy to prevent the course of justice: see WRIGHT ON CRIMINAL CONSPIRACY, 1873, p. 30; ARCHIBOLD'S CRIMINAL PLEADING (25th Edn.) p. 1354; *R.* v. *Steventon* (2); *R.* v. *Porter* (3). So anxious is the law to secure the pure administration of justice that it is an indictable misdemeanour for any person to fabricate evidence with intent to mislead a judicial tribunal, even if the tribunal never sits and the evidence is never used: see *R.* v. *Vreones* (4). But the doctrine of collusion is not confined to acts which might constitute an infringement of the criminal law. Conduct will fall within this doctrine which, though permissible in ordinary civil actions, is adverse to the principles on which the Divorce Court acts. Prior to 1857 the rule was that all sentences obtained by consent or collusion were mere nullities: see POYNTER'S LAW OF MARRIAGE AND DIVORCE, 1824, p. 160. The object of the rule was to prevent dissolution of marriage by mutual consent: see SHELFORD ON MARRIAGE AND DIVORCE, 1841, p. 738. The scope of the rule was, I think, narrower in former days than at the present time. SHELFORD ON MARRIAGE AND DIVORCE, p. 415, deals with the matter thus:

> "Collusion is an agreement between the parties for one to commit or appear to commit an act of adultery in order that the other may obtain a remedy at law as for a real injury. The law permits no co-operation for such a purpose, and refuses a remedy for adultery committed with such an intent. But it is not proof of collusion that after the crime is committed both parties are desirous of a separation."

Such was the view in 1841. It is, however, now clear that collusion exists not only when a false case is presented to the court, but is equally possible in a good case, although (as has been rightly pointed out) it is less frequently practised in a good case because the temptation is lacking: see J.P. BISHOP ON MARRIAGE AND DIVORCE, 1881, vol. 2, s. 28.

All conduct which disturbs the course of justice falls within the general idea of fraud on the court and contempt of court. Such (says Professor Bishop) is the doctrine in principle everywhere. This view is strikingly illustrated by the decision of SIR F. JEUNE in *Churchward* v. *Churchward and Holliday* (5). In that case the respondent wife had actually committed adultery with the co-respondent. Her husband had not connived at the adultery. But he made an agreement with his wife whereby he undertook to present a petition for divorce but without a claim for damages against the co-respondent, while she, on her part, undertook to pay the costs of the petition, to settle money on the child of the marriage, and not to defend

the suit. Sir F. Jeune held that this was collusion, and he formulated the broad rule that if the initiation of a suit for a divorce be procured, or its conduct (especially if abstention from defence be a term) provided for, by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld. *Churchward* v. *Churchward and Holliday* (5) contains an admirable review of the authorities, and shows the wide stretch of the doctrine in question. It is essential to point out, however, that collusion must be distinguished from courtesy. Asperity of language, or the employment of offensive phrases, need not be a feature of matrimonial proceedings. It has been well said, moreover, that a mere agreement between the parties not involving an imposition on the court, or a suppression of facts, but merely to facilitate the proofs and smooth the asperities of litigation is, though liable to be looked into by the court, not collusion or otherwise objectionable: J.P. Bishop on Marriage and Divorce (1881), vol. 2, s. 28, and *Harris* v. *Harris and Lambert* (6). The perils, however of undue communication between the parties are indicated by Lord Penzance in *Barnes* v. *Barnes* and *Grimwade* (7). I have noted the importance of the decision in *Churchward* v. *Churchward and Holliday* (5). But I am bound to say that Bigham, P., in *Malley* v. *Malley* (8), showed no desire to apply the doctrine of collusion with undue severity. There a wife presented a petition for dissolution against her husband on the grounds of adultery, cruelty, and desertion. The parties had been living apart for some time under a separation deed, and at the time of the divorce suit the husband owed the wife £325 under the deed. The husband (acting by an agent) urged the wife to divorce him, and offered to pay £100 and the costs of the petition. The wife agreed, and started the proceedings. Bigham, P., held that as the wife only got from the husband in a different way that which she could have enforced by action under the deed, and as the husband would apparently have been obliged to pay the costs of the suit in any event if the wife succeeded, the arrangement did not amount to collusion. I beg most respectfully to say that if similar facts arose in the Divorce Court to-day, I deem it probable that the judge would desire a full argument as to whether the decision of Bigham, P., was consistent with a sound application of the vital doctrine of collusion. The arrangement there might well tend to obscure the truth in the case. In *Scott* v. *Scott* (9) Bucknill, J., did not purport fully to define the doctrine, but he pointed out the importance of the question of motive, which actuated the parties with respect to any arrangement. He stated that collusion may be defined as "an improper act done or any improper refraining from doing an act for a dishonest purpose." This definition was given, I think, for the purpose only of the facts of that case. It should be considered in conjunction with such decisions as *R.* v. *Porter* (3). The actual decision of that experienced judge, however, tends to show that an arrangement is not necessarily collusive, even though it involves not only monetary conditions between the parties, but also an offer by the guilty husband to supply the wife with information as to his misconduct, if she will agree to present a suit for dissolution. Such are the main aspects of collusion. There are, however, two vital features of the doctrine which prevent it from operating with undue harshness. The first feature is that indicated at the end of the judgment of Sir Frances Jeune, P., in *Churchward* v. *Churchward and Holliday* (5)—viz., that, although collusion exist in a given suit, it is always open to the petitioner to abandon that suit, and to commence fresh proceedings free from the collusive taint. The second feature is that, although collusion may exist at a certain stage of the communications between the parties antecedent to the suit, it may be quite possible that those communications be wholly terminated, or the collusive understanding wholly spent, and that one of the parties may then present a petition which is innocent of the vice of collusive illegality. This is the effect of the decision of Sir Henry Duke, P., in *Watkin* v. *Watkin and Malcolm* (10).

I have to consider whether the doctrine of collusion as I have stated it requires me on the facts and documents before me to dismiss this petition. I shall deal very briefly with the matter. Principles are more important than particular sets of facts.

The correspondence between the parties caused me grave anxiety. It lasted (so far as material) from March, 1916, to June, 1918. I shall not set it out in detail. The wife repeatedly expressed her anxiety for a divorce. She repeatedly pointed out the misery of her existence when tied by marriage to a husband who refused to live with her and neglected every duty that he owed. She pointed out the ease with which a decree could be obtained in an undefended divorce suit. She used phrases which, if unexplained, might almost suggest a desire on her part that the husband should commit adultery in order that she might gain her freedom. For a long time the husband ignored her suggestion, but at last, on June 27, 1918, he wrote that he had committed adultery on June 17, 1918, at a certain address in Manchester. He stated further that he had so acted at the request of his wife. After, however, considering the whole of the correspondence disclosed before me, and weighing the whole of the evidence which has been given in court, I have come to the conclusion that what the wife was, in truth, asking for was not that the husband should commit adultery, but that he should supply her with such evidence of his adultery as would enable a petition to be presented. I am satisfied that the husband had been (as his wife suspected) living in adultery for years with a woman who passed as his wife. His suggestion that he had committed adultery in June, 1918, at the request of his wife is in every way a mere falsehood. Equally false was his suggestion that his wife had promised that, if he would so act, she would not ask for costs when securing a decree. Upon the whole, I do not think that collusion is here established. I am confirmed in that view by the fact that the wife did not act on the information given in the husband's letter of June 28, 1918, but alleged in her petition, and duly proved before me, adultery by the husband in the month of July, 1918, at Redcar, in Yorkshire. I am also confirmed in this view by reason of the fact that the wife has from first to last insisted on her right to costs against her husband. If any collusive agreement ever existed, it was, in any event, spent before any proceeding was ever commenced in this court. I am able to acquit the wife of connivance at her husband's adultery. I, therefore, grant a decree nisi with costs.

Solicitors: *Bower, Cotton & Bower*, for *S. Sharpe Waterburn*, Blackpool.

[Reported by J. A. C. Skinner, Esq., *Barrister-at-Law.*]

MORTIMER *v.* BECKETT

[Chancery Division (Russell, J.), February 13, 1920]

[Reported [1920] 1 Ch. 571; 89 L.J.Ch. 245; 123 L.T. 27; 64 Sol. Jo. 341]

Injunction—Contract for personal service—Restraint against breach—Agreement by boxer appointing sole manager—No independent negative agreement not to employ other manager.

Contract—Unenforceable contract—Want of mutuality—Obligations of party not sufficiently defined.

By an agreement contained in a letter signed by the defendant and addressed to the plaintiff the defendant stated: "In consideration of the sum of ten shillings (10s.), and also of your many services rendered and to be rendered to me, I undertake that you shall have the sole arrangements of matching me for all my boxing contests and engagements during the period of the next seven (7) years, and in making such arrangements for me, I undertake that for the consideration set out above you are to benefit to the extent of fifty per cent. (50%) of any purses put up for me above the sum of £25 (twenty-five pounds), and for music-hall and other engagements you are to receive also a sum of 50% (fifty per cent.)." In December, 1919, the defendant wrote to the plaintiff stating that he had decided for the future to act as his own manager. On a motion by the plaintiff for an injunction to restrain the defendant from entering contests except such as had been arranged by the plaintiffs,

Held: in the absence of an independent negative stipulation in the agreement binding the defendant not to engage in the exercise of his profession save through the agency of the plaintiff, to grant the injunction would be in effect to force the defendant to employ the plaintiff as his agent and to accept that agent's services, and to that extent to order specific performance of a contract for personal service, and, therefore, the injunction would not be granted.

Held, further: the obligations of the plaintiff were so ill-defined in the agreement that it was impossible to predict what would be a breach of it by him, and, therefore, the agreement was invalid for want of mutuality, and no injunction could be granted to enforce it.

Notes. Referred to: *Warner Bros. Pictures, Inc.* v. *Nelson*, [1936] 3 All E.R. 160.

As to mutuality in contract see 8 Halsbury's Laws (3rd Edn.) 80; as to injunctions to enforce contracts see ibid., vol. 21, p. 379 et seq.; and as to specific performance of contracts for personal service and contracts lacking mutuality see ibid., 2nd Edn., vol. 31, pp. 334–338. For cases see 12 Digest (Repl.) 101–104, 28 Digest (Repl.) 816 et seq.; 42 Digest 435 et seq.

Cases referred to:

(1) *Lumley* v. *Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, *726.*

(2) *Clarke* v. *Price* (1819), 2 Wils. Ch. 157; 37 E.R. 270, L.C.; 28 Digest (Repl.) 822, *671.*

(3) *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416; 60 L.J.Ch. 428; 64 L.T 716; 39 W.R. 433; 7 T.L.R. 325, C.A.; 43 Digest 55, *563.*

(4) *Wolverhampton and Walsall Rail. Co.* (1873), L.R. 16 Eq. 433; 43 L.J.Ch. 131, L.C.; 28 Digest (Repl.) 830, *733.*

(5) *Montague* v. *Flockton* (1873), L.R. 16 Eq. 189; 42 L.J.Ch. 677; 28 L.T. 580; 37 J.P. 676; 21 W.R. 668; 42 Digest 913, *85.*

(6) *Davis* v. *Foreman*, [1894] 3 Ch. 654; 64 L.J.Ch. 187; 43 W.R. 168; 8 R. 725; 28 Digest (Repl.) 831, *734.*

(7) *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413; 78 L.J.Ch. 117; 99 L.T. 932; 53 Sol. Jo. 151; 28 Digest (Repl.) 831, *735*. A

Also referred to in argument:

Ryan v. *Mutual Tontine Westminster Chambers Assocn.*, [1893] 1 Ch. 116; 62 L.J.Ch. 252; 67 L.T. 820; 41 W.R. 146; 9 T.L.R. 72; 37 Sol. Jo. 45; 2 R. 156, C.A.; 28 Digest (Repl.) 820, *659*. B

Motion for an injunction to restrain the defendant from pursuing the occupation of a professional boxer except through the agency of the plaintiff.

By a contract contained in a letter dated Jan. 14, 1914, and made between the plaintiff, Bernard Mortimer, a boxing trainer and promoter, and the defendant, Joe Beckett, a boxer, agreed as follows: C

"London, Jan. 14, 1914.—To Bernard Mortimer, Esq.—Dear Sir,—In consideration of the sum of ten shillings (10s.) and also in consideration of your many services rendered and to be rendered to me, I undertake that you shall have the sole arrangements of matching me for all my boxing contests and engagements during the period of the next seven (7) years, and in making such arrangements for me I undertake that for the consideration set out above you are to benefit to the extent of fifty per cent. (50%) of any purses put up for me above the sum of £25 (twenty-five pounds) and for music-hall and other engagements you are to receive also a sum of 50% (fifty per cent). I acknowledge to have received from you during the past five years monetary assistance, and you have arranged and procured boxing matches for me, and I understand and have had this letter read and explained to me by Arthur F. Bettinson, of the National Sporting Club, Covent Garden.—I am, Yours faithfully, JOE BECKETT.—Witness: L. W. Penn, 43, King Street, Covent Garden, W.C.—Received the sum of 10s." D E

After the agreement Mortimer acted as manager for Beckett and arranged a large number of boxing matches for him in which Beckett's reputation as a boxer greatly increased, and he became heavy-weight champion of England. In his affidavit in F support of the motion Mortimer stated that for some of those contests he received nothing and for most of them much less than fifty per cent. of the purses received by Beckett, that he had paid the greater part of Beckett's training, travelling, and hotel expenses, and that a large sum was due to him. In December, 1919, Beckett had a boxing contest with Carpentier, the French boxing champion, for the heavy-weight championship of England, in which Beckett was defeated. On Dec. 20, Beckett G wrote a letter to Mortimer in which he said that he had decided for the future to be his own manager. On Dec. 28, Mortimer replied, reminding Beckett that he was bound to him by agreement for seven years from January, 1914. A correspondence ensued in which Beckett persisted in his intention to repudiate the agreement, and it appeared that Beckett had arranged a boxing contest on his own behalf. Mortimer then moved for an injunction to restrain Beckett from entering into any boxing H contests or carrying on any engagements as a professional boxer except such contests or engagements as had been or should be arranged by or through Mortimer.

Emmanuel, K.C., and *Northcote* for the plaintiff.
Maugham, K.C., and *Sheldon* for the defendant.

RUSSELL, J.—This is an action in which the plaintiff Mortimer sues the I defendant Joe Beckett in respect of an agreement dated Jan. 14, 1914, and by the notice of motion he asks for an injunction to restrain the defendant until judgment or further order from entering into or agreeing to enter into any boxing contest or making or carrying on any engagement as a professional boxer other than such contests or engagements as have been or should be arranged for him by or through the plaintiff. The document in question was signed by the defendant when he was between twenty-one and twenty-two years of age. It is in the form of a letter

addressed to the plaintiff, and is in these terms: [HIS LORDSHIP read the agreement.] There are certain issues raised on affidavit relating to the circumstances of the signature of the document, and whether the document as signed represented the effect of the document as explained to the defendant, a comparatively illiterate individual. I have nothing to do with that at the present time. The motion has been fought on the assumption that it was properly signed, and the other matters can only be dealt with at the trial.

The first thing I have to consider is what the document means. The consideration is ten shillings, a past consideration which may be disregarded, and this: "in consideration of your many services . . . to be rendered to me." There is nothing more definite as regards the plaintiff's services, and, accordingly, nothing more definite is enforceable against him. In my opinion, therefore, the agreement lacks mutuality. The defendant, on the other hand, agrees during the specified period of seven years to employ the plaintiff, and no one else, as his agent to enter into contracts for his appearance in the ring, and as a reward the plaintiff is to receive fifty per cent. of any purses put up above the sum of £25, and of the earnings in any music-hall or other engagements. The question I have to consider is, whether on a document of that kind the court will grant an injunction, and, to that extent, grant specific performance of the contract. It is an agreement for personal services, an agreement to employ the plaintiff as the sole agent of the defendant, and the defendant binds himself to accept those services and to employ him as sole agent, the authorities which have been cited support the view that the court will not grant an injunction upon such a contract as this, but will leave the plaintiff to his common law remedy in damages. The first case is *Lumley* v. *Wagner* (1), which came before LORD ST. LEONARDS on appeal from SIR JAMES PARKER, and is, therefore, a case of high authority. In that case Miss Wagner had agreed to sing at a particular theatre during a particular period, and for the performances specified, and, down to the tenth clause of the agreement she had entered into, there was no independent negative clause to the effect that she would not perform anywhere else. LORD ST. LEONARDS came to the conclusion that down to this clause the agreement did involve a contract to sing at the named theatre at these performances, and at no other, but that, in order that the agreement should be enforceable by injunction, there must be an independent negative stipulation that she would perform nowhere else. But there was an added independent negative clause, and LORD ST. LEONARDS although he had come to the conclusion that in the absence of such an express independent negative stipulation he would not grant an injunction, granted it on finding independent negative stipulation. I will read a few passages from his judgment. He says (1 De G.M. & G. at p. 618):

> "The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and one by the defendant, which state of facts may have and in some cases has introduced a very important difference, but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that term not to sing for anyone else, is not a correlative contract, it is in effect one contract, and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to aid the theatre to which she agreed to attach herself. I am of opinion that, if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the

contract as much as she would now do with reference to the contract into which she has actually entered. It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre, while the court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement."

Further on in his judgment he refers to *Clarke* v. *Price* (2), as having been pressed by the defendants' counsel, and says this (ibid. at p. 622):

"That is a case which does not properly belong to their argument, because there was no negative stipulation, and I quite admit that the court cannot enforce the performance of such an affirmative stipulation as is to be found in that case; there the defendant having agreed to take notes of cases in the Court of Exchequer, and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and LORD ELDON, when refusing the injunction, in effect said: 'I cannot compel Mr. Price to sit in the Court of Exchequer, and take notes and compose reports'; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant by the defendant that he would not compose reports for any other person. . . . LORD ELDON, therefore, was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he therefore very properly as I conceive, refused that injunction; that case, therefore, in no respect touches the question now before me, and I may at once declare that, if I had only to deal with the affirmative covenant of J. Wagner that she would perform at Her Majesty's Theatre, I should not have granted any injunction."

Therefore, although there LORD ST. LEONARDS treated the first ten clauses of the agreement as implying a negative provision, yet he said that he would not have granted an injunction, if there had not been an independent negative stipulation.

That case was considered in *Whitwood Chemical Co.* v. *Hardman* (3). There the manager of a manufacturing company agreed to give during a specified term "the whole of his time to the company's business." The agreement was positive in form, but it involved a negative stipulation not to give any of his time to anyone else. KEKEWICH, J., granted an injunction, and the matter went to the Court of Appeal who held (reversing the decision of KEKEWICH, J.) that in the absence of any negative stipulation in that behalf, the company was not entitled to an injunction to restrain the manager from giving, during the term, part of his time to a rival company. The matter was gone into by LINDLEY, L.J., at considerable length. He said ([1891] 2 Ch. at p. 426):

"The first point to observe is that there is no negative covenant at all, in terms, contained in the agreement on which the plaintiffs are suing—that is, the parties have not expressly stipulated that the plaintiff shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give 'the whole of his time' to the plaintiff company. That is important in this respect that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, as there was in *Lumley* v. *Wagner* (1) and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had their attention drawn to certain specific points, and that they had come to an agreement on those points. In this case we are left more or less in the dark about that, because, as I have said, there is nothing that shows that anything definite was in the minds

A of the parties beyond this, that the defendant was to give the whole of his time to the plaintiff's business. Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on ad infinitum; but it does not at all follow B that because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else that is inconsistent with it. The court has never gone that length, and I do not suppose it ever will. We are dealing here with a contract of a particular class. This is a contract involving the performance of a personal service, and, as a rule, the court does not decree specific performance of such contracts. That is a general rule. There has C been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley* v. *Wagner* (1) that is to say, where a person has engaged not to serve any other master, or to perform at any other place, the court can lay hold of that and restrain him from so doing."

Then comes a passage which causes me some trouble. The learned lord justice D says that he agrees with some observations of LORD SELBORNE in *Wolverhampton and Walsall Rail. Co.* v. *London and North Western Rail. Co.* (4)

> "to the effect that the principle does not depend upon whether you have an actual negative clause if you can say that the parties were contracting in the sense that one should not do this, or the other—some specific thing upon which you can put your finger."

E If by this LINDLEY, L.J., meant that the court could grant an injunction when there was no independent negative stipulation, his view is contrary to what was said in *Lumley* v. *Wagner* (1), and what he himself went on to say at the end of his judgment. He then continues:

> "But there is this to be considered. What are we to say in this particular F case? What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything, which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now, there it appears to me the case goes beyond *Lumley* v. G *Wagner* (1) and every case except *Montague* v. *Flockton* (5). The principle is that the court does not decree specific performance of contracts for personal service, and the question is whether there is anything in this case which takes it out of this principle."

Then he discusses *Montague* v. *Flockton* (5) and says:

> "MALINS, V.-C., did go to the length of restraining an actor from performing H at a rival theatre, although there was no stipulation on his part in terms, that he would not do so; and with great deference to the learned judge, I must say I think he arrived at that conclusion owing to a misunderstanding of *Lumley* v. *Wagner* (1). I cannot read the decision of MALINS, V.-C., without seeing that he was under the impression that LORD ST. LEONARDS in *Lumley* v. *Wagner* (1) would have granted the injunction even if the negative I clause had not been in the contract. This was a mistake. LORD ST. LEONARDS was very clear and explicit on that point. He said distinctly he would not have done it in the absence of that negative clause, but he did go on to say in other parts of his judgment that, in the absence of that negative clause, there would have been a breach of the agreement. That is true enough, and MALINS, V.-C., I think, was under the impression that LORD ST. LEONARDS intended to intimate, not only that there would be a breach of the agreement, but that the remedy of injunction would be granted in the absence of that

negative clause, which is not in accordance with the judgment in *Lumley* v. *Wagner* (1), as I understand it." A

I do not see how to reconcile that with the earlier passage I have read. LINDLEY, L.J., continues a little further on:

"I agree with what the late Master of the Rolls, SIR GEORGE JESSEL, said about there being no very definite line. I agree also with what FRY, L.J., has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley* v. *Wagner* (1) rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend [that is, to be followed in cases like it where there is a negative stipulation]. I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service, than by leaving them alone and, whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial." B C

KAY, L.J., in the same case, says (ibid. at p. 432): D

"However, what strikes me in this case is that, if the court could possibly interfere in the way in which the learned judge has interfered, by injunction, I do not see any case of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it possibly be argued that an injunction could be obtained to prevent his serving someone else during that engagement? Yet, if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind." E

Two subsequent cases have been cited, *Davis* v. *Foreman* (6), which came before KEKEWICH, J., and *Kirchner & Co.* v. *Gruban* (7), which came before EVE, J. F Those cases only go to this, that there may be instances of clauses which primâ facie appear negative in form, but are in substance affirmative, and in those two cases the learned judges declined on this ground to grant injunctions. It was said that the clauses were negative, but the judges found they were in fact affirmative, and, therefore, not within *Lumley* v. *Wagner* (1).

Applying these authorities to the case before me, if I grant an injunction here, G the effect will be to force the defendant to employ a particular person as his agent as far as his boxing engagements are concerned and to accept that agent's services. Therefore, I should to that extent, be granting specific performance of a contract for personal services. The contract is not negative, save so far as a negative stipulation can be inferred from the word "sole." It is, therefore, positive in form, and there is no independent negative stipulation to bring the case within *Lumley* v. H *Wagner* (1) and *Whitwood Chemical Co.* v. *Hardman* (3). I hold, therefore, that no injunction ought to be granted.

There is another ground on which I think I should be exercising a wise discretion in refusing an injunction. The contract is very peculiar in form. It is impossible to put one's finger on anything which the plaintiff is bound to do. The only consideration is 10s., past service, and a vague reference to future services, which are I in no way defined, so that it is impossible to predict what would be a breach by the plaintiff of the contract. It is, therefore, lacking in mutuality, and on that ground also, I think, I should be unwise to grant an injunction pending the trial. The motion must, therefore, be dismissed.

Solicitors: *Nicholls & Co.*, for *C. A. Emmanuel & Emmanuel*, Southampton; *Lowe & Co.*, for *A. H. Emmanuel*, Southampton.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

Re WILSON AND SCOTTISH INSURANCE CORPORATION, LTD.

[CHANCERY DIVISION (Astbury, J.), April 23, 1920]

[Reported [1920] 2 Ch. 28; 89 L.J.Ch. 329; 123 L.T. 404; 36 T.L.R. 545; 64 Sol. Jo. 514]

Insurance—Motor insurance—Value of car—Car insured for £250 "estimate of present value"—Renewal of policy annually—No amendment of value—Increase in value—Destruction of car—Liability of insurers.

On Nov. 8, 1915, a motor car was insured "against damage or loss up to full value" under a policy which was renewable yearly. In the proposal form the insured stated that both the price paid for the car and its "present value" was £250. In 1919, the insured having renewed the policy annually without amendment of the "present value" of £250, the car was destroyed by fire. The value of the car at that date was found to be £400.

Held: the insured must be deemed to have repeated his estimate of the "present value" of the car as £250 at each renewal of the policy, and, therefore, the insured was not entitled to recover the value of the car in 1919, but was limited to £250, the value originally estimated by him.

Notes. As to renewal of insurance policies see 22 HALSBURY'S LAWS (3rd Edn.) 192, 248, 249, and for cases 29 DIGEST 326 et seq.

Case referred to:

(1) *Pim* v. *Reid* (1843), 6 Man. & G. 1; 6 Scott, N.R. 982; 12 L.J.C.P. 299; 1 L.T.O.S. 230; 134 E.R. 784; 29 Digest 328, *2671*.

Special Case stated by an arbitrator.

On Nov. 8, 1915, Robert Wilson signed a proposal form issued by the Scottish Insurance Corpn. for the insurance of a private motor car "against damage or loss of car up to full value." The form contained a table of rates of premium based upon the "full value" of the car, including accessories. The car, according to the particulars given by Wilson in the proposal form, was a Studebaker 20 h.p. car, made in 1915 and purchased in November, 1915; the price paid by the purchaser was given as £250 and the "proposer's estimate of present value" as £250. The rate quoted for a 20 h.p. car whose full value was £250 according to this table would have been £10 1s.; but by a note annexed to the table and printed in red,

> "cars not exceeding 25 h.p. (Treasury rating), the maker's catalogue price of which was not more than £200 without accessories or £250 with accessories, can be accepted at a premium of £8 15s."

and under this heading the car was insured and a policy issued by the corporation dated Nov. 8, 1915. By this policy the insurers agreed to indemnify the insured for twelve months, among other risks, against

> "damage by fire or explosion or self-ignition of any motor vehicle belonging to the insured and described in the schedule hereto, to an amount not exceeding the full value of the car, such sum to include loss of or damage to accessories on or usually carried with such motor vehicle."

The particulars of the car were given in the schedule to the policy and included the proposer's estimate of present value, given as "£250." The policy was subject to conditions indorsed on the back of the policy, of which condition 9 was as follows:

> "This policy may be renewed from year to year by payment of an annual premium. . . . The directors shall not be bound to send any notice of the renewal premium becoming due and shall be at liberty to decline to renew the policy at the end of the year. Further the corporation shall be at liberty at any time, by giving notice in writing to the insured by registered letter, without assigning any reason . . . to cancel the policy on refunding the

unexpired portion of the premium, subject to the rights of the insured in respect of prior loss."

By condition 10, any question between the corporation and the insured as to liability or amount of compensation was to be referred to arbitration. The policy was renewed by the insured from year to year each November, and the same premium paid until June, 1919, when the car was destroyed by fire owing to an accident at the garage. The insured claimed £500 as the full value of the car, and the corporation denied liability beyond £250; the question was therefore referred to arbitration. The arbitrator awarded that the corporation should pay £250, and directed the insured to pay the costs of the award. He also found that the full value of the car was £400 at the date of its destruction, and, the parties having requested that the opinion of the court should be taken, he stated a Case as to whether the full value of the car within the meaning of the policy was to be subject to a limit of £250. If this question was answered in the affirmative he awarded that the corporation should pay £250; if in the negative, he awarded that the corporation should pay £400. The matter thus came before his Lordship in the form of a Special Case stated by the arbitrator and filed Mar. 10, 1920.

R. M. Pattisson for the insured.
Herbert D. Samuels for the insurers.

ASTBURY, J.—The question for the decision of the court relates to the amount which the insured can recover under a motor car insurance policy, the car in question having been destroyed by fire. In November, 1915, the proposal to insure was made. The form of proposal which was issued by the insurers contains (inter alia) particulars of policies with "rates of premium based on the full value of the car." The car was a "20 h.p. Studebaker," and was purchased in November, 1915, for £250. At the rate charged for a 20 h.p. car, value £200, the premium would have been £9 12s. 6d., with an increasing rate as the value increased. But a note to this table stated that cars not exceeding 25 h.p., the maker's catalogue price of which was not more than £250 with accessories, would be accepted at a premium of £8 15s. Under the offer contained in this note the car was insured. In the columns reserved in the form for particulars, the "price paid" and "estimate of present value" were entered by the insured as £250. The policy was issued, and by cl. 3 thereof the insurers agreed "to indemnify the insured to an amount not exceeding the full value of the car." The policy was renewed from year to year, the last renewal being in November, 1918. In June, 1919, the car was destroyed by fire, and the matter was referred to the arbitrator. He found that the "full value" of the car at the time of its destruction was £400, but that the insured was only entitled to £250. At the request of the parties, he stated a Case for the opinion of the court as to whether the "full value" within the meaning of the policy was limited to £250, and this now comes before me for decision.

No decision on the point appears to be directly applicable, but I think that on the renewal of the policy in November, 1918, the insured must be deemed to have continued his estimate of the "present value" of the car as £250. In *Pim* v. *Reid* (1) CRESSWELL, J., said:

"No fresh proposal appears, therefore, to be expressly required on either side at the end of the year; but it may be then very material for the company to know if any change in the extent of the risk to enable them to determine whether or not they will continue the insurance."

Here the car was insured and the value estimated at £250. It is true that the form contains the words "proposer's estimate of present value," but it is equally clear that if he had informed the insurers that the "present value" was £400 he would have had to pay a higher premium or the insurers would have refused the renewal. There is no evidence before me as to the value of the car on the occasion of the last renewal, and it is impossible to determine whether the insured

is entitled to more than £250 owing to a rise in value between the last renewal and the date of the fire. Probably the increase took place before November, 1918. The matter must go back to the arbitrator to determine whether the increase in value wholly accrued since the date of the last renewal. If so, the insured is entitled to recover the full value, £400, and the costs of the arbitration award and this hearing. If, on the other hand, the car was worth more than £250 at the last renewal, the insured can only recover £250, and must pay the above costs.

Solicitors: *King, Wigg & Brightman*, for *Proud, Robinson & Roddam*, Bishop Auckland; *William C. Crocker*, for *Millons & Newcombe*, Newcastle-on-Tyne.

[*Reported by* F. PORTER FAUSSETT, ESQ., *Barrister-at-Law.*]

EVANS AND ANOTHER *v.* ENEVER

[KING'S BENCH DIVISION (Coleridge, J.), March 23, 1920]

[Reported [1920] 2 K.B. 315; 89 L.J.K.B. 845; 123 L.T. 328; 36 T.L.R. 441; 64 Sol. Jo. 464]

Landlord and Tenant—Lease—Forfeiture—Waiver—Breach of covenant—Arrears of rent—Payment of arrears under statute—Tenant adjudicated bankrupt—Fresh proceedings by landlord.

The plaintiffs, by two leases, let certain premises to the defendant for twelve years from 1914. The lease contained a proviso for re-entry in case the lessee should become bankrupt or if the rent should be in arrear for twenty-one days. In July, 1918, the defendant was adjudicated a bankrupt. In January, 1919, two quarters' rent were in arrear, and the plaintiffs, by specially endorsed writ, claimed possession of the premises on the ground of forfeiture for non-payment of rent. The defendant, taking advantage of the Common Law Procedure Act, 1852, s. 212, paid the rent, and costs, to the plaintiffs, whereupon those proceedings came to an end. In May, 1919, the plaintiffs again sued for possession on the ground of forfeiture by reason of the defendant's bankruptcy. The defendant contended that, by the acceptance of rent in the first action, the plaintiffs had waived the forfeiture.

Held: the acceptance of the rent by the plaintiffs in the first action did not operate as a waiver of the forfeiture, and, therefore, the second action for possession on the ground of the defendant's bankruptcy could succeed.

Notes. Considered: *Re Wells, Swinburne-Hanham* v. *Howard*, [1932] All E.R. Rep. 277. Referred: *Civil Service Co-op. Soc.* v. *McGrigor's Trustee*, [1923] 2 Ch. 347; *Morris* v. *Harris*, [1926] All E.R. Rep. 15; *Re Katherine et Cie, Ltd.*, [1931] All E.R. Rep. 125.

As to forfeiture of a lease see 23 HALSBURY'S LAWS (3rd Edn.) 665 et seq., and for cases see 31 DIGEST (Repl.) 512 et seq.

Cases referred to:

(1) *Dendy* v. *Nicholl* (1858), 4 C.B.N.S. 376; 27 L.J.C.P. 220; 31 L.T.O.S. 134; 22 J.P. 625; 6 W.R. 502; 140 E.R. 1130; 31 Digest (Repl.) 562, *6821.*

(2) *Toleman* v. *Portbury* (1872), L.R. 7 Q.B. 344; 41 L.J.Q.B. 98; 26 L.T. 292; 20 W.R. 441, Ex.Ch.; 31 Digest (Repl.) 184, *3161*. A

Also referred to in argument:

Jones v. *Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 290, *4252*.

Actions tried by COLERIDGE, J., without a jury. B

The plaintiffs had let certain premises for twelve years from Michaelmas, 1914, to the defendant by two leases, each of which contained a covenant for the payment of the rent on the usual quarter days. The leases also contained a proviso for re-entry in case the lessee should become bankrupt, or should underlet or part with the possession of any part of the demised premises without the licence of the lessor, or if the rent should be in arrear for twenty-one days. The defendant C carried on business on the second floor of the premises as a company under the name of Allen & Co., and a Miss Muirhead, a sister-in-law of the defendant, who was employed by the company, was allowed to reside on the third floor and attic of the premises, for which she paid the company a rent of £2 per week. The defendant purported to be a trustee of Allen & Co., and thereby purported to give the company the right to lease the third floor and attic to Miss Muirhead. In D July, 1918, the defendant was adjudicated bankrupt, and on Jan. 21, 1919, there were two quarters' rent—Michaelmas and Christmas, 1918—in arrear. On that date the plaintiffs served on the defendant specially indorsed writs claiming possession of the premises on the ground of forfeiture for non-payment of the rent, and claiming £77 10s. for the rent. The defendant took advantage of s. 212 of the Common Law Procedure Act, 1852, and paid to the plaintiffs the sum E claimed for rent, together with the costs. Thereupon those proceedings came to an end. The defendant's bankruptcy was known to the plaintiffs. On May 7, 1919, the plaintiffs brought two fresh actions, one against the defendant claiming possession of a part of the premises which was in his own occupation, on the ground of forfeiture by reason of the defendant's bankruptcy, and the other against the defendant and Miss Muirhead to recover possession of the part of the premises F occupied by Miss Muirhead, on the ground of forfeiture by reason (i) of the defendant's bankruptcy; and (ii) of his breach of covenant not to part with the possession of any part of the premises.

E. W. Hansell for the plaintiffs.

Haldin, K.C., and *S. Ford* for the defendants. G

COLERIDGE, J., stated the facts, and continued: What was the legal effect of that payment of rent by the defendant? The adjudication in bankruptcy in July, 1918, being known, and being a breach which worked a forfeiture, clearly, if any act had been done by the plaintiffs subsequent to that date which could either directly or inferentially acknowledge the existence of the tenancy after H the bankruptcy, that would be a waiver of the forfeiture. The first question I have to consider is, whether or not the receipt of this money so paid in these circumstances is inferentially or directly an acknowledgment of the existence of the tenancy after July, 1918. It is perfectly clear, from *Dendy* v. *Nicholl* (1), that an unqualified demand or suit for rent which accrues due subsequent to the breach which is known by the applicant for such rent waives the forfeiture. That is well I recognised law which has never been disputed. But there is another series of decisions in which it has been held that an action for recovery of possession for breach of covenants is irrevocable, and that subsequent conduct or acts do not qualify that position. Now here the action was not a mere action for rent, but was one for possession for breach of covenant, the breach being the non-payment of rent and the law afforded the defendant a statutory right to dispose of that breach by payment of the rent, and costs, which course he adopted. The landlords could refuse to take the rent, and, of course, if they had refused, the argument

would have been all the stronger that nothing that they did in the way of claiming possession for non-payment of rent qualified the assertion that the lease was determined. But how does the matter stand if they had accepted the rent? I do not observe that that has been the subject of any direct decision, but in *Toleman* v. *Portbury* (2) there is a judgment of a strong and powerful court, delivered by KELLY, C.B., in which he says (L.R. 7 Q.B. at p. 352):

> "But it is said it is an injustice that the plaintiff should be able to maintain the forfeiture and still have the rent; but I cannot see this. The plaintiff is clearly entitled to the money, either as rent if there were no forfeiture, or as mesne profits if there was."

That seems to me to be exceedingly clear, and, if I may say so with great respect, very good common sense. If that is so, the claim for possession being thus met, the fact that the second action was not brought until May 7, 1919, for possession on the ground of forfeiture, due to the adjudication of the bankruptcy in July, 1918, does not, in my opinion, prevent the success of the action by reason of the acceptance of the rent in the former action, in the circumstances I have described, and there having been no alteration in the meantime in the position of the parties, no rent having been paid or received. It would follow that the action brought in May, 1919, for forfeiture by reason of the adjudication in bankruptcy in July, 1918, is well founded, it being admitted that the bankruptcy did in fact take place, and it being admitted that, if that was so, there was primâ facie a breach which would entitle the landlords to possession.

That disposes of the main issue in the case. There is a subsidiary issue in regard to the third floor [HIS LORDSHIP stated the facts, and continued:] The defendant has not in law parted with the possession of the upper floor so as to involve a breach of the covenants of his lease. But the bankruptcy is a sufficient ground for forfeiture, and there will be judgment for possession in both actions, and for mesne profits.

Judgment for plaintiffs.

Solicitors: *G. & G. Keith; E. A. Fuller.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re MARSHALL. MARSHALL *v.* WHATELEY

[CHANCERY DIVISION (Eve, J.), January 22, 1920]

[Reported [1920] 1 Ch. 284; 89 L.J.Ch. 204; 122 L.T. 673; 64 Sol. Jo. 241]

Will—Forfeiture—Mentally disordered person—Income payable thereto until he should assign or charge or affect to assign or charge income—Order appointing receiver—Subsequent execution by beneficiary of equitable charge on life interest—Lunacy Act, 1890 (53 & 54 *Vict.*, *c.* 5), *s.* 116 (1) (*d*).

By his will the testator, who died in 1913, gave his residuary estate upon trust to raise the sum of £6,000 and to pay the income to his son for life until he should assign or charge or affect to assign or charge the income or some part thereof. The son was incapable of managing his affairs, and on Dec. 12, 1916, an order was made appointing his mother receiver under s. 116 (1) (d) of the Lunacy Act, 1890. On May 15, 1919, the son purported to execute an equitable charge on his life interest under the testator's will.

Held: there was no forfeiture of the son's life interest as the receiver appointed under the order of Dec. 12, 1916, was the statutory agent of the son and the charge of May 15, 1919, executed after the appointment of a receiver, was null and void.

Notes. The Lunacy Act, 1890, has been repealed by the Mental Health Act, 1959; for s. 116 (1) (d), of the Lunacy Act, 1890 (17 HALSBURY'S STATUTES (2nd Edn.) 1108), compare s. 101 of the Mental Health Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 1049).

Considered: *Re Custance, Keppel* v. *Douglas*, [1945] 2 All E.R. 441. Applied: *Re Oppenheim's Will Trusts*, [1950] 2 All E.R. 86. Referred to: *Baring's Settlement Trusts, Baring Bros. & Co.* v. *Liddell*, [1940] 3 All E.R. 20; *Re Westby's Settlement, Westby* v. *Ashley*, [1950] 1 All E.R. 479.

As to the effect of a forfeiture clause see 34 HALSBURY'S LAWS (2nd Edn.) 422, and for cases see 39 DIGEST 50, 51.

Case referred to:

(1) *Re Walker*, [1905] 1 Ch. 160; 74 L.J.Ch. 86; 91 L.T. 713, C.A.; 33 Digest 139, *172*.

Also referred to in argument:

Re Tancred's Settlement, [1903] 1 Ch. 715; 72 L.J.Ch. 324; 88 L.T. 164; 51 W.R. 510; 47 Sol. Jo. 319; 40 Digest (Repl.) 607, *1062*.

Re E.G., [1914] 1 Ch. 927; 83 L.J.Ch. 586; 111 L.T. 95; 58 Sol. Jo. 497, L.JJ.; 33 Digest 242, *1606*.

Wilkinson v. *Wilkinson* (1819), 3 Swan. 515; 2 Wils. Ch. 47; 36 E.R. 958; 40 Digest (Repl.) 603, *1045*.

Jacobs v. *Richards* (1854), 18 Beav. 300; 23 L.J.Ch. 557; 23 L.T.O.S. 44; 18 Jur. 527; 2 W.R. 174; 52 E.R. 118; 33 Digest 133, *94*.

Kirkwall v. *Flight* (1842), 3 W.R. 529; 33 Digest 129, *51*.

Selby v. *Jackson* (1843), 6 Beav. 192; 13 L.J.Ch. 249; 2 L.T.O.S. 366; 49 E.R. 799, L.C.; 33 Digest 131, *71*.

Re Porter, Coulson v. *Capper*, [1892] 3 Ch. 481; 61 L.J.Ch. 688; 67 L.T. 823; 41 W.R. 38; 36 Sol. Jo. 626; 3 R. 19; 40 Digest (Repl.) 605, *1055*.

Adjourned Summons.

By his will, dated Feb. 14, 1912, the testator, Reginald Dykes Marshall appointed executors and trustees and gave and devised to them all his residuary estate upon trust (inter alia) to raise the sum of £6,000 and hold the same and the investments for the time being representing the same upon trust to pay the income thereof to his son, Fitzroy Dykes Marshall, by equal quarterly payments during his life or until he should become bankrupt or should assign or charge or affect to assign or charge the said income or some part thereof or until some other

A event should happen whereby if the income belonged absolutely to him he would be wholly or partially deprived of the personal enjoyment thereof, and there was a gift over after the determination during his life of the trust of the income.

The testator died on Oct. 3, 1913, and his will was duly proved by his executors on Nov. 9, 1913. Fitzroy D. Marshall was a bachelor aged forty-nine and unable through infirmity to manage his own affairs. On Dec. 12, 1916, an order was made B under s. 116 (1) (d), of the Lunacy Act, 1890, and s. 1 of the Lunacy Act, 1908, appointing his mother, Mary Jane Marshall, receiver of his estate, and the whole of the income was directed to be applied for his maintenance. On May 15, 1919, Fitzroy D. Marshall, by a document under his hand addressed to Percival Bennett and Wallace Bennett, acknowledged that they had advanced him £30 and for securing to them the repayment thereof together with any further advances with C interest thereon at £30 per cent. per annum, and Fitzroy D. Marshall thereby purported to charge all that his share, income, estate, and interest, whether vested or contingent, under the will of the testator Reginald D. Marshall with the repayment of the sum of £30 and further advances and interest. And he further thereby undertook to execute a legal mortgage of his share and interest if called on to do so.

D This summons was taken out on behalf of Fitzroy D. Marshall (a person unable to manage his own affairs) by his mother, Mary J. Marshall, as his next friend and asked the question whether in the events that had happened Fitzroy D. Marshall had forfeited his interest in the £6,000 bequeathed by the testator's will.

Courthope Wilson, K.C., and *G. M. Hildyard* for the plaintiff.

E *G. D. Pepys* for the trustees, persons entitled in remainder.

EVE, J.—Under the will of his late father, who died in 1913, the plaintiff, Fitzroy Dykes Marshall, became entitled to the income of a fund of £6,000 until (inter alia) he assigned or charged or affected to assign or charge the same or some part of it. On May 15, 1919, he executed this document: [His Lordship read F the charge of May 15, 1919.] That document could not operate as an effective charge, because by the very execution of the document the plaintiff destroyed his life interest and thereby rendered it impossible that the persons to whom the charge was given should receive any part of the income. But the plaintiff by this instrument undoubtedly affected or attempted to charge his life interest, and, if the matter rested there, I should hold that he had thereby forfeited the income. There G are, however, other circumstances which have to be taken into account.

The plaintiff was, on Dec. 12, 1916, made the subject of an application in lunacy, and by an order of that date his mother, Mary J. Marshall, was

> "authorised in the name and on behalf of Fitzroy Dykes Marshall to receive and give a discharge for all dividends, interest, and income and all arrears thereof respectively to which the said Fitzroy Dykes Marshall is or may become en- H titled, [and further] the whole net income of the said Fitzroy D. Marshall is allowed for his maintenance from the date hereof."

The first question is whether that order itself operated as a charge on the income of the fund of £6,000 or as a direction to pay the same to another person and thereby put an end to the plaintiff's interest in that income. It is admitted, however, that I this contention cannot be successfully put forward. The person appointed to act as a receiver under s. 116 of the Lunacy Act, 1890, is not strictly a receiver, but the statutory agent of the person of unsound mind, and his receipt is the receipt by such person and certainly not the less so where, as in this case, the whole income is directed to be applied for the maintenance of such person.

There remains for consideration the question whether the document of May 15, 1919, has any effect, seeing that it was executed after the making of the order of Dec. 12, 1916. The plaintiff contends that its execution was an invalid act, and that the document is void. The order of Dec. 12, 1916 could only have been made

upon its being proved to the satisfaction of the judge in lunacy that the plaintiff was "through mental infirmity arising from disease or age incapable of managing his affairs," so that in effect it was adjudged that in December, 1916 the plaintiff was of unsound mind to the extent of being incapable of managing his own affairs. That order has not been superseded, and the question is whether in these circumstances the document of May last is or is not void. A very similar point was considered in the Court of Appeal in *Re Walker* (1), but there the court was dealing with a lunatic so found by inquisition. The court refused to direct an inquiry whether the lunatic had a lucid interval at the time of the execution of the document impeached and decided that it was wholly void. The question is, does the same result follow when the document is executed by a person not certified as a lunatic, but respecting whom an order has been made under s. 116 (1) (d)? I think it is impossible to read the judgments of the Court of Appeal in *Re Walker* (1), and particularly those passages where the lords justices relied on the provisions of s. 120 of the Lunacy Act, 1890, equally applicable, be it observed, to lunatics not so found, without coming to the conclusion that their reasoning applies to these persons also. The way it is put is that the right of a person of unsound mind to manage his affairs is suspended by the order, and that the sole management thereof in the meantime is committed to the committee or quasi-committee as the person appointed under s. 116 (1) (d), is called in some of the judgments. If this were not so, this unsatisfactory result would follow, that the affairs of the person of unsound mind, although put under the control of one person, the receiver, would in fact be controlled by two persons, namely, the person of unsound mind and the receiver. That is a state of things which the court ought not recognise if it can be avoided, and it follows that in my opinion the reasoning of *Re Walker* (1), applies to a case like the present, and the decision ought to be treated as extending to persons in the position of the plaintiff. I think that the concluding words of the judgment of COZENS-HARDY, L.J., apply equally to the case of a lunatic so found and a person in respect of whose affairs, a receiver has been appointed. He says ([1905] 1 Ch. at p. 179):

> "It cannot be right that the Crown, or the committee who represents the Crown, should have the control and management of the lunatic's estate, and at the same time that she should have power to dispose of her estate as she thinks fit. In my opinion, this deed ought to be treated as absolutely null and void."

So here I am of opinion that the document of May 15, 1919, ought to be treated as absolutely void, and on that footing it cannot have worked a forfeiture of the income of the fund of £6,000 as it would have done but for the order of Dec. 12, 1916.

Solicitors: *Cartwright & Cunningham*, for *Donisson & Edwards*, Liverpool; *Lee & Pembertons*.

[*Reported by* W. P. PAIN, ESQ., *Barrister-at-Law*.]

MARRIOTT *v.* MALTBY MAIN COLLIERY CO., LTD.

[Court of Appeal (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), November 26, 1920]

[Reported 90 L.J.K.B. 349; 124 L.T. 489; 37 T.L.R. 123; 13 B.W.C.C. 353]

Workmen's Compensation—Death resulting from injury—Suicide—Need to prove depression direct result of injury and not of brooding over consequences of injury—Death due to shock—No cerebral or other physical injury—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

On Nov. 17, 1919 the workman, a miner in the employment of the respondents, met with a severe injury to his hand. He suffered great pain and was very depressed, telling his wife that his hand would never be right again. His depression increased as time went on, and he suffered from insomnia. About Feb. 15, 1920, his doctor, in the hope that he would shake off the depression, advised him to return to work. He did so, but was greatly worried by his inability to "carry on" as before the accident, and on Feb. 28 he committed suicide. The county court judge found that he committed suicide while insane as a result of the accident, and awarded compensation to his widow as his dependant. On appeal by the employers,

Held: in such a case it must be proved (i) that at the time the workman committed suicide he was insane, (ii) that the insanity was directly the result of the accident and not indirectly, i.e., in consequence of a depression of mind brought about by brooding over the consequences of the injury, and (iii) that the suicide was the result of the insanity; where those matters were established a dependant was entitled to compensation although only shock and no cerebral injury was proved; in the present case, especially in view of the evidence that the workman was very depressed immediately after the accident and that his depression progressively increased until his death, there was evidence on which the county court judge could properly come to the conclusion to which he did.

Notes. (i) In view of the verdict now returned in a coroner's court it is submitted that today in place of "insanity" proof would have to be given of the deceased having killed himself while the balance of his mind was disturbed. (ii) The Workmen's Compensation Acts have been repealed. By s. 7 (1) of the National Insurance (Industrial Injuries) Act, 1946 [16 Halsbury's Statutes (2nd Edn.) 797]: ". . . where an insured person suffers personal injury caused by accident arising out of and in the course of his employment . . . (c) industrial death benefit . . . shall be payable to [inter alia a widow] if the death of the insured person results from the injury."

Considered: *Johnson* v. *Warren & Co.* (1928), 21 B.W.C.C. 411; *Church* v. *Dugdale and Adams, Ltd.* (1929), 22 B.W.C.C. 444; *Dixon* v. *Sutton Heath and Lea Green Colliery, Ltd.* (1929), 22 B.W.C.C. 521. Referred to: *Bevan* v. *Lancasters Steam Coal Colleries* (1927), 20 B.W.C.C. 241; *Smith* v. *Cornhill Insurance Co.*, [1938] 3 All E.R. 145; *Parry* v. *English Steel Corpn., Ltd.* (1939), 32 B.W.C.C. 272.

As to death benefit under the Act of 1946 see 27 Halsbury's Laws (3rd Edn.) 837 et seq. As to death resulting from accident under the Workmen's Compensation Acts, see ibid. (2nd Edn.), vol. 34 pp. 862–868, and for cases see 34 Digest 341 et seq.

Cases referred to:

(1) *Withers* v. *London, Brighton and South Coast Rail Co.*, [1916] 2 K.B. 772; 85 L.J.K.B. 1673; 115 L.T. 503; 32 T.L.R. 685; 61 Sol. Jo. 8; 9 B.W.C.C. 616, C.A.; 34 Digest 351, *2831*.

(2) *Grime* v. *Fletcher*, [1915] 1 K.B. 734; 84 L.J.K.B. 847; 112 L.T. 840; 31 T.L.R. 158; 59 Sol. Jo. 233; 8 B.W.C.C. 69, C.A.; 34 Digest 331, *2691*.

(3) *Bell* v. *Great Northern Rail Co. of Ireland* (1890), 26 L.R. Ir. 428; 36 Digest (Repl.) 197, **1852.*

(4) *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76; 17 T.L.R. 555; 45 Sol. Jo. 578; 36 Digest (Repl.) 197, *1038.*

Appeal from the award of a county court judge sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The applicant for compensation was the widow of a miner who suffered an injury to his hand while at work, became depressed as a result, and committed suicide. The county court judge found that he killed himself while he was insane as a result of the accident and awarded the widow compensation. The employers appealed.

Compston, K.C. and *F. J. Coddington* for the employers.

Douglas Hogg, K.C. and *Edgar Dale*, for the widow, were not called on to argue.

LORD STERNDALE, M.R.—The appeal in this case rests on the point that there was no evidence to show that the death of the workman upon whom the applicant was dependent was the result of the accident which was occasioned to him. The workman was a miner, and during his work on Nov. 17, 1919, a heavy bar fell upon his hand. It injured his hand badly. It is described by the doctor thus: "Right hand split down back between ring finger and middle, bones shown, they broken and sticking out." He was attended by the doctor for a certain time. The doctor observed that he was depressed, and advised him to go back to his work, and he did go back to his work. He continued to be in this melancholy state, and worked intermittently (he could not work continuously) until Feb. 27, 1920. At one o'clock in the morning of Feb. 28 he cut his throat with his razor.

The question is whether there was evidence upon which the learned county court judge could find, as he did, that the workman committed suicide under the influence of insanity, and that that insanity resulted from the accident. I think it is established quite clearly by the cases to which we have been referred, and which I do not intend to examine again, that in order to justify a finding of this sort it must be shown, first, that the insanity existed, and, secondly, that it was the result of the accident and the injury, and not the result of brooding over the injury causing depression which might culminate in insanity. That is to say, it must directly result from the injury and not indirectly in consequence of a state of depression of mind brought about by the consequences of the injury. I prefer to put it that way rather than to use the technical terms which have been used, because there is considerable doubt as to the exact meaning of some of those expressions. The question here is not whether we should have found, as the learned county court judge has found, but whether there was evidence upon which it was possible for him reasonably to find, as he did. The evidence of the workman's wife was that when he was brought home he was very bad. He said his hand would never get better. He seemed depressed, very depressed—that is, immediately upon the happening of the accident—he kept getting worse, was always talking about it, he did not work, and he could not sleep for weeks. He got compensation and the compensation stopped on Feb. 11. He went to work a few days afterwards; he returned and said he could not do it. From time to time he tried again, and he complained in the same way. There is no history of insanity in the family at all. The doctor said that he saw him, that the injuries were as I have described them, that he was mentally very perturbed and suffering great pain, and that his mental perturbation never cleared up, but got worse. He advised him to try and work to distract his mind and get out of the melancholic state.

The doctor said that he was neurotic after the accident, but not before. The injury to his hand was grave, and after Feb. 16 he said he had done his best, but did not think he could carry on. The doctor then advised him to try once more,

but he did not see him again, and he did not know personally whether he tried or not. In fact he did.

A specialist was called who had not seen him. I agree with what counsel for the employers said—that expert evidence of that kind, although often very valuable, must be received with considerable care, and the court must be careful not merely to accept the opinion of the doctor, but to form its own opinion upon the state of things that is pointed out by the expert person who is more skilled in the comprehension of certain symptoms than the ordinary layman. The specialist's evidence was that, having heard the account, he was of opinion that the workman was suffering from insanity. I quite agree that the learned county court judge ought not to have accepted that, simply saying: "The doctor says he is of that opinion, therefore I accept it." But he pointed out that, the depression beginning at once, the melancholia (and I think it is right to say that I think the doctor who attended the workman and used the word "melancholia," was using it in a medical sense) followed, and then, following a progressive course culminating in insanity, there were circumstances that pointed to the insanity being a consequence of the accident. There was evidence of an injury that might cause a mental shock —call it neurasthenia or call it what you like, some mental shock. There was evidence that signs of the mental shock showed themselves at once and did not develop, as in some cases they do, some time afterwards when the consequences of the accident began to prey upon the workman's mind, and there was evidence that, starting from those points, there was a progression of things going on which eventually culminated in insanity. That shock occasioned by an accident may be a subject of compensation, although there is no cerebral injury is fairly well established at this time.

Without saying in the least at what conclusion I might have come to if I had heard the evidence, I think that there was some evidence on which the learned county court judge could come to the conclusion that the depression, the melancholia, which this workman showed, was occasioned by the shock of the accident, and not by his mind preying on the consequences of the accident. If that be correct, and if that melancholia did develop into insanity, and the insanity was the cause of the suicide, I have the authority of LORD COZENS-HARDY in *Withers* v. *London, Brighton and South Coast Rail. Co.* (1) that that is a ground for compensation under the Workmen's Compensation Act, 1906. He said this ([1916] 2 K.B. at p. 775):

> "It has been said that there is some doubt whether suicide can be the result of an accident within the Workmen's Compensation Act. I confess I do not feel that doubt at all. I have no doubt that it may, and I have no doubt that an accident may be of such a nature that there is a lesion of the brain, structural injury to the brain itself, which accident may lead to an unsoundness of mind which may directly lead to suicide."

The Master of the Rolls was dealing there, no doubt, with a lesion of the brain and structural injury, but when it is once established that without any actual structural injury which can be found by examination a shock may be the subject of compensation, the words which he used there are applicable to a case where the injury is shock and not any structural injury which could be discovered. I think that there was some evidence upon which the learned county court judge could find as he did. That being so, we cannot interfere with his judgment, and this appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The dependants of a workman who seek to recover compensation for the death of a workman by suicide have to establish that, although the death was occasioned by his own act, yet in fact it resulted from the injury by accident which he had previously suffered. To do that, it seems to me that the dependants have to prove three things: First, that at the

time the workman committed suicide he was in fact insane. Secondly, that the insanity was the result of the accident. Thirdly, that the suicide itself was the result of the insanity. The third thing that it is necessary to prove would probably be easy, and in fact would require little independent proof if the first two conditions had previously been established.

In this case the evidence which the learned county court judge had before him was evidence to this effect. The workman was a miner, a hard-working respectable man, with no sign of any tendency to insanity, no hereditary predisposition that way. On Nov. 17, 1919, he suffered an extremely severe accident to his hand, an accident which was so severe that the flesh was torn away from the back of the hand disclosing the bones in a splintered condition and bursting the palm of the hand. It was an extremely severe accident, and one which we may reasonably infer occasioned severe physical shock as well as mental shock. The workman was at once attended by a doctor, who was called to give evidence before the learned county court judge. The doctor, Dr. Wood, saw the workman on Dec. 17, on the day the accident occurred. He described the accident which I need not read, and he then said: "Mentally, very perturbed; suffering great pain." That is the doctor's account of the conditions in which he found the workman immediately after the accident. I turn now to the wife's account before I go further into what the doctor said. The wife said: "The ambulance brought the deceased home at 10 p.m. after seeing Dr. Wood. Very bad." Then this is in inverted commas, meaning that this is what the workman said to her: " 'My hand will never get better.' Seemed depressed, very depressed." Those are the two accounts of the workman's condition on the night of the day of the occurrence of the accident itself, and they seem to me to indicate that the workman had received a severe physical and mental shock. I go back again to the doctor's evidence for the subsequent history of the case as it appeared to him. The next statement after that which I have read is this: "His mental perturbation"—which remember began from the time he first saw him——"never cleared up; he got worse." I now go back to the wife's account to see what her view was. She said: "Kept getting worse,"—meaning the depression—"Always talking about it; did no work; hand in sling; could not sleep for weeks." The employers paid the workman compensation down to Feb. 11. Dr. Wood thought that in his condition of depression it would be wise that he should try if possible to go back to work. His wife said that he told her that the doctor advised him to try work, it would do him good. The hand healed, but was very stiff. That was in February, and on Feb. 16 the workman did go back to work, but the wife said that he returned on that day saying that he could not do his work, and on subsequent days he gave the same sort of account. On Feb. 27 he came back from work. There is no distinct evidence as to his condition on that day except that he had been at work, and about one o'clock in the morning of Feb. 28, he committed suicide by cutting his throat with a razor.

Those were the actual facts which were before the learned county court judge. The scientific facts which were before him were to be taken partly from the evidence of Dr. Wood, and still more, I think, from the evidence of Dr. Maxwell Telling, the mental specialist who was called. Dr. Wood, I notice, is a surgeon, a Fellow of the Royal College of Surgeons. Dr. Telling is a doctor of medicine, also a Fellow of the Royal College of Surgeons, and he describes himself as a mental specialist. Dr. Telling did not see the workman and had to form his opinion entirely from the evidence which he had heard given by Dr. Wood. He said that in his view the accident "induced a change in the man's balance of outlook, the first and definite stage of definite insanity." I take it that what he means is that he had heard the evidence to which I have called attention about the depression having begun at once, and when he said that that induced a change in the man's balance of outlook I think he was saying what to his mind that fact indicated. There seems to be good ground for accepting that statement of his. Dr. Telling said that that change of outlook is the first and definite stage of definite insanity. You have, therefore,

A what scientifically and medically may be the first stage of insanity in this doctor's opinion appearing in this case immediately after the accident. Then he said that that followed a progressive course, a fixed idea of incapacity beyond what the mere physical circumstances warranted, and then suicide, that being the culminating and convincing proof of actual insanity and the melancholia directly after the accident leaving no doubt as to the cause of the insanity. In that last sentence he was again B emphasising that which I have already pointed out, namely, that the appearance of melancholia immediately followed upon the accident itself. I think that it is not fair to the doctor to suggest—it is quite certain he did not intend to suggest, as appears by what he said afterwards—that it was the suicide which he regarded as the proof of insanity. What he regarded as the proof of insanity was the concatenation of circumstances taken together culminating in suicide. He made that quite C plain. He said: "In this case, having regard to all the facts that led up to suicide, I regard suicide as proof of insanity." I think that he was only repeating from what he had said before that it was the culminating point which removed any hesitation there might have been as to the effect of the other symptoms which he had noticed, because he went on afterwards to say that suicide per se is not the slightest evidence of insanity.

D Those are the facts in the present case, and the question is whether there was evidence on which the learned county court judge was justified in coming to the conclusion that the man was suffering from insanity as the result of the injury by accident. It was contended before us that the authorities lay down the proposition that unless the insanity can be shown to be due to some positive injury to the structure of the brain it cannot be treated, as a matter of law, as the result of injury. E To my mind the cases do not establish that at all. It is quite true that in the *Withers' Case* (1), the Master of the Rolls does refer—particularly where he is saying that insanity may be the result of accident—to those cases in which there is an injury to the structure of the brain. But I do not think that reference was intended to be exhaustive. It was the illustration which would come obviously first to the mind of anyone who was dealing with any such question. We do not know what F may be the effect on a workman's mental condition of an injury which does not itself cause any damage in the actual structure of the brain, and I think, in fact, as the Master of the Rolls has pointed out, it is now established that insanity occasioned by what we call "shock" may be the result of that shock and so be the result of injury. But there may, in fact, be insanity resulting from some violent cause which does not itself affect the structure of the brain. Unless the facts of a case G lead to the conclusion, as they did in *Withers' Case* (1), that the insanity which resulted came, not from injury itself, but from the brooding over the injury—from something which was outside the injury and not occasioned by the injury—it seems to me impossible for us to say that the learned county court judge was wrong in inferring that in such circumstances the insanity was the result of the injury which the man had suffered. It has hardly been contended that if the insanity resulted H from the accident and the workman committed suicide in the circumstances in which this workman did, there was no evidence that the workman's death was the result, through the insanity, of the "injury by accident." I think, for these reasons, that there was evidence before the learned county court judge on which he could properly come to the conclusion that the workman's death resulted from I the "injury by accident," and that we cannot interfere with that conclusion.

SCRUTTON, L.J.—I agree with the judgments which have just been delivered. I express shortly in my own words the reason why I agree, because I regard this as a case of some little difficulty and I have no doubt in any future claims following on suicide we shall have counsel on one side citing *Grime* v. *Fletcher* (2), and counsel on the other side citing the present case. In what I am about to say I do not mean to suggest anything different from what my brothers have said, and I hope I shall not. But possibly expressing the same thing in different words may make a little

clearer what, at any rate, one member of the court conceives to be the distinction between the authorities. A

The dependant in the present case asks for compensation for the death of her husband who committed suicide because, she says, the suicide was the result of an accident under the Workmen's Compensation Act, 1906, and, therefore, she is entitled to be compensated for it. The workman was working in a mine and some fellow workman knocked away a prop which supported the roof above him. Knocking away the prop might have brought down the roof; in fact, it only brought down the prop which fell on the workman's hand, causing him serious injury. It appears he was much frightened and cried out. That day he was very depressed, and he went home fearing he would never work again. The doctor said that before the accident he was in no way neurotic. He also said that he was suffering from melancholia after the accident. He went back to work, and each time found the stiff hand a great obstacle, and he came back from work and cut his throat. B C

There seemed to me to be two states of fact which, like all states of fact that involve mental condition, shade into each other so that it is very difficult to say where one begins and the other stops. You may have the fact where the accident itself and the shock resulting from the accident and caused apparently by the damage done in the accident to other parts of the body than the brain has some physical effect which one cannot state precisely because one does not know what is the mysterious connection between mind and matter, but it has some physical effect on the brain which results in a change of mental habit. Insanity is a question of the degree. You depart from the ordinary standard of sanity of your time, and it may be in the first place that that physical change that takes place from the shock of the accident may take you so far from the normal standard of sanity that you would be considered insane. If then the suicide results from that condition of mind you may have a case where the accident has caused the suicide. On the other hand, you may have a case where the accident has created some physical disability which causes great and continuing pain after the accident which engenders great apprehension of poverty, and a mind which was sound at the time of the accident and after the accident may continue thinking, with fear, about pain in the future, or the fear of poverty, and brood over it, and gradually get into such a morbid condition that from the result of that brooding the person commits suicide. The line between the two is not easy to draw. Obviously there will be a state of things which is half-way between the two. But, in my view, if you get the first state of facts you get a case where the suicide does result from the accident. If you get the second state of facts you get a state of facts where the suicide is too remote from the accident to be considered the cause of it. It will always, no doubt, be difficult to get precise evidence on the matter, it will always be a case where the learned county court judge may be tempted by sympathy with the workman to find a state of facts which will give the workman a remedy and not the state of facts which will not. But, putting sympathy apart, that seems to me to be the question to which the court has to address itself, and it is a question of fact and not of law. As PALLES, C.B., said in *Bell* v. *Great Northern Rail Co. of Ireland* (3): D E F G H

> "As the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law, that if negligence causes fright, and such fright in its turn so affects such structures as to cause injury to health, such injury cannot be 'a consequence, which in the ordinary course of things, would flow from the' negligence unless such injury 'accompany such negligence in point of time'." I

There is a very similar explanation of the matter in the judgment of KENNEDY, L.J., in *Dulieu* v. *White & Sons* (4).

The two workmen's compensation cases to which we have been referred of *Grime* v. *Fletcher* (2) and *Withers* v. *London, Brighton and South Coast Rail. Co.*

(1) do not seem in any way to interfere with the law as I have stated it. In *Grime* v. *Fletcher* (2), the workman was injured by a very minute splinter of metal getting into his eye. He went on with his work though he was attended by his doctor for fourteen days. Then the specialist told him that he might lose his eye, and he went back to work the next morning and shot himself. On those simple facts the Court of Appeal were of opinion—and I see no reason to dissent from their view—that there was no evidence on which the learned county court judge could come to the finding he did that insanity during which the workman committed suicide was the direct cause of the accident. It was a case where the sudden knowledge that he might lose his eye and the lack of moral courage to stand up against it had led to his determining his existence rather than face his troubles. In the other case—namely, *Withers* v. *London, Brighton and South Coast Rail. Co.* (1)—the learned county court judge had found that the suicide was not the result of the accident, and the Court of Appeal did not feel able on the evidence to disturb his finding. Here, again, there was a wound to a thumb by accident, and some time afterwards the workman, believing that the effect of the injury would for ever prevent him from returning to his work, committed suicide. The learned county court judge found it was not the result of the accident, and the Court of Appeal held that they could not interfere in his finding.

In the present case, when one gets at the time of the accident that the workman was frightened and had a severe shock in a place where the injury might have been very serious indeed if the roof had come down, that on the day of the accident he was very depressed, that he was neurotic after the accident and not before, and suffered from melancholia, I am unable to say that there is no material on which the learned county court judge could come to the conclusion that he did. As shown by the notes of the judgment with which we have been favoured, his conclusion was that the shock had caused some physical injury to the brain which ultimately resulted in insanity and his committing suicide. The question is not whether I should have come to the same conclusion, but whether there is evidence upon which the judge might come to that conclusion, and I am unable to say—as the Court of Appeal were unable to say in *Withers* v. *London, Brighton and South Coast Rail. Co.* (1), that there is no evidence upon which the learned county court judge could have properly come to that conclusion. For that reason I agree that this appeal should be dismissed, with the usual result.

Appeal dismissed.

Solicitors: *Parker-Rhodes & Co.*, Rotherham; *Corbin, Greener & Cook*, for *Raley & Sons*, Barnsley.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re DILKE'S SETTLEMENT TRUSTS. VEREY *v.* DILKE

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), October 13, 1920]

[Reported [1921] 1 Ch. 34; 90 L.J.Ch. 89; 124 L.T. 229; 37 T.L.R. 13]

Power of Appointment—General power—Power to appoint to "such persons" as donee should appoint—Appointment to "such persons and purposes" as donee should appoint.

A power to appoint by deed to "such persons" as the appointor shall appoint is validly exercised by an appointment to "such persons and purposes" as the appointor shall by will or codicil appoint.

By a settlement, dated Dec. 1, 1914, approved by the Master in Lunacy, to which D., a person of unsound mind not so found by inquisition, by his receiver was a party, money was settled upon trust to pay the income thereof during the life of D. as therein mentioned, and after his death, in the events which happened, upon trust for such persons as D. with the consent and concurrence in the deed of the settlement trustees (not being less than three), or of a majority of three or four trustees, should by deed personally appoint. By a deed, dated April 19, 1918, made between D., who had recovered and was at that time no longer subject to the lunacy jurisdiction, and three of the four settlement trustees, D., with the consent and concurrence of the three trustees parties thereto, appointed that they and the fourth settlement trustee, who did not signify his assent to or dissent from the appointment, should stand possessed of the settled fund in trust for such persons and purposes as D. should by will or codicil appoint. By a codicil dated May 6, 1918, D., after referring to the last-mentioned deed and the power thereby conferred, appointed that the settlement trustees should pay and transfer the fund in manner therein mentioned. D. died on Dec. 7, 1918.

Held: the appointment by codicil was valid and effective because the consent of the trustees and the concurrence of the trustees did not impose upon them the duty of ascertaining who were the persons to take under the appointment, but merely imposed on them the duty of ascertaining whether or not D. was in such a condition of mind as to be fit to exercise the power conferred by the settlement of 1914, and, accordingly, the power was a general power, and so had been validly exercised by the deed of 1918.

Decision of PETERSON, J. (1920), 123 L.T. 386, affirmed.

Notes. Followed: *Re Phillips, Lawrence* v. *Huxtable*, [1930] All E.R. Rep. 165. Distinguished: *Re Watts, Coffey* v. *Watts*, [1931] All E.R. Rep. 786. Applied: *Re Joicey, Thompson* v. *Duncan* (1932), 173 L.T. Jo. 453; *Re Harvey, Banister* v. *Thirtle*, [1950] 1 All E.R. 491. Considered: *Re Churston Settled Estates, Freemantle* v. *Baron Churston*, [1954] 1 All E.R. 725. Applied: *Re Triffitt's Settlement, Hall* v. *Hyde*, [1958] 2 All E.R. 299.

As to general and special powers of appointment see 30 HALSBURY'S LAWS (3rd Edn.) 208, 209; as to the construction of powers of appointment see ibid. 234–241, and for cases see 37 DIGEST 415–417.

Appeal from an order of PETERSON, J.

By an indenture of settlement dated Dec. 1, 1914, and made in pursuance of a compromise approved by the Chancery Division and the Master in Lunacy and to which Sir Charles Wentworth Dilke, a person of unsound mind not so found by inquisition, by his receiver was a party, a sum of £48,000 was settled upon trust to pay the income thereof during the life of Sir Charles Wentworth Dilke as therein mentioned, and after his death, subject to certain trusts which failed, in trust for such person or persons as Sir Charles Wentworth Dilke with the consent and concurrence in the deed of the settlement trustees (not being less than three), or of a majority of three or four trustees, should by deed personally appoint and

in default of appointment in trust as therein mentioned. By a deed, dated April 19, 1918, made between Sir Charles Wentworth Dilke, who had by this time recovered and was no longer subject to lunacy jurisdiction, of the one part and three of the four settlement trustees of the other part, Sir Charles Wentworth Dilke with the consent and concurrence of the three trustee parties thereto appointed that they and the fourth settlement trustee, who did not signify his assent to or dissent from the appointment, should stand possessed of the settlement fund in trust for such person or persons and purposes as Sir Charles Wentworth Dilke should by will or codicil appoint. By a codicil, dated May 6, 1918, to his will, Sir Charles Wentworth Dilke, after referring to the last-mentioned deed and the power thereby conferred, appointed that the settlement trustees should pay and transfer the fund in manner therein mentioned. Sir Charles Wentworth Dilke died on Dec. 7, 1918. A summons was taken out by Sir Charles Wentworth Dilke's executors for the determination (inter alia) of the question whether Sir Charles Wentworth Dilke was entitled on April 19, 1918, to exercise the power given to him by the settlement; and, if so, whether the power had been well and effectually exercised by him by the deed of that date. The summons was adjourned into court and came on to be heard before Peterson, J., on April 29 and 30, 1920, when his Lordship decided (123 L.T. 386) that the power had been properly exercised, as the consent and concurrence of the trustees did not impose on them the duty of ascertaining who were the persons who were actually to take under the exercise of the power of appointment, but merely whether Sir Charles Wentworth Dilke was in their opinion in such a condition of mind as to be a fit person for the exercise of the power of appointment itself. From that decision the defendant, Sir Fisher W. Dilke, appealed.

Hughes, K.C., and *E. Knowles Corrie* for the defendant.
H. B. Vaisey for the executors of Sir Charles Dilke, the father of the testator.
Luxmoore, K.C., and *Dighton Pollock* for the widow of the testator.
G. R. Northcote for the plaintiffs.
Clauson, K.C., and *Droop; J. T. Prior;* and *Bryan Farrer* for other parties interested who were made respondents to the appeal.

LORD STERNDALE, M.R.—This appeal from the decision of Peterson, J., raises a question in connection with the estate of Sir Charles Wentworth Dilke, a son of Sir Charles Dilke, the well-known statesman, and turns upon practically one clause in a deed of settlement. There have been difficulties and disputes with regard to the estates of the two baronets as to their rights to some property which was left under the will of Mr. Snook. I do not think it is necessary to go in detail into the history of the matter. It is recited quite sufficiently for all practical purposes in the indenture of Dec. 1, 1914, which is the one with which we have to deal, and I refer to those recitals for the history of the matters which led up to the making of the indenture and to the question which we have to decide.

The indenture was entered into as a compromise of certain proceedings between the estate of the late baronet and the estate of the then baronet, the testator, who was at that time a person of unsound mind, and it was in the nature of a compromise. The clause with which we have to deal is this:

> "Provided always that if the present baronet shall die leaving a widow whom he shall have married after the due and authorised termination of all control of his person and estate under the Lunacy Acts but without leaving issue or if he shall leave issue, but none of them shall attain a vested interest in the trust fund, then from and after his death or such failure of issue, as the case may be the said trustees or trustee shall pay the whole of the income of the trust fund to such widow during the remainder of her life."

The testator married, but married before the formal order discharging him from

the lunacy jurisdiction had been made. Therefore there was no such widow. The proviso continues:

"In default of any issue of the present baronet attaining a vested interest [there was no such issue, no wife and no widow, no such issue at all of the testator] then subject to the interest of any such widow as aforesaid the said trustees or trustee shall stand possessed of the trust funds in trust for such person or persons as the present baronet with the consent and concurrence in the deed of the said trustees or trustee (not being less than three) or of a majority of three or four trustees shall by deed personally appoint."

Those are the words with which we have to deal. But as some reliance was placed on the succeeding words I will read them too:

"And in default of and so far as any such appointment shall not extend or operate then as to the sum of £15,000 and the estate duty thereon as the present baronet shall by any existing or future will appoint."

The testator then made this appointment or purported appointment. It was an indenture made between himself and three of the four trustees, and therefore there was the requisite majority of the four trustees. Those three of the four trustees concurred in the deed. It recited various matters and then proceeded in this way:

"Now this indenture witnesseth as follows: For effectuating the aforesaid desire and in the exercise of the power for this purpose conferred on him by the principal indenture and of all other powers the said Sir Charles Wentworth Dilke with the consent and concurrence of the trustees (being three out of the four trustees of the principal indenture) testified as aforesaid hereby appoints that the said trustees and the said Sir John Paget Mellor [the fourth trustee] after the death of the said Sir Charles Wentworth Dilke and subject to the rights and interests of his issue (if any) shall stand possessed of the trust fund and all other (if any) the property now or which may by any means hereafter become subject to the trusts of the principal indenture, in trust for such person or persons and purposes as the said Sir Charles Wentworth Dilke shall by will or codicil appoint."

Those words "and purposes" do not occur in the clause in the deed of Dec. 1, 1914, but they do occur here. He did appoint by will and codicil, and the question is whether that is a proper appointment in favour of those persons whom he appointed by will or codicil. That depends upon the meaning, it seems to me, of the words

"in trust for such person or persons as the present baronet with the consent and concurrence in the deed of the said trustees or trustee . . . shall by deed personally appoint."

Apart from these words I have no doubt that PETERSON, J., is quite right in saying that this is an ordinary general power of appointment. Some stress was laid on the absence of the words "and purposes" after the words "such person or persons" in the clause. I do not attach any importance to it. It may be contained in other precedents in the form of general appointment or it may not—I believe it very often is, but I attach no importance to its absence. It seems to me that the draftsman might have left out "such person or persons." It would have made no difference if it had been "as he shall appoint" without those other words. It would still be a general power of appointment, and I have no doubt that this was but for the words that I have already read a general power of appointment under which what was done would be perfectly properly done.

I think that the question as to the effect of the words cannot be better stated than it was stated by PETERSON, J., in his judgment. He said this:

"But, in view of the fact that without these words there would be a simple general power of appointment which would enable that to be done which has been done, does the introduction of the words alter what would otherwise be

a general power of appointment so as to restrict it in such a way as to prevent the appointor from doing that which he otherwise would have been entitled to do under the general power of appointment, or is the more reasonable interpretation that that consent and concurrence in the deed of the trustees means that, before the trustees can consent to the exercise of the general power, they must manifest their consent by concurring in the deed of appointment itself?"

That states the question perfectly accurately and perfectly clearly. The only argument on the part of the defendant, I think, may be put in one sentence, and it is this, that the meaning of the words "with the consent and concurrence" and so on is this: First it is said that the person or persons to whom the consent and concurrence must apply must exclude Sir Charles Wentworth Dilke himself; and secondly that that being so it also means that the consent and concurrence of the trustees must be to the persons who are appointed. They must know the persons who are appointed, if not by name then by description, and they must consent to the appointment of those particular persons, and that they have not the power to consent to the appointment of persons such as would take under this appointment who were not known to them at the time that they gave their consent. That is to say it must be a consent to the persons, and a consent to the appointment is not sufficient. That I think was the entire drift of the argument on the part of the defendant.

Having read the question as stated by Peterson, J., in his judgment, I cannot do better than read the answer which he gave to it. He said:

"On the whole, having regard to the facts of the case, having regard to what I have said as to the effect of a simple general power of appointment, I am of opinion that the true meaning of this clause is that the consent of the trustees and the concurrence of the trustees does not impose upon them the duty of ascertaining who are the persons who are actually to take under the exercise of the power of appointment, but does merely impose upon them the duty of ascertaining whether or not Sir Charles is, in their opinion, in such a condition of mind as to be a fit person for the exercise of the power of appointment itself. In other words, my view is that the true meaning of the clause is this, that it is equivalent to a declaration that the trustees are to stand possessed of the trust funds in trust for such person or persons as the present baronet shall by deed personally appoint, such appointment to be made with the consent and concurrence of the trustee or trustees, but not less than three nor more than four trustees."

I cannot express my opinion of the meaning of this clause better than that I agree in the way the question has been stated by Peterson, J., and I agree with his answer to it. In my opinion, this appeal should be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The question that we have to determine is whether the power which has been exercised by the deed of April 19, 1918, is a general power or a special power. The two classes of power have been defined in the way I am about to state. General powers are such as the donee can exercise in favour of such person or persons as he pleases, including himself. Limited powers, which are sometimes also called special powers, are such as the donee can exercise only in favour of certain specified classes or persons. It is said, on the one hand, that here is a power which can be exercised by Sir Charles Wentworth Dilke in favour of such person or persons as he pleases, although for the validity of the exercise of the power the consent of the trustees and their concurrence in the deed is required. On the other hand it is said that it is a special power exercisable only in favour of such persons or classes of persons as shall be approved by the trustees and ascertained or ascertainable by name or description at the date of the exercise of the power. Which of those two constructions is the right one? The words are,

"In trust for such person or persons as the present baronet [—that is Sir Charles Wentworth Dilke—] with the consent and concurrence in the deed of the said trustees or trustee (not being less than three) or of a majority of three or four trustees shall by deed personally appoint."

Omitting for the moment the words "with the consent and concurrence" and so on, it is clearly a general power. It is upon trust for such persons as the present baronet shall personally appoint. There can be no question about that. But the words "with the consent and concurrence" are inserted.

In my opinion, the natural meaning of those words is that the consent and concurrence in the deed of the trustees is required to the appointment. It is in trust for such persons and so on as with their consent the present baronet shall appoint. It is to the appointment that the consent is required. In other words the consent is required in order to give validity and effect to the appointment. But the appointment is to be made by Sir Charles Wentworth Dilke himself, and to him and him alone is left the selection of the objects of the power. Having done so, however, having selected the objects of the power, he can only give effect to it by obtaining the consent of the trustees and their concurrence in the deed. I think I am only stating in my own words the view expressed by PETERSON, J., with which I entirely concur, and I agree that this appeal must be dismissed.

YOUNGER, L.J.—I am of the same opinion, and I cannot help suspecting that the difficulty which has arisen in the present case respecting the validity of the appointment of April 19, 1918, is in some sense attributable to the fact that under that appointment the fund has in fact been appointed by Sir Charles Wentworth Dilke in trust for such person and persons and purposes as he shall by will and codicil appoint, because when you look at the deed of Dec. 1, 1914, you find not in exercise of any such power but in default of the exercise of such power of appointment, then the fund is not as to the whole, but only as to the sum of £15,000 and the estate duty thereon to go as the present baronet, that is Sir Charles Wentworth Dilke, shall by any existing or future will appoint. Accordingly, if the appointment be good the effect has been that the whole fund is disposable by the baronet by his will, whereas according to the terms of the deed of trust it would appear that he is only entitled to dispose of £15,000 of it, and then only if there has been no such appointment made as is previously contemplated. In other words, I think that if the appointment had not actually taken the form which it did the arguments against it would not have been as plausible as they have been. But one has to take the deed apart from its provisions and say what is authorised by that deed, and I cannot come to any other conclusion than that in point of fact there is, in the event, given to Sir Charles Wentworth Dilke a general power of appointment by deed, and that the extent to which that appointment may go is not limited by the fact that it is not valid unless three out of four or all the four trustees consent to its being made. Nor again am I able to arrive at the conclusion that you ought in any way to limit the effect of the words "for such person or persons as the present baronet should appoint." The general power given by the trust deed in default of appointment, which is expressed to be as to the sum of £15,000 as the present baronet shall by any existing or future will appoint, is different from the words immediately preceding, but not, it seems to me, sufficient to enable the court to place on these words any limited signification. Accordingly there was here a general power of appointment to be exercised with certain consent. That power has been exercised and the consent forthcoming. The power is therefore, in my opinion, well and effectually exercised.

Appeal dismissed.

Solicitors: *Stow, Preston & Lyttelton; Lewis & Lewis; Preston & Foster; Lethbridge, Money & Prior; Farrer & Co.; Russell-Cooke & Co.; Beaumont, Son & Rigden.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HARDY *v.* CENTRAL LONDON RAIL CO.

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), July 2, 6, 26, 1920]

[Reported [1920] 3 K.B. 459; 89 L.J.K.B. 1187; 124 L.T. 136; 36 T.L.R. 843; 64 Sol. Jo. 683]

Child—Negligence—Dangerous machine—Children warned off from time to time—Knowledge by them that they had no business to be on premises—Trespassers—Liability of owner of premises for injury to child—"Allurement"—Relevance where leave and licence to child to be on premises negatived.

The defendants had a moving staircase leading from the booking-hall of a station down to the railway platforms below. The booking-hall was open to the street, and there was no physical obstruction to prevent anyone walking on to the staircase, at the bottom of which there was a barrier, where a ticket-collector was stationed. It was a common practice for children living in the vicinity, especially in the evening, to play upon the staircase, but they were always warned off, when seen, by the ticket-collector, by the clerk in the booking-office in the hall, and by a station policeman, who visited the hall twice every hour and drove the children away whenever he saw them. One evening, after the policeman had driven the children away and they had returned, the plaintiff, aged 5½, was left by an elder boy, in whose charge he was, in the hall, while the boy played on the staircase. The plaintiff was found with his hand caught in the rubber band of the staircase, he being seriously injured. In an action by the plaintiff in which he alleged negligence by the defendants in not guarding or watching the staircase, but leaving it unattended,

Held: although the warnings given to the children were ineffective to keep them permanently away from the staircases they were entirely effective in bringing home to their minds that they had no business to be where they were or to play on the staircase; they were, therefore, trespassers; and, in the absence of evidence of allurement with malicious intent to injure, the plaintiff was not entitled to succeed.

Per Bankes, L.J.: In *Latham* v. *R. Johnson and Nephew, Ltd.* (1), [1913] 1 K.B. 398, Farwell, L.J., says that he is not aware of any case that imposes any greater liability on the owner [of land] towards children than towards adults. This is no doubt true, but in accepting the proposition the fact must not be lost sight of that a very different inference may have to be drawn from facts when dealing with the case of an infant than when dealing with the case of an adult. For instance, what may amount to an effective warning to an adult may be no warning at all to an infant. What may amount to an invitation or a licence to a child may be neither the one nor the other to an adult.

Per Warrington, L.J.: The presence of an "allurement" to children may be a natural element in considering whether in all the circumstances leave and licence is to be inferred, but where, as I think is the case here, leave and licence is distinctly negatived, the fact ceases to be relevant.

Notes. The distinction between invitees and licensees was abolished by the Occupiers' Liability Act, 1957, which, by s. 2 (37 Halsbury's Statutes (2nd Edn.) 834) provided that an occupier of premises owed the same duty—a "common duty of care"—to all his visitors, the common duty being to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

Approved: *Addie & Sons (Collieries), Ltd.* v. *Dumbuck*, [1929] All E.R.

Rep. 1. Considered: *Phipps* v. *Rochester Corpn.*, [1955] 1 All E.R. 129. Referred to: *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R. Rep. 222; *Culkin* v. *McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Gould* v. *McAuliffe*, [1941] 1 All E.R. 515; *Walder* v. *Hammersmith Borough Council*, [1944] 1 All E.R. 490; *Adams* v. *Naylor*, [1944] 2 All E.R. 21; *Buckland* v. *Guildford Gas Light & Coke Co.*, [1948] 2 All E.R. 1086; *London Graving Dock Co.* v. *Horton*, [1951] 2 All E.R. 1; *Pratt* v. *Richards*, [1951] 1 All E.R. 90; *Gough* v. *National Coal Board*, [1953] 2 All E.R. 1283.

As to the standard of care required in relation to children see 28 HALSBURY'S LAWS (3rd Edn.) 16–19, and for cases see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

(1) *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(2) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(3) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(4) *Harrold* v. *Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, *577*.

(5) *Deane* v. *Clayton* (1817), 7 Taunt. 489; 1 Moore, C.P. 203; 129 E.R. 196; 43 Digest 411, *345*.

(6) *Lowery* v. *Walker*, [1910] 1 K.B. 173; 79 L.J.K.B. 297; 101 L.T. 873; 26 T.L.R. 108; 54 Sol. Jo. 99, C.A.; reversed, [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 27 T.L.R. 83; 55 Sol. Jo. 62; 48 Sc.L.R. 726, H.L.; 36 Digest (Repl.) 55, *302*.

(7) *Grand Trunk Rail. Co. of Canada* v. *Barnett*, [1911] A.C. 361; 80 L.J.P.C. 117; 104 L.T. 362; 27 T.L.R. 359, P.C.; 36 Digest (Repl.) 71, *379*.

(8) *Hayward* v. *Drury Lane Theatre, Ltd. and Moss Empires, Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 33 T.L.R. 557; 61 Sol. Jo. 665, C.A.; 36 Digest (Repl.) 48, *255*.

(9) *Gautret* v. *Egerton*, *Jones* v. *Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gantret* v. *Egerton*, *Jones* v. *Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, *247*.

Also referred to in argument:

Jenkins v. *Great Western Rail. Co.*, [1912] 1 K.B. 525; 81 L.J.K.B. 378; 105 L.T. 882, C.A.; 36 Digest (Repl.) 64, *346*.

Earl v. *Lubbock*, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 53 W.R. 145; 21 T.L.R. 71; 49 Sol. Jo. 83, C.A.; 36 Digest (Repl.) 107, *532*.

Norman v. *Great Western Rail. Co.*, [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; 31 T.L.R. 53, C.A.; 38 Digest 352, *580*.

Keffe v. *Milwaukee Rail. Co.* (1875), 18 Amer. Rep. 393.

Barrett v. *Southern Pacific Co.* (1891), 25 Amer. St. Rep. 186.

Singleton v. *Eastern Counties Rail. Co.* (1859), 7 C.B.N.S. 287; 114 E.R. 827; sub nom. *Singleton* v. *South-Eastern Rail. Co.*, 34 L.T.O.S. 67; 36 Digest (Repl.) 114, *565*.

Ponting v. *Noakes*, [1894] 2 Q.B. 281; 63 L.J.Q.B. 549; 70 L.T. 842; 58 J.P. 559; 42 W.R. 506; 10 T.L.R. 444; 88 Sol. Jo. 438; 10 R. 265; 1 Digest 33, *259*.

Appeal by the defendants from an order of SHEARMAN, J., in an action tried by him without a jury.

The plaintiff was a boy aged 5½ years, who sued by his father as his next friend to recover damages for personal injuries owing to the alleged negligence

of the defendants. The defendants had at their Liverpool Street Station a mechanical escalator for the use of passengers, leading from the booking-hall down to the railway lines. The staircase was worked by an endless band, which consisted of different segments joined together by studs. At the top the band passed round a wheel, and where it left the wheel and followed the guidance of a brass plate leading to the head of the staircase it was open to sight and touch by persons in the booking-hall. It was not fenced off or protected at this point. The booking-hall was open to the street, and the staircase was open at the top, so that there was no physical obstruction to prevent anyone in the booking-hall from using it. There was a ticket-collector at a barrier at the bottom of the staircase, and there was a booking-clerk behind a window in the booking-hall. It was a common practice for children to play with and upon the staircase, especially in the evening, by running down as far as they could without being caught by the ticket collector at the bottom and running up again. The children, when seen, were always warned of the staircase by the clerk or the ticket-collector, and a railway policeman, whose duty it was to visit the booking-hall twice every hour, always drove the children away. The children went away when told to do so. On the evening of April 9, 1919, a number of children who were playing on the staircase were driven away by the policeman and chased as far as the other side of the street. The children returned later, among them being the plaintiff, who was in charge of an older boy named Nichols. Before going into the station Nichols ascertained that the policeman was not there, and then went down the staircase, the plaintiff being left in the booking-hall. He was soon afterwards heard to scream, and his hand was found to be caught in the band at the place where it left the wheel and passed along the brass plate, and was so severely injured that it had to be amputated. By the statement of claim the plaintiff alleged that the booking-hall was a place of habitual resort for children who frequently played upon the top part of the escalatory, and that the defendants were negligent in that they took no precaution to prevent children from playing in the booking-hall and upon and with the escalator, permitted the plaintiff to be and remain in the booking-hall, suffered the escalator to be unattended, took no steps to insure that it was properly watched and safeguarded, and did not guard or adequately or properly guard the governing wheel and moving balustrade. The defendants denied that they were guilty of negligence, and pleaded that the plaintiff was at the time of the accident a trespasser on their premises. SHEARMAN, J., said that he could not distinguish the case on its facts and the law from *Cooke* v. *Midland Great Western Railway of Ireland* (2). The defendants knew that children were in the habit of frequenting the station, and he came to the conclusion that the plaintiff was there with the licence of the defendants, because they did not take the simple and effective steps which would have prevented the children from coming on their property, that the moving staircase was an allurement to children, and that the defendants were negligent in not protecting the machinery at the place where the accident happened, and were therefore liable. He awarded the plaintiff £300 damages, and the defendants appealed.

Compston, *K.C.* and *R. O. Roberts* for the defendants.
Hawke, *K.C.* and *Croom-Johnson* for the plaintiff.

Cur. adv. vult.

July 26. The following judgments were read.

BANKES, L.J.—This is an appeal from the judgment of SHEARMAN, J., awarding damages to an infant who was very seriously injured while in the defendant company's booking-hall at Liverpool Street Station. There is in the booking-hall a mechanical moving staircase or escalator. The infant placed his hand in such a position that it was caught by the strap which worked the staircase, and it was so severely crushed that it had to be amputated. The exact position of the escalator in reference to the street was not gone into at the trial. The learned judge mentions

the fact in his judgment that it was within a few yards of the open street, but I do not understand that any attempt was made to establish that the escalator was a nuisance, so as to bring the case within the authority of *Lynch* v. *Nurdin* (3) and *Harrold* v. *Watney* (4), and that class of case. The case for the plaintiff, as set out in the statement of claim, was that the booking-hall was a place of habitual resort for children, who frequently played upon the escalator, and that the negligence of the defendants consisted in taking no precautions to prevent children from playing in the booking-hall and upon and with the escalator, in permitting the plaintiff to be and remain in the booking-hall, in suffering the escalator to remain unattended, in taking no steps to ensure that the same was properly watched and safeguarded, and in not guarding or adequately or properly guarding the governing wheel and moving balustrade. There appears not to have been any real conflict of evidence in reference to the extent to which childrn were in the habit of playing on the escalator, or as to the efforts of the railway company's servants to prevent their doing so. SHEARMAN, J., has found that the plaintiff was where he was, when he was injured, "with the licence of the company because they did not take the simple, easy, and effective steps which would have prevented the children coming into the property." If this finding is warranted by the evidence I think that the plaintiff would be entitled to the damages which the learned judge awarded him, on the ground that there was evidence upon which the learned judge might treat that portion of the escalator in which the plaintiff's hand was caught, as something so highly dangerous in itself to children licensees as to constitute a trap against which it was the duty of the railway company to provide adequate protection: see per HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) [1913] 1 K.B. at p. 419.

The serious and important question in the present case is whether the learned judge was justified in holding that the infant plaintiff was in the position of a licensee. That depends entirely upon the evidence as to which, as I have said, there was no real conflict. The evidence established clearly that numbers of children had been for a long time in the habit of playing upon the escalator whenever they got the opportunity, and generally in the evening. The evidence established equally clearly that the railway company's employees warned the children off whenever they saw them. The employees particularly referred to were a female ticket-collector who was stationed at the bottom of the escalator, a female booking-clerk in the booking-office, and a railway policeman whose duties took him into the booking-hall about once every half hour. The warnings off given by these persons were ineffective in this sense only, that they did not prevent the children returning as soon as they thought that the policeman was safely out of the way, or the ticket-collector or booking-clerk so occupied as to be unable to do anything except warn them off again. The evidence seems to show that the children always went away when told to do so. If this is the true view of the evidence, the finding of the learned judge appears to me to lay a wider duty upon the owner or occupier of premises towards children frequenting those premises than the law has hitherto recognised.

That law has been so fully and elaborately discussed comparatively recently in this court by FARWELL, L.J., and HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) that it is not necessary to look beyond those judgments to ascertain what the law is. FARWELL, L.J., says that he is not aware of any case that imposes any greater liability on the owner towards children than towards adults. This is no doubt true, but in accepting the proposition the fact must not be lost sight of that a very different inference may have to be drawn from facts when dealing with the case of an infant than when dealing with the case of an adult. For instance, what may amount to an effective warning to an adult may be no warning at all to an infant. What may amount to an invitation or a licence to a child may be neither the one nor the other to an adult. The present appears to be a case in which, though the warnings off were ineffective in the sense

I have indicated, they were entirely effective in bringing home to the minds and intelligences of the children concerned that they had no business to be where they were, or to play on the escalator, and that whenever they were seen they would be warned off. I can conceive of warnings to children so ineffective, either from their nature or from the absence of any attempt to enforce them, as to convey to the mind of a child the impression that no real objection was taken to what was being done. In such a case it might be possible to draw the inference that the child was allowed to be and remain under the impression that it had permission to do what it was doing; or to use the language of GIBBS, C.J., in *Deane* v. *Clayton* (5) (7 Taunt. at p. 533) and VAUGHAN WILLIAMS, L.J., and KENNEDY, L.J., in *Lowery* v. *Walker* (6) ([1910] 1 K.B. at pp. 185, 198) it was encouraged to come by the absence of objection. The same kind of inference was drawn in *Lowery* v. *Walker* (6) in the House of Lords, where LORD HALSBURY speaks of persons crossing the occupier's ground in one sense with his permission, not that he has given direct permission, but that he has declined to interfere and so acquiesced in their crossing it.

The present case is not one in which, in my opinion, any inference of licence can be drawn. I come to the conclusion upon the evidence that the children were all of them fully aware of the fact that they had no right to be and no business to be, where they were. In other words, that they were trespassers. In *Latham* v. *R. Johnson and Nephew, Ltd.* (1) HAMILTON, L.J., deals with this point in these words ([1913] 1 K.B. at p. 415):

> "Here it is hard to see how infantile temptations can give rights however much they may excuse peccadilloes. A child will be a trespasser still if he goes on private ground without leave or right, however natural it may have been for him to do so."

In the present case the elder boy, in whose charge the infant plaintiff was, appears to me to have been fully aware that he was a trespasser in the booking-hall. The plaintiff was probably old enough to be aware of the fact also, seeing that it was the policeman who drove the children away on several occasions. However that may be, I do not think that the plaintiff is entitled to be put into a better position than the boy in whose charge he was at the time of the accident. If the plaintiff was a trespasser, then he has no right of action, as there is no evidence of any allurement with malicious intent to injure: see *Latham* v. *R. Johnson and Nephew, Ltd.* (1) (ibid. at p. 405) per FARWELL, L.J., and per LORD ROBSON in *Grand Trunk Rail. Co. of Canada* v. *Barnett* (7) ([1911] A.C. at p. 369).

One naturally feels great sympathy for a child who has been injured as the infant plaintiff has, but to recognise a right of action in respect of his injuries would be, I think, to acknowledge the existence of a rule of law, which, if carried to its furthest length, would measure the degree of protection to which a child is entitled by the extent to which it disregarded warnings, until at last persistent disobedience and neglect to obey warnings would entitle a child to protective fencing round every object within the limits of its wanderings which might attract its youthful fancy and could cause it injury. The decision in *Cooke* v. *Midland Great Western Railway of Ireland* (2) in the House of Lords clearly proceeded upon the inference that the children resorted to the turntable with the tacit permission of the railway company. The headnote of the case is misleading in using the expression "trespassers." The notice board was obviously treated as not conveying any impression to the children's minds. For the reasons I have given I do not think that any inference can be drawn in the present case except that the children were, and knew that they were, trespassers. The appeal must be allowed, the judgment for the plaintiff set aside, and judgment entered for the defendants with costs here and below.

WARRINGTON, L.J.—The question in this case is whether the defendants are liable in damages for the result of an accident whereby the plaintiff, a little

boy of 5½ years old, sustained a serious injury. The action was tried before SHEARMAN, J., without a jury, and he found for the plaintiff, awarding him £300 damages. The defendants appeal. The plaintiff's claim is founded on the alleged neglect of the defendants' duty to perform a duty towards the plaintiff which, it is said, they owed him, and the main question is whether they owed any, and, if so, what duty towards the plaintiff in the circumstances of the present case, and whether they neglected to perform such duty.

[HIS LORDSHIP stated the facts and continued:] In these circumstances the liability of the defendants depends in the first instance on the answer to be given to the question: Was the plaintiff on the occasion in question a mere trespasser at the place where he met with the accident, or was he there by the licence or invitation, express or tacit, of the defendants? It has been contended, and SHEARMAN, J., has held that his position was that of licensee, if not of invitee. If that conclusion is correct, it may be that it was the duty of the defendants to protect the plaintiff from a temptation, so potent to a child, of moving machinery, and the danger almost certainly resulting from interference with it: see per HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) ([1913] 1 K.B. at p. 416). But I think the plaintiff was not a licensee or invitee, but a mere trespasser. I think, on the evidence, that the defendants cannot be said to have permitted children to resort to the booking-office as a playground or for any purpose not connected with the use of their railway; and, further, I think it was proved, particularly by the evidence of Harry Nichols, the boy in whose care the plaintiff was, that it was brought home to the children that in frequenting the booking-office they were doing what was forbidden. Not only were they aware that their practice of so frequenting the station was forbidden by the defendants, but it is made clear to my mind from the statement of Nichols, noted by counsel, but not mentioned by the judge, that he looked round for the policeman and on this particular occasion they deliberately did what they knew they were forbidden to do. Much stress was laid in argument on the "allurement" afforded by the moving staircase. Such a fact may be a natural element in considering whether in all the circumstances leave and licence is to be inferred, but where, as I think is the case here, leave and licence is distinctly negatived, the fact ceases to be relevant. In the case of a trespasser, to quote the words of HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) ([1913] 1 K.B. at p. 411):

> "The owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him'; but otherwise a man 'trespasses at his own risk'."

It cannot be said in the present case that the defendants violated their duty towards the plaintiff as there expressed, and, in my opinion, once the conclusion is arrived at that the plaintiff was a trespasser, the judgment of the court ought to be in the defendants' favour.

Much stress was rightly laid on the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland* (2), but I think it is quite clear that that decision proceeded on the footing that the plaintiff was a licensee, if not an invitee: see per LORD COLLINS, in which case the duty of the owner is higher than in the case of a trespasser. It may then be his duty, if there exists on the land some "allurement," the yielding to which may be a source of danger, to take some steps to counteract the attraction or to minimise the danger. The decision in *Cooke* v. *Midland Great Western Railway of Ireland* (2) is carefully and exhaustively explained by HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1), and it would be presumptuous in me to attempt to add anything to what he has said. *Lynch* v. *Nurdin* (3) again was a different case. There the children were lawfully on the highway. The defendant's servant had negligently left on the highway an unattended horse and cart, which, to use the language of VAUGHAN WILLIAMS, L.J., in *Harrold* v. *Watney* (4), in reference to another

A subject-matter, "constituted a danger to those using the highway—that is, it constituted a nuisance," and in such a case the wrongful act of the children in meddling with it did not neutralise the effect of the initial negligence of the defendant. On the whole, while I feel sincere sympathy for the child and his parents, I cannot give effect to it. In my opinion, the appeal should be allowed, and judgment entered for the defendants.

B

SCRUTTON, L.J.—The first question is as to the legal position of the plaintiff in the company's station. He was not a passenger by train, but was brought with or came with other children who played on the top half of the moving staircase, whenever they were not stopped from so playing. The company's policeman turned them off whenever he saw them, but he was not always in that part of the station. C As one of the boys said, according to a note taken plaintiff's counsel: "He had told me not to play on the stairs, but not on that evening. I looked round that day to see if the policeman was there; he wasn't. So I went on the stairs. . . . The lady in the booking-office upstairs told me to run away." Another boy said: "Twice I was told to go away; a man downstairs told me to go back. The policeman had told me three times to go away, My mother told me not to go again." A girl now in an D industrial school said: "One night a policeman told us to go away. We went away. Then we came back again. . . . Mother told me not to go again." The ticket-collector at the bottom of the stairs often went after them. The policeman had always warned off children and had done so that evening. The lady in the booking-office called out from her window, but did not leave the office. The evidence was confused as to whether the little boy was in charge of anyone. The boy Nichols, E who went because the policeman was not there, said: "Johnny always went with me." The boy Miller said: "Nichols kept Johnny for fear he might be hurt; he is too small to go on." The girl said she was with Johnny; he was standing still.

On this evidence the judge has found that "the child was there with the licence of the company." I am unable to take that view. The evidence seems clear that, F whenever servants of the company saw the children, they either drove them away or told them to go away, and that the children waited till the policeman had gone to another part of the station. The judge has apparently found the children licensees because, there being an object attractive to children on the company's premises, the company have not taken every step they could to keep trespassing children off, such as putting barriers at the top of the stairs. This seems to me a very dangerous proposition for landowners. Many of them have objects attractive to children on G their land—apple trees, streams, and other infantile joys. Must they, besides warning off the children whenever they see them, erect such fences or walls that no child can get through? No one can walk London streets without seeing that children delight to cling on to omnibuses and trams when the collector is inside collecting fares, though he turns them off as soon as he returns. Are they there by licence of the company? KENNEDY, L.J., in *Lowery* v. *Walker* (6) ([1910] 1 K.B. H at p. 198) distinguishes between absence of objection in circumstances implying intentional encouragement and merely tacit acquiescence short of such permission. This case seems even further off leave and licence; there is constant active objection, but failure to keep someone always there to stop children who are doing what you have repeatedly told them not to do and stopped them from doing. I cannot under-I stand a use of language which describes such persons as there by my leave and licence, because I do not go to the expense and trouble of always stopping them from infringing my rights, though I very frequently do so. In my opinion, the plaintiff was a trespasser, and I do not think till comparatively recently anyone could have any doubt about it. In *Lowery's Case* (6) the House of Lords found themselves justified from evidence of long continued use of a short cut, with no effective prevention by the landowner, in finding a position equivalent to licensees. In *Cooke's Case* (2) again the House of Lords found the company had given leave to the children to be on the turntable. I do not think I should have found that fact

in either case; but neither finding compels me to find a licence in this case, where, in my opinion, there are no facts to support it. If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on this land in the course of his business. Against those he was under no obligation to guard trespassers.

I would add that if the child was a licensee he was, in my opinion, a bare licensee. I have endeavoured to state the law as to such persons in *Hayward* v. *Drury Lane Theatre, Ltd. and Moss' Empires, Ltd.* (8) and do not re-state it here, but on the measure of liability there laid down, which rests on the great authority of WILLES, J., in *Gautret* v. *Egerton*, *Jones* v. *Egerton* (9), I cannot see that the company would even on this assumption be liable. The learned judge below followed *Cooke* v. *Midland Great Western Railway of Ireland* (2) as I did in *Latham* v. *R. Johnson and Nephew, Ltd.* (1). I entirely agree with the criticisms and limitations which FARWELL, L.J., and HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) made on *Cooke's Case* (2) and explained, as it is there explained, it does not in my opinion govern this case. In my opinion, the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors: *Ransome & Williams; Ashurst, Morris, Crisp & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

FLOWER *v.* LYME REGIS CORPORATION

[COURT OF APPEAL (Bankes, Atkin and Younger, L.JJ.), November 19, 1920]

[Reported [1921] 1 K.B. 488; 90 L.J.K.B. 355; 124 L.T. 463; 37 T.L.R. 145; 65 Sol. Jo. 133; [1920] B. & C.R. 138]

Bankruptcy—Annulment—Composition approved by court and paid by debtor—Property of debtor—No vesting order—Re-vesting of property in debtor—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 21.

If the court approves a composition of the bankrupt's debts accepted by the creditors, and annuls the bankruptcy under the Bankruptcy Act, 1914, s. 21 (2), but makes no order vesting the property of the bankrupt in him or in any other person, the property re-vests in the bankrupt if he has paid or provided for the whole composition.

Quaere: whether the property re-vests if the bankrupt has not so paid or provided.

Notes. As to effect of annulment of a bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 356–358, for cases see 4 DIGEST (Repl.) 213–215 and for the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Appeal by plaintiff from the judgment of SHEARMAN, J., sitting without a jury at Dorset Assizes.

The plaintiff brought an action to recover a sum of £275 originally due from the defendants to one S. S. Sanders, which was duly assigned by Sanders to the plaintiff in writing on Mar. 31, 1914, notice of which assignment was given to the defendants on April 8, 1914. On Mar. 16, 1914, Sanders had entered into a contract with the defendants to do certain repairing work. The plaintiff was a party to the

contract as surety for Sanders, in consideration of which Sanders assigned to the plaintiff all moneys due or becoming due to Sanders under the contract, and agreed that the plaintiff's receipt should be a good and sufficient discharge thereof. On Nov. 2, 1914 the defendants paid to Sanders £275 in settlement of his claim under the said contract. On Mar. 19, 1915, a receiving order in bankruptcy was made against the plaintiff, and on May 4, he was adjudicated a bankrupt. The only two creditors in the bankruptcy agreed to accept a composition of 5s. in the pound, which amount was deposited with the official receiver. On April 23, 1917, an order was made in the bankruptcy under s. 21 of the Bankruptcy Act, 1914 whereby the composition was approved and it was ordered "that the receiving order of Mar. 19, 1915, be and the same is hereby discharged and that the order of adjudication made on May 4, 1915 against" the plaintiff "be and the same is hereby annulled." In 1918 the plaintiff issued a writ claiming £275 as due to him under the assignment of Mar. 31, 1914, and paid without his authority by the defendants to Sanders. SHEARMAN, J., gave judgment for the defendants, and the plaintiff appealed.

By the Bankruptcy Act, 1914, s. 21:

> "(1). Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by a majority in number and three fourths in value of all the creditors who have proved, resolve to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs. . . . (2) if the court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the court may appoint, on such terms, and subject to such conditions, if any, as the court may declare."

The plaintiff in person.

T. E. Haydon for the defendants.

BANKES, L.J.—This is an appeal from SHEARMAN, J., and the facts are few and simple. The question really depends upon an important point that counsel for the defendants has raised on the construction of the Bankruptcy Act, 1914. The material facts which it is necessary to state are these, that in March, 1914 a man named Sanders took a contract from the defendants for making up a road, and on March 31, 1914 Sanders assigned all moneys coming due to him under that contract to the plaintiff, and the plaintiff duly gave notice of the assignment to the defendants. That assignment was absolute in form, and therefore was within the meaning of the Judicature Act an absolute assignment, of which notice was duly given to the defendants. As a result of that the plaintiff became entitled to receive from the hands of the defendants all monies which they owed under this contract to Sanders. In November, 1914, after some dispute with Sanders, the defendants paid to him direct a sum of £275 in settlement of his claim. The plaintiff now claims that money on the ground that under the assignment his was the hand to receive it; that he was the only person who could give a discharge, and that the defendants had no business to pay it to Sanders, and having failed to pay the plaintiff they must now pay the plaintiff. The plaintiff was adjudicated bankrupt in May, 1915, but he had only two creditors, and he arranged with those two creditors that they would accept a composition of 5s. in the pound. He apparently deposited cash for the amount of the composition with the official receiver, and thereupon an order was made on April 23, 1917 annulling the bankruptcy, the money in cash for the payment of the composition in full being then in the hands of the official receiver. The form of the order was:

> "That the composition is approved, ordered that the receiving order of Mar. 19, 1915 be and the same is hereby discharged; the order of adjudication made on May 4, 1915 against Flower be and the same is hereby annulled."

It is said that in the absence of some order from the court vesting the property of

the debtor in him, any property he had at the time of that order of April 23, 1917 either remained in the trustee or the official receiver, or possibly went to the Crown—at any rate, in the absence of an order vesting it in the plaintiff he has no title to it. That argument is founded on the distinction in language between ss. 21 and 29. Section 29 deals with the position where there is an annulment, either where the debtor has paid his debts in full, or where it is proved in the opinion of the court that the debtor ought never to have been adjudicated a bankrupt. In either of those two cases the provision in sub-s. (2) of that section is that in default of any other appointment the property reverts to the debtor, for all his estate and interest therein. It is said that, having regard to that language, when the position is considered where there is an annulment in the case where a composition is agreed, the court ought not to treat the case like a case under s. 29 (2) where, no order being made to vest the property, it will revert to the debtor, because no similar words to those in s. 29 (2) are found in s. 21 (2).

Section 21 (2) provides:

> "If the court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the court may appoint, on such terms, and subject to such conditions, if any, as the court may declare."

It is obvious that the sub-section contemplates the court making some order in reference to the vesting of the property, because it speaks of an order annulling the bankruptcy and vesting the property, as though the same order would contain some provision in reference to both matters. It is also claimed that if the property is to be vested in the bankrupt conditionally, some order under this sub-section must be made, otherwise there can be no conditional vesting of the property in him. But the question is: What is the necessary result where the court makes an order annulling a bankruptcy and makes no provision with regard to the vesting of the property in the bankrupt? We have not to consider the case where a composition is merely agreed upon, and either the money not deposited for the purpose of paying it, or an interval elapsing before it is paid. It may have to be decided on some future occasion what the exact position under those circumstances is, but we have now to deal with a case where in substance the composition was paid at the time the order annulling the bankruptcy was made.

What is the effect of annulling the order in bankruptcy? It is to discharge the trustee or official receiver, if he is acting as trustee, to set aside the order under which the trustee or official receiver obtained his title, and to leave the property, as it were, in the air, vested in no one. I cannot conceive that that can be the proper reading or meaning of the section, and in my opinion the note by the learned author of Williams' Bankruptcy Practice (1915, 11th Edn.) p. 97, is quite correct where he expresses the view that, although there is no expression to this effect, on payment of the whole composition, the estate of the debtor would, by necessary implication, re-vest in him, and when he uses the words "by necessary implication," I understand that he means that the reason is because there is no other person in whom, under any circumstances, the property could be considered to be properly vested. For these reasons, in my opinion, the view taken by the learned judge was not correct, and that being the only substantial point in the case, the plaintiff is entitled to succeed, and the appeal must be allowed, and judgment must be entered for the plaintiff for the amount claimed with costs.

ATKIN, L.J.—I agree. It seems to me that the title in this debt, being originally in the plaintiff by reason of the assignment, could only be taken out of him by the adjudication in bankruptcy, an order for which was duly made, but on this scheme being approved the adjudication was annulled. Under what circumstances then can the defendants who owe the debt say that they no longer owed the debt to the plaintiff, but that they owed it to some third person? It seems to me that the title of the trustee has gone when the order was made annulling the order to

adjudication, certainly when the composition approved, of which the order formed a part, had been in fact completed. It is not necessary to determine what the position would be under s. 21, until the composition was, in fact, completed. It may be that the property revests conditionally in the bankrupt. It may be that the order annulling the adjudication only operates conditionally; that is to say, does not operate until the composition is completed, but we have not to consider that point. It appears to me inevitable, when once an order has been made, and all conditions in the order have been fulfilled, that thereupon the bankruptcy is in fact annulled. If it is annulled, it seems impossible for the trustee in bankruptcy to say that he had any title at all. That appears to dispose of the matters in this action, because it cannot be disputed on the facts that the plaintiff has been entitled and was entitled to sue. Whether he had the whole beneficial interest or not is not relevant to this inquiry. In this respect the learned judge has made a mistake, the plaintiff has established his right, and judgment should be entered for the plaintiff in the action for the sum of £275, and he should have the costs both here and below.

YOUNGER, L.J.—I am of the same opinion. I think, if one looks at s. 21 of this Act, and particularly at sub-s. (2) of that section, one sees that the order which the court is thereby empowered to make annulling the bankruptcy is an order which should be made at a point of time when the composition on which it turns has not, in fact, been paid. And on that view it would be desirable, if not necessary, that the Legislature should expressly direct that on that order, and in that order, and as a term of that order, provision might be made by the court for vesting the property of the bankrupt in him, or in such other person as the court might appoint. Such an order vesting the property in such other person might be necessary for the purpose of enabling the composition to be finally paid.

In this case, an order annulling the bankruptcy was made, and it contained no provision at all with regard to the vesting of the property of the bankrupt in himself or in anybody else. What, in those circumstances, would be the position of the property prior to the payment of the composition it is, in this case, unnecessary for us to determine. In this case, the composition was provided for at the date of the order, but after the composition has been paid, as it has in fact been paid, it is as it appears to me, clear that the position is this: The trustee in bankruptcy, in this instance, as I understand it, the official receiver, then held the bankrupt's property, all the purposes of the bankruptcy having been fully discharged. These were the only purposes for which the property was assigned to him by the statutory assignment in the other section of the Act. These purposes did not exhaust the property. The property remains in his hands, however, free and discharged from them and all of them. What is the necessary result? The necessary result is that there is a resulting trust for the assignor of that property, that is, the plaintiff in this case; and it seems to me, therefore, on those facts, and having regard to all the circumstances of this case, that the plaintiff's title has been restored to him, and that he was in a position to make the claim which he did make at the date of the issue of the writ in this action.

Appeal allowed.

Solicitors: *Bridgman & Co.*

[*Reported by W. C.* SANDFORD, ESQ., *Barrister-at-law.*]

MORYOSEPH *v.* MORYOSEPH

[CHANCERY DIVISION (Sargant, J.), April 16, 1920]

[Reported [1920] 2 Ch. 33; 89 L.J.Ch. 376; 123 L.T. 569; 64 Sol. Jo. 497]

Trust—Rule in Lassence *v.* Tierney—*Application to real estate.*

The rule in *Lassence* v. *Tierney* (1) (1849), 1 Mac. & G. 551, that if a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, on failure of such objects the absolute gift prevails, applies to real, as well as to personal, estate.

Lassence v. *Tierney* (1) (1849), 1 Mac. & G. 551, and *Hancock* v. *Watson* (2), [1902] A.C. 14, explained and applied.

Notes. Referred to: *Re Atkinson, Atkinson* v. *Weightman*, [1925] W.N. 30; *Re Monk, Giffen* v. *Wedd*, [1927] All E.R. Rep. 157.

As to the rule in *Lassence* v. *Tierney* see 34 HALSBURY'S LAWS (2nd Edn.) 214, and for cases see 44 DIGEST 554–556.

Cases referred to:

(1) *Lassence* v. *Tierney* (1849), 1 Mac & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub nom. *Lassence* v. *Tierney, Lassence* v. *Lescher*, 14 Jur. 182, H.L.; 43 Digest 643, *790*.

(2) *Hancock* v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 43 Digest 644, *792*.

(3) *Yarrow* v. *Knightly* (1878), 8 Ch.D. 736; 47 L.J.Ch. 874; 39 L.T. 238; 26 W.R. 704, C.A.; 44 Digest 976, *8323*.

Also referred to in argument:

Re Sidway Hall Estate (1877), 37 L.T. 457; 44 Digest 920, *7776*.

Interlocutory Summons taken out in the action to have the question determined whether, according to the true construction of the will, and in the events which had happened, the testator died intestate as to a one-fifth share or interest of or in 18, Gun Square, which on the death of Deborah Lang fell into, and formed part of, the testator's residuary estate, or who was now entitled to such one-fifth share.

By his will, dated July 23, 1867, Judah Moryoseph devised and bequeathed unto his two sons, Raphael Moryoseph and Abraham Moryoseph, and his nephew, Aaron de Sola (whom in a subsequent part of his will he appointed trustees and executors thereof), their heirs, executors, administrators, and assigns, all his real and personal estate, to hold the same upon the several trusts, intents, and purposes thereinafter declared of and concerning the same, that was to say, after several specific devises of portions of his real estate. As to his freehold house, No. 18, Gun Square, Houndsditch, the testator directed his trustees to receive the rents and annual profits thereof, and to pay the same to his daughter, Deborah Moryoseph, for her separate use; and after the decease of Deborah he gave and devised the house unto and amongst the children or child of Deborah living at her decease, and if she should have no children or child surviving her he devised the same unto and amongst his own children or child living at the decease of Deborah. As to the sum of £1,000 consolidated annuities, the testator directed his trustees to receive the interest, dividends, and annual produce thereof, and to pay the same to Deborah during her life for her separate use, and from and after her decease the said sum was to be divided between her children or child her surviving; but if she should leave no children or child her surviving, then the testator bequeathed the said sum between all his own children living at the decease of Deborah. As to the rest, residue, and remainder of his real and personal estate, the testator gave, devised, and bequeathed the same unto and amongst all his

sons and daughters only, their heirs and assigns, share and share alike as tenants in common. The will then proceeded as follows:

> "But the share or shares of any or either of my daughters I direct and desire the same to be settled upon them at the discretion of my trustees . . . for their sole and separate use and in accordance with my previous directions as to the legacies hereinbefore bequeathed to my said two daughters Deborah and Simcha."

The testator died on Jan. 23, 1867, and his will was approved by his sons, Raphael Moryoseph and Abraham Moryoseph, Aaron de Sola, the third executor, having renounced and disclaimed. The testator left five children only, namely, three sons, Raphael, Abraham, and Phineas; and two daughters, Deborah, who had married Jonas Joshua Lang in 1868, and Simcha, who had married Alfred Abrahams in 1859. On Feb. 18, 1869, an action was instituted to administer the testator's estate, and a decree was made for administration thereof. In pursuance of an order made on the further consideration of the action, on June 14, 1870, a sum of £1,000 bank £3 per cent. annuities was carried to the credit of the action: *Moryoseph* v. *Moryoseph* (1868, M. 103); "the trust legacy of the defendant Deborah Lang and her issue subject to duty"; and the interest thereon had, in pursuance of the same order, been duly paid to her during her lifetime. On May 1, 1919, Deborah Lang died, having by her will made in 1917 appointed the defendant, Fernand Rènè Lang, her executor. She left no child of her own nor any child of the testator her surviving. On a petition presented for payment out of the fund in court an order was made by SARGANT, J., on Dec. 2, 1919, by which it was declared that the fund fell into the testator's residuary estate, and was divisible in equal fifth shares between the legal personal representatives of his five deceased children or the persons respectively claiming under them, and that in the events which had happened the one-fifth share of Deborah Lang in the residuary estate belonged to her absolutely, and was payable to her executor.

J. W. Manning, K.C. for the heir-at-law.
Dighton Pollock for Deborah Lang's executor.

SARGANT, J.—The question arising on this summons is whether the rule in *Lassence* v. *Tierney* (1) and *Hancock* v. *Watson* (2) applies to real as well as personal estate, and I am surprised to find that it is still a subsisting question. [HIS LORDSHIP stated the material parts of the testator's will, and continued:] Deborah Lang has recently died, having survived her only child and all her brothers and sisters named in the will. The specific devise of No. 18, Gun Square, therefore, failed, and the house in question fell into residue. The consequence is that the ultimate remainder in the house went, as to one-fifth part thereof to Deborah Lang as forming part of the residue, and became settled under the provision settling her share of residue in accordance with the testator's directions as to the legacy of £1,000 consols. It is not disposed of under that settlement, inasmuch as the trusts of the sum of £1,000 consols have been exhausted without there being anyone entitled to receive the ultimate interest in it. There was an administration action in connection with this estate, and certain funds were paid into court. Recently, on a petition for payment out of the funds which came before me, I came to the conclusion, as to the destination of Deborah's legacy and her share in the residuary estate so far as it was personalty, that the rule in *Hancock* v. *Watson* (2) applied, and that the absolute interest therein given to Deborah in the first instance under the trusts of the will was not disturbed by the direction to settle, save so far as that direction extended. The result was that the ultimate interest in the share of residue given to the daughter Deborah vested, so far as it was personalty, in her, and passed to her legal representative. I have now to decide whether the same rule applies to her one-fifth share in the house.

It is suggested that *Lassence* v. *Tierney* (1) was only decided in connection with

personalty, and that the rule laid down by it, as stated in the text-books, was limited to personalty. It is true that, on its main lines, the decision in *Lassence* v. *Tierney* (1) deals only with settled personalty, but this is due to the circumstance that the absence of acknowledgment by the wife of the deed of settlement of her real estate was fatal to the claim of her husband under her will against her heir-at-law. But the reasoning on which the judgments in *Lassence* v. *Tierney* (1) and *Hancock* v. *Watson* (2) were founded appears to me to be as applicable to realty as to personalty. The reasons for those decisions are of general application, and may be stated in this way: Where property is settled under a will by way of a series of positive original trusts, and those trusts are not exhaused, there is nothing to take away from the testator's estate any interest in the property left undisposed of by those trusts; but when property is given so as to be absolutely segregated from the estate of the testator, and then the person taking under the gift has the absolute gift to him modified by its settlement upon trusts, then to the extent to which those limited trusts are not exhaustive the original absolute gift prevails. The distinction is between positive and negative trusts. To the extent that the negative trusts are not exhaustive the prior positive gift is left unaffected. It is now for the first time suggested that there is a difference in this connection between real and personal estate. There is no basis for the suggestion, as the reasoning on which the rule is founded is as applicable to real as to personal estate. In JARMAN ON WILLS (6th Edn.) pp. 1456 to 1458, the learned author seems to regard the rule relating to personalty as having originated by way of analogy to a previously existing rule as to realty. Certainly he treats an absolute gift of realty, followed by contingent or imperfect gifts, as not being displaced, save so far as necessary to satisfy those contingent or partial gifts; and that is a rule based on the same principle. The industry of counsel has not been able to discover any case in which it clearly laid down that the rule in *Lassence* v. *Tierney* (1) applies to real estate, but *Yarrow* v. *Knightley* (3) goes a small way in that direction. For myself I think it would be very unsound to introduce a new distinction of the kind suggested between real and personal estate out of tenderness to the heir-at-law, especially when to do so would be in defiance of reasoning equally applicable to real and personal estate. There will be a declaration that the one-fifth share and interest of or in No. 18, Gun Square, which on the death of Deborah Lang fell into and formed part of the testator's residuary estate, now forms part of her estate, and passed to her executor.

A B C D E F

Solicitors: *Hicks, Arnold & Bender.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

GRINDELL *v.* BASS

[Chancery Division (Russell, J.), July 14, 15, 30, 1920]

[Reported [1920] 2 Ch. 487; 89 L.J.Ch. 591; 124 L.T. 211; 36 T.L.R. 867]

Sale of Land—Contract—Memorandum—Pleading signed by counsel—Defence to action as time at which memorandum must exist—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

B., an elderly woman, who was the owner of a freehold house which she occupied, in December, 1918, agreed to sell the house to E., her son-in-law, in consideration of an annuity and being allowed to remain in possession of the house during her life. The only documentary evidence of this contract was a letter from B. to E. which did not constitute a memorandum to satisfy s. 4 of the Statute of Frauds [now Law of Property Act, 1925, s. 40 (1)]. In April, 1919, B., without divulging her agreement with E. agreed to sell the house to G. and a formal contract was entered into which B. refused to carry out. G. commenced an action against B. for specific performance of his contract, and a defence signed by counsel was delivered on behalf of B. which pleaded the contract with E. in terms which constituted a memorandum to satisfy the Statute of Frauds. G. made E. a defendant to the action and E. counterclaimed for specific performance of his agreement.

Held: counsel was the duly authorised agent of B. to sign the defence and in it to plead the contract with E., and so, although the signing of a memorandum within the Statute of Frauds was not in the minds of either counsel or his client, the pleading signed by counsel was a good memorandum within the Statute of Frauds signed by the duly authorised agent of B. before E. was a party to the action; and, therefore, E. was entitled to judgment on his counterclaim, and G.'s action must be dismissed.

John Griffiths Cycle Corpn., Ltd. v. *Humber & Co., Ltd.* (1) [1899] 2 Q.B. 414; *Daniels* v. *Trefusis* (2) [1914] 1 Ch. 788; and *North* v. *Loomes* (3) [1919] 1 Ch. 378, applied.

Notes. That part of s. 4 of the Statute of Frauds considered in this case has been replaced by the similar provision as to contracts for the sale of land of s. 40 (1) of the Law of Property Act, 1925.

Applied: *Farr, Smith* v. *Messers*, [1928] 1 K.B. 397.

As to the memorandum in writing of a contract for the sale of land see 29 Halsbury's Laws (2nd Edn.) 240–243, and ibid. vol. 8 (3rd Edn.), pp. 87–109; for cases see 40 Digest (Repl.) 21–38. For the Law of Property Act, 1925, s. 40, see 20 Halsbury's Statutes (2nd Edn.) 500. As to a purchaser of land's measure of damages for the vendor's breach of contract see 29 Halsbury's Laws (2nd Edn.) 390, 391, and for cases see 40 Digest (Repl.) 284–291.

Cases referred to:

(1) *John Griffiths Cycle Corpn., Ltd.* v. *Humber & Co., Ltd.*, [1899] 2 Q.B. 414; 68 L.J.Q.B. 959; 81 L.T. 310, C.A.; 12 Digest (Repl.) 178, *1189*.

(2) *Daniels* v. *Trefusis*, [1914] 1 Ch. 788; 83 L.J.Ch. 579; 109 L.T. 922; 58 Sol. Jo. 271; 40 Digest (Repl.) 42, *248*.

(3) *North* v. *Loomes*, [1919] 1 Ch. 378; 88 L.J.Ch. 217; 120 L.T. 533; 12 Digest (Repl.) 177, *1175*.

(4) *Smith* v. *Webster* (1876), 3 Ch.D. 49; 45 L.J.Ch. 528; 35 L.T. 44; 40 J.P. 805; 24 W.R. 894, C.A.; 12 Digest (Repl.) 177, *1173*.

Also referred to in argument:

Buckmaster v. *Harrop* (1802), 7 Ves. 341; 32 E.R. 139; 40 Digest (Repl.) 38, *213*.

Hatten v. *Russell* (1888), 38 Ch.D. 334; 57 L.J.Ch. 425; 58 L.T. 271; 36 W.R. 317; 40 Digest (Repl.) 264, *2210*.

Barkworth v. *Young* (1856), 4 Drew. 1; 26 L.J.Ch. 153; 28 L.T.O.S. 199; 3 Jur. N.S. 34; 5 W.R. 156; 62 E.R. 1; 12 Digest (Repl.) 146, *919*.

Baker v. *Monk* (1864), 4 De G.J. & Sm. 388; 10 L.T. 630; 25 Digest 256, *823*.

Clark v. *Malpas* (1862), 4 De G.F. & J. 401; 31 L.J.Ch. 696; 6 L.T. 596; 26 J.P. 451; 10 W.R. 677; 45 E.R. 1238, L.JJ.; 25 Digest 254, *806*.

Bain v. *Fothergill* (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261, H.L.; 40 Digest (Repl.) 287, *2392*.

Gas Light and Coke Co. v. *Towse* (1887), 35 Ch.D. 519; 56 L.J.Ch. 889; 56 L.T. 602; 3 T.L.R. 483; 30 Digest (Repl.) 429, *723*.

Witness Action.

Mrs. Ann Eliza Bass was in December, 1918, the owner of and resided in a freehold house at Hornsea, in the county of York, known as Burton House. She was at that time about seventy-seven years of age and in reduced circumstances. Her son-in-law, Stanley Earle, who also resided at Hornsea, had made her an offer to pay her an annuity of £2 a week if she made over to him Burton House, on the understanding that she was to continue in possession and occupation of the house during her life. On Dec. 17, 1918, Mrs. Bass wrote to Stanley Earle a letter in the following terms :

"Burton House, Dec. 17, 1918.—My dear Stanley,—I have thought things out generally and have come to the conclusion that if you are still in the same mind to allow me an annuity of £2 per week as per agreement formerly offered, and still retain possession of my house during my lifetime, it would be the easiest way for me. The income to commence immediately as I am fast getting to the end of my resources and have already lost many weeks through not deciding sooner. I see no prospect of getting a smaller house. The one in Cliff-lane is not to let, the owner at present occupying it. I called to-day. Can you come and see me or let me know when you will be at home to get things fixed up as soon as possible.—Affectionately yours, ANNIE E. BASS.—P.S. As soon as possible Mr. Wells must be informed, as I have reason to think he can sell for me to go out in April."

Earle at once commenced to pay the weekly annuity, and the deeds relating to Burton House were handed over to him, but Mrs. Bass continued to reside there. On April 23, 1919, John Grindell, who resided at Hornsea and was desirous of purchasing a house, visited Mrs. Bass, accompanied by his daughter and Lord, a house agent. At the interview nothing was said by Mrs. Bass as to her agreement with Earle, but after some discussion she agreed to sell the house to Grindell for £1,000 and an agreement was drawn up by Lord to carry that out, and was signed in duplicate by the parties, Grindell paying a deposit of £200 by cheque. It appeared that Mrs. Bass had some time previously told Lord that she would be willing to sell the house for £1,000. Mrs. Bass subsequently refused to carry out the agreement, and accordingly, on June 11, 1919, Grindell commenced an action against Mrs. Bass for specific performance of the agreement of April 23, 1919, and duly delivered a statement of claim. On July 31, 1919, a defence signed by counsel was delivered on behalf of Mrs. Bass, in which it was alleged that the agreement had been obtained by undue influence, and that the plaintiff and Lord had taken advantage of the defendant's unprotected position and age to induce her to sign the agreement; that she had no professional or independent advice and that the property was worth more than £1,000. Paragraph 4 of the defence was as follows :

"Prior to the date of the said agreement, viz., on or about Dec. 17, 1918, the defendant had agreed to sell the said premises, Burton House, to Stanley Earle in consideration of his paying her the sum of £2 a week during her life and allowing her to retain possession of Burton House during her life, or so long as she should desire. A memorandum in writing of such agreement is contained in a letter dated Dec. 17, 1918 and signed by the defendant. The

defendant, at the time of the making of the said agreement, handed over to the said Stanley Earle the title deeds of Burton House, and the same are still in his possession, but no conveyance of the said premises to the said Stanley Earle has yet been executed. The said Stanley Earle has ever since paid to the defendant the sum of £2 a week."

The defendant also counterclaimed for the rescission of the agreement. Grindell, on Nov. 10, 1919, amended the writ by adding Stanley Earle as a defendant. Earle delivered a defence in which he pleaded two alternative agreements, between him and Mrs. Bass (a) by an offer made by the said letter of Dec. 17, 1918, and accepted by him by parol; or (b) by an agreement made partly by the said letter and partly by parol; and also pleaded that in pursuance and part performance of the agreement (i) Mrs. Bass had handed over to him the title deeds of Burton House; (ii) Mrs. Bass had authorised him to instruct her solicitor to complete the sale, and he had given such instructions; and (iii) he had paid the annuity of £2 a week from Dec. 17, 1918, and had allowed Mrs. Bass to retain possession of the house, and to have the rents and profits thereof. He also counterclaimed for specific performance of the said agreements and a declaration that he was entitled to the house free of any right, claim or interest of Grindell in or to the same. Grindell in his reply and defence to the counterclaims pleaded that there was no sufficient memorandum in writing of the agreement alleged by Earle to satisfy the Statute of Frauds. At the trial it was argued on behalf of Earle that apart from anything else the defence of Mrs. Bass, signed by her counsel as her duly authorised agent, and delivered before Earle was a party to the action, was a sufficient memorandum in writing of the agreement between her and Earle.

Hurst, K.C. and *Northcote* for the plaintiff.
Preston, K.C. and *G. G. Solomon* for Earle.
Mathew, K.C. and *L. F. Potts* for Mrs. Bass.

Cur. adv. vult.

July 30. **RUSSELL, J.,** read the following judgment.—Originally Mrs. Bass was the sole defendant to this action, and the plaintiff by his statement of claim claimed specific performance of a contract in writing, dated April 23, 1919, for the sale to him by Mrs. Bass of freehold hereditaments at Hornsea known as Burton House. Mrs. Bass defended the action on two grounds. First she alleged that she had been induced to sign the contract by the undue influence of the plaintiff and a Mr. Lord, who took advantage of her unprotected position, age and weakness, and refused to give her an opportunity of consulting her relatives. Secondly, she alleged that in December, 1918, she had already sold Burton House to a Mr. Stanley Earle. Further she counterclaimed for rescission of the contract of April 23, 1919. The plaintiff thereupon joined Stanley Earle as a defendant to the action. He delivered a defence relying on the earlier agreement with him and counter-claiming for specific performance of his agreement, and a declaration that he is entitled to Burton House free from all right, claim and interest of the plaintiff. His counsel stated at the hearing that he did not ask for specific performance but only for the declaration. In answer to the claim of the defendant Earle, the plaintiff relies on the Statute of Frauds.

I will first deal with the claim of the defendant Earle. On Dec. 17, 1918, Mrs. Bass wrote the following letter to Mr. Earle: [HIS LORDSHIP then read the letter and continued:] It appears from that letter and from Mr. Earle's evidence that there had been previous negotiation and discussion between him and Mrs. Bass on the subject, and the letter as explained by the oral evidence is an offer by Mrs. Bass to sell Burton House to Mr. Earle in consideration of an annuity of £2 a week for her life, she retaining a life interest in the property during her life as well. I have heard the evidence of Mr. Earle and Mr. Middlemiss, the solicitor, and, although the matter has not yet been carried through to completion, I am satisfied that Mrs. Bass's offer was very shortly afterwards accepted by Mr. Earle,

and that a contract was made for the sale to Mr. Earle of Burton House on the terms above-mentioned. I may add that the terms of the contract have been duly performed, that is to say, the £2 a week annuity has been paid, and Mrs. Bass continued in possession. Latterly the house has not been occupied by her, nor has it been let; had it been let she would have received the rents.

The next question is: Is there any sufficient memorandum within the statute? For this it is necessary to find a memorandum signed by Mrs. Bass or by an agent for her thereunto lawfully authorised. In my opinion, the letter of Dec. 17, 1918, is not a sufficient memorandum. There is nothing in it stating in terms what Mrs. Bass is going to do in return for the £2 a week. It might as well relate to the grant of a long term of years on Burton House as to a conveyance of the fee. It is, however, contended by counsel on behalf of Mr. Earle that there is in existence a memorandum containing all the terms and signed by an agent of Mrs. Bass thereunto lawfully authorised, and they point to the defence of Mrs. Bass delivered in this action on July 31, 1919 (before Earle was joined as a party), and signed by her counsel. Paragraph 4 of that defence is in the following terms: [His Lordship then read para. 4 and continued:] That paragraph contains all the terms of the bargain, but is the document signed by an agent within the statute? There appears to be no direct authority on the point. It has been held that a solicitor instructed on behalf of one of the parties to prepare a formal contract has no authority to sign for his client any memorandum of the contract within the statutes: *Smith* v. *Webster* (4). That case has been explained by the Court of Appeal in *John Griffiths Cycle Corpn.* v. *Humber & Co.* (1) and by Sargant, J., in *Daniels* v. *Trefusis* (2). In the former case it was held that it was not necessary in order to satisfy the statute that the principal should have authorised the agent to sign the document as a record of the contract. In *Daniels* v. *Trefusis* (2), Girdlestone, acting for Daniels, had sold land to Trefusis. There was no contract or memorandum signed by Trefusis. Girdlestone alleged afterwards that he had bought the land from Daniels, and had resold it on his own account to Trefusis; and he sued Daniels for specific performance of his alleged contract with him. Daniels' solicitors being desirous of obtaining a proof of Trefusis' evidence, obtained from his solicitors a statement of what had passed between Trefusis and Girdlestone, and also answers by Trefusis to certain specific questions. These documents were not signed by Trefusis, but were inclosed in letters signed by his solicitors. The solicitors were authorised by Trefusis to forward these documents. Girdlestone's action having failed, Daniels sued Trefusis for specific performance of the contract between them. The Statute of Frauds having been pleaded, it was held that the two documents and the letters signed by the solicitors constituted a sufficient memorandum signed by the agents of Trefusis, his solicitors having authority to forward the particular documents. Sargant, J., says:

> "It seems to me that the unintentional by-product of satisfying the Statute of Frauds may be produced as completely by a note or memorandum signed by an agent of the party as by a note or memorandum signed by the party himself, provided, of course, that the agent had authority to sign the particular note or memorandum."

I may refer also to *North* v. *Loomes* (3), where Younger, J., held that authority to a solicitor to complete a contract carried with it authority to affirm the existence and validity of the contract; and that, accordingly, a letter sign by the purchaser's solicitor referring to a document signed only by the vendor, was a memorandum signed by the purchaser's agent by him thereunto lawfully authorised.

To apply the principle of these authorities to the present case, no one can doubt that Mrs. Bass' counsel was by her authorised to sign the defence and to allege in the defence the existence and terms of her contract with Earle as an answer to the claim by the plaintiff. It matters not that the fact that a memorandum within the Statute of Frauds would thereby be brought into existence was

not present to the minds of either counsel or client. I am of opinion that counsel, being the authorised agent to sign the particular document, is an agent thereunto lawfully authorised within the meaning of the statute, and that the document, containing as it does all the necessary terms, is a proper memorandum within the statute. In this view it is unnecessary to consider or decide further points which were discussed, namely, whether there had been sufficient part performance of the agreement, and whether it was open to the plaintiff in the action to rely on the statute as a defence to Earle's counter-claim. The result is that there is in existence an agreement for the sale of Burton House to Earle earlier in point of date than the plaintiff's contract; and that to an action by Earle against Mrs. Bass to enforce the Earle contract the Statute of Frauds affords no defence.

[HIS LORDSHIP held that there was no ground for setting aside Grindell's contract on the ground of undue influence over-reaching or otherwise, and that there was no proof of sale at an undervalue, and continued:] The result is that although apart from the existence of the Earle contract the plaintiff has a good enforceable contract, he cannot in view of the Earle contract get specific performance. The action fails and will be dismissed. The counter-claim of Mrs. Bass fails and will be dismissed. The counter-claim of Earle succeeds, and there will be a declaration in accordance with para. 2 of the prayer to that counter-claim. In view of the unfounded charges contained in the defence of Mrs. Bass, the action against her will be dismissed with costs. Her counter-claim will be dismissed with costs. The plaintiff will pay the defendant Earle's costs of action and his costs of his counter-claim.

Solicitors: *Gamlen, Bowerman & Forwood*, for *Locking, Holdich & Locking*, Hull; *Cunliffe, Blake & Mossman*, for *Middlemiss, Pearce & Miller*, Hull.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

YOUNG *v.* LADIES' IMPERIAL CLUB, LTD.

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), March 10, 1920]

[Reported [1920] 2 K.B. 523; 89 L.J.K.B. 563; 123 L.T. 191; 36 T.L.R. 392; 64 Sol. Jo. 374]

Club—Expulsion of member—Resolution of committee—Member of committee not summoned to meeting—Member not beyond the reach of effective notice or in ill-health—Invalidity of resolution—Contents of notice.

The rules of a club provided that, if the conduct of any member, either in or out of the club house, should, in the opinion of the executive committee, be injurious to the character and interests of the club, the committee should have power at once to suspend such member and to recommend her to resign, and if she should not resign within a month she could then be expelled. The plaintiff, a member of the club, had certain differences with another member, a Mrs. L., and, as a result of her conduct then the secretary of the club wrote to her stating that the committee recommended her to resign. The plaintiff did not do so, and after a month had passed a meeting of the members of the committee was called, save that no notice was sent to one member who some time previously had intimated her desire to be relieved of the obligation to attend meetings of the committee. The notice summoning the meeting stated that the object of the meeting was "to report on and discuss the matter concerning [the plaintiff]

and Mrs. L." The committee passed a resolution that the plaintiff's name should be erased from the list of members so that she ceased to be a member of the club. In an action by the plaintiff for an injunction restraining the defendants from erasing her name and a declaration that she was still a member of the club,

Held: (i) every member of the committee should have been summoned to the meeting; summoning could only be waived where it could not possibly have any result as where a member was at such a distance that a summons could not reach him in time to allow him to communicate with the committee, or, possibly, in the case of illness so grave that the member affected could not request that the meeting be adjourned or express his views in writing if he knew sufficient of the matter to be discussed; the reason for the member of the committee not being notified in the present case was quite inadequate; and, therefore, the meeting and the resolution passed thereat were not valid, and the plaintiff was entitled to succeed; (ii) the notice summoning the meeting was insufficient; when the expulsion of a member or similar action was contemplated a more definite notice should be given as by such words as "to take such action as may be thought necessary under [the relevant rule of the club's rules]."

Notes. Referred to: *Howard* v. *Odhams Press, Ltd.*, [1937] 2 All E.R. 509; *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226; *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175.

As to the expulsion of a member of a club see 5 HALSBURY'S LAWS (3rd Edn.) 262–265, and for cases see 8 DIGEST (Repl.) 655 et seq.

Cases referred to:

(1) *Smyth* v. *Darley* (1849), 2 H.L. Cas. 789; 9 E.R. 1293, H.L.; 13 Digest (Repl.) 252, *789*.

(2) *Re Portuguese Consolidated Copper Mines, Ltd.* (1889), 42 Ch.D. 160; sub nom. *Re Portuguese Consolidated Copper Mines, Ltd., Steele's Case*, 58 L.J.Ch. 813; 62 L.T. 88; 5 T.L.R. 522; 1 Meg. 246, C.A.; 9 Digest (Repl.) 277, *1744*.

Also referred to in argument:

Labouchere v. *Earl Wharncliffe* (1879), 13 Ch.D. 346; 41 L.T. 638; 28 W.R. 367; 8 Digest (Repl.) 655, *30*.

Kaye v. *Croydon Tramways Co.*, [1898] 1 Ch. 358; 67 L.J.Ch. 222; 78 L.T. 237; 46 W.R. 405; 14 T.L.R. 244; 42 Sol. Jo. 307, C.A.; 10 Digest (Repl.) 1089, *7534*.

Fisher v. *Keane* (1878), 11 Ch.D. 353; 49 L.J.Ch. 11; 41 L.T. 335; 8 Digest (Repl.) 656, *36*.

Dawkins v. *Antrobus* (1881), 17 Ch.D. 615; 44 L.T. 557; 29 W.R. 511, C.A.; 8 Digest (Repl.) 652, *21*.

Baird v. *Wells* (1890), 44 Ch.D. 661; 59 L.J.Ch. 673; 63 L.T. 312; 39 W.R. 61; 6 T.L.R. 229, C.A.; 8 Digest (Repl.) 658, *46*.

Richardson-Gardner v. *Fremantle* (1870), 24 L.T. 81; sub nom. *Gardner* v. *Freemantle*, 19 W.R. 256; 8 Digest (Repl.) 658, *44*.

Appeal by the plaintiff from an order made by ROCHE, J., in an action tried by him without a jury.

The plaintiff, Mrs. A. M. Young claimed an injunction to restrain the defendants from suspending her from membership of the defendants' club and from erasing her name from the list of members, a declaration that she was still a member of the club, and damages.

The plaintiff was elected a member of the defendants' club in 1912. She paid her entrance fee and her annual subscriptions regularly. While she was a member of the club she made certain charges against a Mrs. L., another member of the club, in consequence of which she received a notice from the executive committee to

attend and explain her conduct. She did not attend then, and she was again asked to attend on a subsequent date. Again she did not attend. Consequently, a notice was issued convening a special meeting of the executive committee for May 2, 1918. The executive committee met, and unanimously passed a resolution that the plaintiff be asked to resign her membership, and that a letter be written to her to that effect. Accordingly, the secretary of the club wrote to the plaintiff telling her that the defendants recommended her to send in her resignation. As the plaintiff did not resign within a month, the committee subsequently erased her name from the list of members, and by a further letter the secretary informed her that the defendants would not accept her subscription for the current year, and gave her notice that her membership had ceased and that the defendants refused to admit her into the club. By r. 42 of the rules of the club:

> ". . . If the conduct of any member, either in or out of the club house, shall, in the opinion of the executive committee . . . be injurious to the character and interests of the club, the committee shall have power at once to suspend such member from the use of the club, and to recommend her to resign. If such member shall not resign within a month after notice of such recommendation has been given to her, the committee shall erase her name from the list of members, and the person whose name is so erased shall cease to be a member of the club. Provided that no member can be so suspended or recommended to resign unless a resolution to that effect shall have been passed by a majority of at least two-thirds of the members of the committee actually present at a meeting specially convened for the purpose. . . ."

The notice of the meeting of the executive committee stated that the object of the meeting was "to report on and discuss the matter concerning Mrs. Young and Mrs. L." It was sent to each member of the executive committee except the Duchess of Abercorn, who had some time previously intimated her desire, owing to other calls on her time, to be relieved of the obligation to attend meetings of the committee, but had consented to allow her name to remain as a member of the committee. The duchess was not present at the meeting of the executive committee on May 2. She had not, in fact, attended any meetings of the executive committee. ROCHE, J., decided that there had been a compliance with the rules of the club which was sufficient; that, as the member of the committee to whom notice of the meeting had not been sent had only consented to allow her name to remain on the committee on the understanding that she would not attend meetings, there had not been a sufficient irregularity to invalidate the proceedings of the committee; and that, therefore, the plaintiff's action must be dismissed. The plaintiff now appealed.

W. A. Jowitt and *E. M. Marx* for the plaintiff.
Sir Ellis Hume-Williams, K.C., and *G. A. Scott* for the defendants.

LORD STERNDALE, M.R.—The only point that we have to decide is whether the meeting of the executive committee of the club at which the plaintiff's name was erased from the membership of the club was a properly constituted meeting of the committee.

There is no dispute about the facts in so far as is necessary for our decision. The plaintiff was a member of a club called the Ladies' Imperial Club, a proprietary club with a board of six proprietors, and she made some remarks with regard to another lady who was a member of the club which that lady resented. The plaintiff found that the remarks which she had made were unfounded, and withdrew them. At first she did not apologise, but I understand she eventually apologised for making them. The matter was brought before the executive committee. The executive committee had come into existence under r. 26 of the rules of the club which provides:

> "The officers of the club shall consist of a secretary, appointed by the board of proprietors and a committee of not more than eighteen members of the club of

whom six are to be elected by the members at the annual general meeting, and twelve by the board of proprietors."

An objection was taken in the court below that there were only fourteen members of the executive committee, that the rule had not been complied with, and that there was no proper executive committee. That has not been raised before us, and I express no opinion about it at all. The executive committee is an important body because, under r. 9, it has the election of members:

"The election of members shall be vested in the executive committee subject to confirmation by the board of proprietors."

It also has the power of excluding or expulsion—it does not matter what you call it—by r. 42:

"If the conduct of any member, either in or out of the club house, shall, in the opinion of the executive committee . . . be injurious to the character and interests of the club, the committee shall have the power at once to suspend such member from the use of the club, and to recommend her to resign. If such member shall not resign within a month after notice of such recommendation has been given to her, the committee shall erase her name from the list of members, and the person whose name is so erased shall cease to be a member of the club, provided that no member can be so suspended or recommended to resign unless a resolution to that effect shall have been passed by a majority of at least two-thirds of the members of the committee actually present at a meeting specially convened for the purpose. . . ."

I cannot entertain any doubt that, with certain very limited exceptions indeed, where there has to be a special meeting of a committee or any other body specially convened for the purpose, every member of that body ought to have notice of that meeting and a summons to it. It seems to me that that is clearly laid down in *Smyth* v. *Darley* (1), where LORD CAMPBELL said (2 H.L. Cas. at p. 803):

"The election being by a definite body on a day of which, until summoned, the electors had no notice, they were all entitled to be specially summoned, and, if there was an omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance—as, for instance, abroad—there would not be a good electoral assembly."

Exactly the same principle applies in the case of expulsion as in that of election. In the same way in *Re Portuguese Consolidated Copper Mines Ltd.* (2) LORD ESHER said (42 Ch.D. at p. 167):

"I will assume that every point taken by Mr. Rigby and Mr. Buckley ought to be decided in their favour except one. That one is this, that according to their argument it is necessary that all the directors should have had notice of the meeting of the 24th. If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting, could not adjourn itself to the 26th."

That was on general principles, I think, and not on any special provision in the articles that notice should be sent to every member. Therefore, as to the general question, I think that there can be no doubt. If the absent member of the body is at such a distance that it is physically impossible for him to attend in obedience to a summons, then the convener of the meeting is excused from sending the notice to that member, and without any such notice to him, the meeting of the body will be properly convened. I incline to think, but I do not express any very definite opinion, that the same exception would probably be held good where it was undoubted that a member of the body was so dangerously ill that it was impossible for him to be moved, even although he might not be at a distance. I am inclined to think it would be so. The case I have mentioned also, I think, decided that a person who ought to be summoned cannot excuse the convener of the meeting from summoning him by saying: "I shall not be able to come; you need not summon

me." In the *Portuguese Case* (2) the director had gone to Ireland and said he should be in Ireland. It was pointed out that Ireland is not inaccessible by post, nor is England inaccessible from Ireland if the director had thought fit to come back from Ireland and attend the meeting.

The circumstances to which that principle has to be applied in the present case are these. The executive committee consisted of fourteen members, including the chairman, the vice-chairman, and twelve other members. One of those members was the Duchess of Abercorn. It is undoubted that the Duchess of Abercorn was not summoned. She had no notice sent to her of the meeting. The reason that was given for not summoning her was that she was only nominally a member of the executive committee. I think that the expression was used by one of the counsel that she was a de jure member but not a de facto member. I do not recognise the distinction. But it was stated that she was only a nominal member, she would not have attended if she had been summoned, and, therefore, it was unnecessary to send her notice. Even if it were proved that she would not have attended, I should be of opinion that that would not have excused the convener of the meeting from summoning her. But, here, in my opinion, nothing of the kind is proved. The only evidence about the matter is the evidence of Lady Samuel, who was chairman of the executive committee and presided at some of these meetings. Her evidence is this: "Notices were not sent to the Duchess of Abercorn. Formerly she had taken great interest; later, she said she had so many interests that she wanted to resign, but I asked her not to and promised she should not be troubled." She then went on to express the opinion that there was not the slightest chance that the duchess would have attended if she had received the notice. That was her opinion. Therefore, the position of the Duchess of Abercorn was that she was a member of the executive committee like anybody else, but she had said that she wished to resign, and they had said that she should not be troubled. I asked the learned counsel what was the object of retaining her name, and his answer, most naturally, was: "It was an asset to the club to have her name on the executive committee." That is to say, that persons seeing her name on the executive committee would, perhaps, have greater trust in the executive committee than they otherwise would have had. It is quite true she had not attended any of the meetings for some considerable time and no notices had been sent to her. But, so far as I know, no question of the expulsion of a member had arisen. The duchess had not been told that it had since that conversation she had with Lady Samuel. I do not see any ground for saying that it is certain that if the Duchess of Abercorn had had a notice saying that there was a specially convened meeting of the executive committee to consider the expulsion of a member, or the request to a member to resign, she would not have attended. She might have done so, she might not. But, at any rate, she was a person within summonable distance. She was not within the case that I have put, a person of such bad health that she could not attend. The fact that, when she consented to remain a member of the executive committee, she was promised that she should not be troubled, seems to me no ground whatever for omitting to summon her to a specially convened meeting of this description. She may easily have meant that she did not wish to be troubled with notices of meetings and summonses to meetings to consider the ordinary routine business of the club. To my mind it is not shown that she would never have attended, but whether she would, or whether she would not, in my opinion there was no ground whatever for not giving her the opportunity and, therefore, no excuse for not summoning her. If that be so, this meeting is bad. It was an invalid meeting quite incapable of acting under r. 42. It was argued that to hold this would be a very dangerous thing, because it might interfere with the internal management of clubs. In my opinion, it would be a very much more dangerous thing to hold otherwise, because that would be leaving it to the discretion of the secretary or somebody to omit to summon people because it was thought they would not attend. That, to my

mind, would be a very objectionable thing indeed. But I do not think it matters one way or the other. It is a pure point of law, and, in my opinion, it ought to be decided in the plaintiff's favour. I regret to say I cannot agree with the learned judge's judgment on the point.

There is another point—that the notice of the business to be transacted at the meeting was not sufficient. The notice was to report on and discuss the matters concerning Mrs. Young and Mrs. Lawrence, and, there was no reference to action under r. 42 and no reference to any possibility of the expulsion of a member. I have looked at the minutes of the meeting and of the different meetings after this matter began to be discussed, for this reason, that it was said there was no necessity to tell any of the members of the executive committee what was going to be done; they all knew quite well. It certainly does not appear on the face of the document before us, or the evidence, that they all of them did know. There are only seven members in all who attended any of these meetings, and they did not all attend each meeting. There is nothing to show that the other seven, including the Duchess of Abercorn, who were not present at the meeting, were conversant with everything proposed to be done. I quite agree that one ought not to examine this agenda and these notices of meetings too particularly and too meticulously. If in substance they convey to members of the committee what is going to be done, that is sufficient, although one might have thought it might have been better done. My inclination is to say that this is not sufficient, but I do not think it is necessary to decide, because the meeting were incapable of acting on the other ground which I have stated. I have no doubt, however, that it would be very much wiser, if the defendants summon a meeting of this kind, for them to make their notice very much more particular and to give more notice to the members summoned of the kind of business that is going to be transacted and the kind of measures that it is proposed to take. I can see no difficulty in framing such a notice without hurting anybody's feelings. It was said that the putting the words "expulsion or suspension" upon the notice might be objectionable. I do not give any opinion upon that.

The only question about which I have any doubt is what ought to be done with the costs of the action. The learned judge in the court below has assessed the damages at one farthing, and we cannot interfere with that. He has said nothing as to what he would have done with the costs of the action below if he had held the plaintiff entitled to recover. I think that the plaintiff must have the costs of the appeal. What troubles me most is what ought to be done with the costs of the action. I cannot help suspecting that, if the learned judge in the court below had found in favour of the plaintiff, he might have said it was a case where he did not think that she ought to have her costs. He has given us no intimation of his opinion, and as the action was brought to try a matter of right, I do not think we ought to exercise our discretion by depriving the plaintiff of her costs, although I confess I come to that conclusion with considerable doubt. As the practice is so well settled now that in a trial of a case before a jury, the costs will follow the event unless the judge sees reason to make some other order, I do not think we ought to make any other order here. Therefore, I think, with some doubt, and perhaps with a little regret, that the plaintiff should have her costs in the court below.

WARRINGTON, L.J.—There is only one question which we have to determine, that is to say, whether the executive committee of the club, who for this purpose represent the defendants, acted properly in erasing the name of the plaintiff from the list of members of the club in accordance with the rule by which their conduct as a committee is governed.

The matter is, to my mind, not a mere technicality, especially as the question whether or not the vexation and something worse, should be imposed upon a member of having her name erased from the list of members. It seems to me of great importance that the rules which have been made for the purpose of regulating the

proceedings of the committee in respect of such a matter ought to be strictly adhered to. The rule in the present case provides that, if the conduct of any member shall, in the opinion of the executive committee, be injurious to the character and interests of the club, the committee shall have the power at once to suspend such member from the use of the club and to recommend her to resign. If she does not resign within a month after notice of such recommendation has been given to her, the committee shall erase her name from the list of members and the person whose name is so erased shall cease to be a member of the club. Pausing there for one moment, the first resolution virtually amounts to an expulsion of the member, because the member must have resigned in accordance with the resolution, or refused to resign, and if she refuses to resign, the subsequent material action of the committee is purely ministerial. They are directed then to erase the name of the member from the list of members of the club. The resolution of the executive committee is the one which recommends the member to resign. Upon that there is attached the proviso which regulates the action of the committee in that matter:

> "Provided that no member can be so suspended or recommended to resign unless the resolution to that effect shall have been passed by a majority of at least two-thirds of the members of the committee acting and present at a meeting specially convened for the purpose."

At the meeting at which the resolution in question was passed there were present five members of the committee. The members of the committee consisted of fourteen altogether. Among those members was the Duchess of Abercorn. To all the members of the committee notices were sent excepting the Duchess of Abercorn. Therefore, one member of the committee did not have a notice and was not summoned to this which was to be a meeting specially convened. There is a second point which deals with the business which it was intended to transact at that meeting. It is to be observed that the rule provides that the meeting shall be specially convened for the purpose. The purpose is to consider the question whether or not a member shall be suspended or recommended to resign. The only notice that was given in the present case on the agenda was that the meeting was to report on and discuss the matters concerning the plaintiff and the other lady regarding whom the trouble had arisen.

I will deal with the second point first. To my mind, the notice was not a sufficient notice. The meeting convened in accordance with it was not a meeting specially convened for the purpose of considering the particular thing, namely, whether or not Mrs. Young should be recommended to resign. However I pass that for the moment, and I come to what is certainly the more important defect in the proceeding of the committee, namely, the omission to summon the Duchess of Abercorn, who was one of their members. In *Smyth* v. *Darley* in the House of Lords (1), LORD CAMPBELL said:

> "The election being by a definite body on a day of which, until summoned, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance—as, for instance, abroad—there would not be a good electoral assembly."

If, therefore, the default in summoning the Duchess of Abercorn was not justified, then the meeting of the committee was not a good meeting for the purpose of transacting any business at all on behalf of the club. In *Smyth* v. *Darley* (1) the provisions of the Act of Parliament were not unlike the provisions of the rule in the present case. It concerned in that case, the election of an officer of the city of Dublin, and it was provided that when a vacancy occurred "the Lord Mayor shall convene the board of magistrates for the city of Dublin to a meeting," and then the meeting, by the majority of the votes of such magistrates as should be present, should proceed to elect the person. It was held that the omission to summon one

of the magistrates was a fatal defect in the constitution of the assembly who proceeded to elect the officer in question. So here the default in summoning one member of the committee rendered, in my opinion, this committee incompetent to deal with the business which was before it.

It is said that there was a reason for not summoning the Duchess of Abercorn. To my mind, the reason given is wholly insufficient. The reason given is that she had consented to be nominally a member of the committee, but that she was not to be troubled, I suppose, by having to attend. That may well be, but it does not at all follow that she was not to have an opportunity of attending if she wished to attend. It is no great trouble to receive a notice of a meeting, and there is not a word to show that the duchess desired not to have notices. Even if she did it would have had no effect, because a member of the committee had no right to dispense with notices being given her. No right of hers is in question. It is the right of the person with whom the committee is going to deal which is in question, and the member of the committee had no power to waive the giving of the notice. That point was decided in *Re Portuguese Consolidated Copper Mines, Ltd.* (2). In my opinion, therefore, for the two reasons which I have stated, this committee was not a proper committee within r. 42 of the club rules. The action was effective, the appeal succeeds, and the plaintiff was entitled to succeed. I agree with what has been said by the Master of the Rolls.

SCRUTTON, L.J.—In view of the very common practice of including a clause empowering the committee to expel members in the rules of clubs, I think it is desirable that it should be clearly understood that this court is not a Court of Appeal from the decisions of committees of clubs, provided the committees are properly constituted and properly summoned, and ideal with the matter in a way not contrary to the principles of natural justice. I say that because counsel for the plaintiff has said that she has brought this action to clear her character. We know nothing about the lady's character, and have no intention to clear it or express any opinion about it. All we know is that she has made a charge against a fellow member of the club which turns out to be groundless and at first was made without apology. The only point that comes before us is: Was the committee properly constituted, properly summoned, and is there anything contrary to the principles of natural justice in the proceedings?

It is said that the committee was not properly constituted because one of the members of the committee, the Duchess of Abercorn, was not summoned to the meeting which passed the resolution recommending Mrs. Young to resign. It is said, on the other hand, that there was no need to summon the Duchess of Abercorn, because when she had consented to her name appearing on the committee, the chairman, Lady Samuel, had told her that she would not be troubled. In my view, that is quite an insufficient reason for not summoning her. Every member of the committee ought to be summoned to every meeting of the committee, except where summoning can have no possible result, as where the member is at such a distance that the summons cannot reach him in time to allow him to communicate with the committee. Extreme illness may be another ground, though I should require it myself to be extremely serious. A member of the committee receiving a notice to attend may either write to ask for an adjournment of the meeting or express his views in writing to the committee, and I should require the illness to be such as to prevent that form of action being taken on receiving notice of such a meeting. But that a member of the committee whose name is put forward as a member of the committee should not be summoned because she has stipulated that she shall not be troubled, appears to me to be a quite insufficient reason. Counsel were asked why the name of the Duchess of Abercorn was put forward as a member of the executive committee. They replied: Because it was an asset to the club. It appears to be an asset to the club because it may convey to outside members that one of the members of the committee taking part in the deliberations is the Duchess of Abercorn, whose

A name carries great weight. I most strongly disapprove of a system by which anybody allows his or her name to be put forward as performing functions, knowing all the time that he or she is not going to perform them, but in the hope that persons seeing the name appearing will be influenced by it. That seems to me to be a form of proceeding which is extremely unsatisfactory and one which the court should not encourage in any way. In my opinion, therefore, the objection that one of the B members of the committee was not summoned, which is the fact, is not justified by any excuse to which the court can listen.

The other point, which I think also is of some little importance, is this. The notice given to the members of the committee was "to report on and discuss the matter concerning Mrs. Young and Mrs. L." In my view, when expulsion, or action similar to expulsion, is contemplated, a more definite notice should be given C that that is a possibility. If this notice had gone on to say: "and to take such action as may be thought necessary under r. 42, or otherwise," would have been quite sufficient. In my view, when it is a matter raising the question of expulsion from the club, notice of the possibility of such action should be given on the notice.

It appear to me, consequently, that on two grounds this decision is one with which the court will interfere, that the plaintiff's name was not rightfully removed from the D list of members, and that she is entitled to the damages which the learned judge in the court below has fixed at a farthing. I share my brother's view as to costs, because, although I do not think that the lady is taking very much by this action—she certainly is not clearing her character, if that is what she thinks she is doing—but the learned judge in the court below has not expressed any opinion as to what he would have done if he had given the farthing damages which he fixed. It is of im- E portance, it appears to me, that a club committee should understand that they must act regularly in expelling members, and, consequently, I do not feel able to say that a farthing damages shows that the action should not have been brought. It follows, therefore, that the costs here and in the court below should be given to Mrs. Young, though, as I have said, I am inclined to share my brother's regret that that consequence follows. F

Appeal allowed.

Solicitors: *Wingfield & Blew; Kirby, Millett & Ayscough.*

[*Reported* by E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

SAID *v.* BUTT

[KING'S BENCH DIVISION (McCardie, J.), June 11, 14, 25, 1920]

[Reported [1920] 3 K.B. 497; 90 L.J.K.B. 239; 124 L.T. 413; 36 T.L.R. 762]

Theatre—Admission of public—Right of proprietor to refuse to sell ticket.

A theatre stands on a wholly different footing from a public inn, or a public service such as a railway. The proprietors of a theatre can sell or refuse to sell tickets at their option.

Mistake—Mistake of fact—Mistake as to identity of other party to contract—Contract induced by deceit—Contract rendered more beneficial to deceiver or onerous to deceived party.

Where a person is deceived as to the real person with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, the contract cannot be enforced against him.

Tort—Procurement of breach of contract—Procurement by servant of breach of contract between his employer and third person—Servant acting bonâ fide and within authority—Liability to third person.

If a servant, acting bonâ fide within the scope of his authority, procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.

The plaintiff, who had had differences with the officials of a theatre, desired to obtain a ticket for a first night performance of a play at that theatre. In consequence of the differences his application for a ticket was refused. As he knew that the theatre officials would not knowingly sell him a ticket, he obtained one through a friend, who bought it in his own name and did not disclose that it was for the plaintiff. On the night of the performance, on the instructions of the defendant, the managing director of the company which owned the theatre, the plaintiff was refused admission, the money paid for the ticket being tendered to him, but he refused it. In an action against the defendant for procuring a breach by that company of the contract resulting from the sale and purchase of the ticket,

Held: by the device of using the name and services of the friend who bought the ticket the plaintiff could not constitute himself, as the undisclosed principal of the friend, a contractor with the company which would have refused to sell the ticket if they had known for whose use it was intended, and, therefore, the plaintiff could not maintain the action against the defendant.

Per MCCARDIE, J.: Even if the plaintiff had established a valid contract between the theatre company and himself, the defendant, who was clearly acting bonâ fide and within the scope of his authority as managing director, was the alter ego of the company and his acts were those of the company, and on this ground also the action failed.

Notes. Considered: *Dyster* v. *Randall & Sons*, [1926] All E.R. Rep. 151. Applied: *G. Scammell & Nephew, Ltd.* v. *Hurley*, [1929] 1 K.B. 419. Referred to: *G. Scammell & Nephew, Ltd.* v. *Attlee* (1928), 45 T.L.R. 75; *A.-G.* v. *Waltergate Press, Ltd.*, *Same* v. *Bloomfield*, *Same* v. *Carlton* (1930), 142 L.T. 408.

As to avoidance of contracts by mistake see 8 HALSBURY'S LAWS (3rd Edn.) 80–82; as to right of admission to theatres and as to torts through interfering with rights see ibid., 2nd. Edn., vol. 32, pp. 171–173. For cases see 35 DIGEST 97–99, 42 DIGEST 905–908, 986–990.

A Cases referred to:

(1) *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K.B. 1; 83 L.J.K.B. 1836; 111 L.T. 972; 30 T.L.R. 642; 58 Sol. Jo. 739, C.A.; 42 Digest 905, *23.*

(2) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 542, *1771.*

(3) *Lewis* v. *Arnold* (1830), 4 C. & P. 354; 172 E.R. 737, N.P.; 42 Digest 905, *24.*

B (4) *Jay* v. *New Bedford Palace of Varieties* (1918), Times June 30, unreported.

(5) *Clifford* v. *Brandon* (1809), 2 Camp. 358; 170 E.R. 1183, N.P.; 42 Digest 907, *37.*

(6) *Gregory* v. *Duke of Brunswick* (1843), 1 Car. & Kir. 24, N.P.; 42 Digest 908, *38.*

C (7) *Long* v. *Smithson* (1918), 88 L.J.K.B. 223; 118 L.T. 678, D.C.; 42 Digest 990, *188.*

(8) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 42 Digest 971, *30.*

(9) *Smith* v. *Wheatcroft* (1878), 9 Ch.D. 223; 47 L.J.Ch. 745; 39 L.T. 103; 27 W.R. 42; 42 Digest 523, *877.*

D (10) *Gordon* v. *Street*, [1899] 2 Q.B. 641; 69 L.J.Q.B. 45; 81 L.T. 237; 48 W.R. 158; 15 T.L.R. 445; 43 Sol. Jo. 621, C.A.; 35 Digest 44, *393.*

(11) *Fellowes* v. *Lord Gwydyr* (1828), 1 Russ. & M. 83; 39 E.R. 32, L.C.; 42 Digest 477, *453.*

(12) *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203; 8 Jur. 561; 63 E.R. 384; 42 Digest 546, *1067.*

E (13) *Boulton* v. *Jones* (1857), 2 H. & N. 564; 27 L.J.Ex. 117; 157 E.R. 232; sub nom. *Bolton* v. *Jones*, 30 L.T.O.S. 188; 3 Jur. N.S. 1156; 6 W.R. 107; 35 Digest 98, *66.*

(14) *Archer* v. *Stone* (1898), 78 L.T. 34; 42 Digest 479, *469.*

(15) *Phillips* v. *Brooks, Ltd.*, [1919] 2 K.B. 243; 88 L.J.K.B. 953; 121 L.T. 249; 35 T.L.R. 470; 24 Com. Cas. 263; 37 Digest 21, *168.*

F (16) *Hill* v. *Gray* (1816), 1 Stark. 434, N.P.; 35 Digest 49, *441.*

(17) *Whurr* v. *Devenish* (1904), 20 T.L.R. 385.

(18) *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; 35 T.L.R. 14; 63 Sol. Jo. 84; 42 Digest 973, *44.*

(19) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 42 Digest 989, *180.*

G (20) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169.*

(21) *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 12 T.L.R. 19, C.A.; 42 Digest 988, *178.*

H (22) *Belvedere Fish Guano Co.* v. *Rainham Chemical Works, Feldman and Partridge, Ind, Coope & Co.* v. *Same*, [1920] 2 K.B. 487; 89 L.J.K.B. 631; 123 L.T. 211; 84 J.P. 185; 36 T.L.R. 362; 18 L.G.R. 517, C.A.; affirmed sub nom. *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano & Co., Ltd.*, [1921] All E.R. Rep. 48; [1921] 2 A.C. 465; 90 L.J.K.B. 1252; 126 L.T. 70; 37 T.L.R. 973; 66 Sol. Jo. 7; 19 L.G.R. 657, H.L.; 36 Digest (Repl.) 291, *376.*

I (23) *Valentine* v. *Hyde*, [1919] 2 Ch. 129; 88 L.J.Ch. 326; 120 L.T. 653; 35 T.L.R. 301; 63 Sol. Jo. 390; 43 Digest 122, *1243.*

(24) *Davies* v. *Thomas*, [1920] 1 Ch. 217; 89 L.J.Ch. 1; 122 L.T. 340; 36 T.L.R. 39; affirmed post, p. 438; [1920] 2 Ch. 189; 89 L.J.Ch. 338; 123 L.T. 456; 84 J.P. 201; 36 T.L.R. 571; 64 Sol. Jo. 529, C.A.; 42 Digest 984, *139.*

Action tried by McCardie, J., without a jury.

The plaintiff claimed damages from the defendant, Sir Alfred Butt, the managing director of the Palace Theatre, London, on the ground that he had

wrongfully and maliciously procured the Palace Theatre, Ltd., the owners of the theatre, to break a contract made by them with the plaintiff by the sale by them to the plaintiff of a ticket for a seat in the theatre. The plaintiff was a Russian, who in the early part of the late war was in this country as the agent of the Russian Government. He became connected with Mr. Gilbert Miller in certain theatrical enterprises, and came into contact with the defendant. In December, 1919, the plaintiff wished to see the first night's performance of a play by Mr. de Courville, and he obtained, through a friend, in the friend's name, eight tickets for seats in the stalls. When the plaintiff reached the theatre on the night in question he was refused admission and the money paid by him for his ticket was offered to, but not accepted by, him.

He thereupon brought this action against the defendant, who, in his defence, pleaded that he (the defendant) had done what he did in the interests of the Palace Theatre, Ltd., because the plaintiff was not a fit and proper person to enter the theatre. There had been differences between the plaintiff and the theatre officials in respect of a play which had been produced at the Palace Theatre under an agreement of July 5, 1919. The play ran from about July to October, when it was withdrawn.

Disturnal, K.C. and *St. John Field* for the plaintiff.
Patrick Hastings, K.C., and *Gilbert Beyfus* for the defendant.

Cur. adv. vult.

June 25. **McCARDIE, J.,** read the following judgment.—The facts in this case are unusual. The points of law are novel and important.

The plaintiff claims damages against the defendant on the ground that he wrongfully and maliciously procured the Palace Theatre, Ltd., to commit a breach of contract with the plaintiff. The plaintiff is a Russian gentleman of some means. The defendant is the managing director of the Palace Theatre, Ltd. On July 5, 1919, the plaintiff entered into a contract in writing with the Palace Theatre, Ltd., for the production of a light opera called "Monsieur Beaucaire" on terms of sharing the profits. The two material clauses in the contract are cll. 12 and 13. Clause 12 is as follows:

> "Should the gross receipts (after deducting library discounts and excluding entertainments tax) for any two consecutive weeks commencing from Sept. 1, 1919, fall below £2,500 in each of such two consecutive weeks, then the company or the producer shall have the right to terminate the run of the play at the expiration of fourteen days from the end of such two consecutive weeks by giving notice in writing."

Clause 13 is as follows:

> "The producer shall be entitled to have his representative in the front of the house who shall have reasonable access to the box office and all returns and bookings."

Mr. Gilbert Miller, a well-known theatrical producer, was, in fact (though the defendant did not then know it), jointly interested with the plaintiff in his opera, which was produced on July 29, 1919. For five weeks the takings were below £2,500. In the sixth week they rose to over £2,600, and then they fell below £2,500, for the week ending Sept. 20 they were over £2,500. In the following week they fell below £2.500. Then on Sept. 29 the railway strike occurred, and the takings for the week ending Oct. 4 fell to £1,420. On Oct. 6, 1920, the Palace Theatre, Ltd., gave notice to the plaintiff under cl. 12, terminating the run of the opera; the performances ceased on Saturday, Oct. 18, and the opera was withdrawn.

Meanwhile, an unfortunate difference had arisen between the plaintiff and the defendant. Between Sept. 15 and 18, the plaintiff was told by one or more friends that the sale of tickets by the Palace Theatre, Ltd., was not being satisfactorily

dealt with, and that the box officials were stating to inquirers that no seats were available, whereas the contrary was the fact. As the result of receiving that information, the plaintiff asked Mr. Pollock to ring up the Palace Theatre, Ltd., and to make inquiries as to seats for certain performances. He did so and reported the result to the plaintiff. Thereupon the plaintiff went to the Palace Theatre on Sept. 18 and saw several of the officials, including Mr. Volney the manager. A discussion took place and explanations were given to the plaintiff. He did not accept them. He asked to see the defendant. I am satisfied that at this time the plaintiff was charging the officials of the Palace Theatre, Ltd., with deliberately failing to sell tickets in order to cut down the gross receipts and thereby leave it open to the Palace Theatre, Ltd., to terminate the agreement of July 5, 1919, by giving notice under cl. 12. These were serious allegations, and when the plaintiff saw the defendant on Sept. 19, he repeated them. The defendant was indignant. He stated that the charges were baseless. He requested the plaintiff to leave the room. Those charges have never been withdrawn to the present time. The plaintiff and his advisers expressly refused to withdraw them in any way, but, on the contrary, sought to establish them at the trial. On Oct. 2, 1919, the Palace Theatre, Ltd., invited the plaintiff to take immediate proceedings so that the management and officials might have an opportunity of refuting the charges. No such proceedings have been taken. I find that, originally, the charge of impropriety was not expressly made against Sir Alfred Butt himself, but the plaintiff, I think, made such a charge by implication, and the answer of the plaintiff to the first interrogatory in the present action is this :

> "To the first interrogatory I say that at an interview with the defendant on or about Sept. 19, 1919, I charged the box-office officials of the Palace Theatre, Ltd., with having improperly and upon instructions refused to sell seats for performances of the musical play entitled "Monsieur Beaucaire" (when then there were seats available to be sold) to my detriment."

I conceive that this amounts to a direct charge of impropriety against Sir Alfred Butt. I shall not deal further with the details of the dispute as to the sale of seats. But in view of the publicity given to the hearing of the action it is well that I should state clearly my conclusions of fact. They are these : First—the allegation that Sir Alfred Butt directed or induced the box-office officials to cut down the sale of seats is baseless. There is not the slightest evidence to support it. I exonerate Sir Alfred Butt from the suggestion made against him on this point. Secondly, I am not satisfied that any of the box-office officials, either carelessly or otherwise, refused or failed to sell seats. Thirdly, I do not doubt that the plaintiff acted honestly in making his complaint on Sept. 18 and 19. On the other hand, I think that such material as he possessed was quite insufficient to justify the serious charges which he made. I believe that the explanation of the matter is that the plaintiff had never before produced a play, and he was, therefore, unaware of the course of procedure which prevails at the box-offices of theatres with respect to the sale of seats, so as to secure, if possible, a disposal of the more expensive stall and dress circle space ere the less expensive part of the space is sold. I think that he was also unaware of the true nature of the working arrangement between theatres and the well-known ticket agencies and libraries. I may add that under cl. 13 of the agreement, the plaintiff had appointed Mr. Poole as his representative, and that gentleman, therefore, possessed a full power to supervise and investigate the box-office sheets and returns. Mr. Poole was not called as a witness before me. A further question of fact arose at the trial. It was suggested by the plaintiff that Sir Alfred Butt had caused the notice of Oct. 6, 1919, to be given, not because he believed it to be in the best interests of the Palace Theatre, Ltd., but because he desired to injure Mr. Gilbert Miller (whom he had then discovered to be jointly interested in "Monsieur Beaucaire"), and incidentally to punish the plaintiff for the accusations which he had made in

September. It is an unfortunate fact that for a long time a state of asperity had existed between the defendant and Mr. Gilbert Miller. Of the rights and wrongs of the quarrel I cannot judge. The defendant said that he would refuse to enter into business relations with Mr. Miller. I have carefully weighed the evidence and the arguments as to the circumstances and motives under which the notice of Oct. 6 was given. I am satisfied that it was not given for the purpose of injuring Mr. Miller. I am also satisfied that it was not given for the purpose of punishing the plaintiff for the accusations which he had made. In my opinion, the reason was correctly stated in a letter from the defendant dated Oct. 24, 1919, in which he said:

> "The Palace Theatre and myself had no wish whatsoever to withdraw 'Monsieur Beaucaire,' but my colleagues and I felt that it was impossible to continue for one day longer than was obligatory an association with someone who deliberately made an accusation of this nature and who also had not, up to the time of the notice, taken steps to prove it, and who has not, in fact, up to the present moment, commenced any proceedings."

I think that, had the plaintiff withdrawn his charges, arrangements would have been made between the parties for the continued run of "Monsieur Beaucaire." I cannot doubt that the defendant was deeply indignant at the suggestion made against the honour and good faith of the Palace Theatre officials. But for those suggestions I do not believe that the notice of Oct. 6 would have been given. I accept the evidence of Sir Alfred Butt when he says that he discussed the matter with his colleagues and that he and they decided that in view of the plaintiff's attitude, the run of "Monsieur Beaucaire" should not be continued longer than was obligatory. At the date of the notice, the Palace Theatre, Ltd., had no other production in immediate view. A stop-gap had to be provided, and the result was a loss of several thousand pounds. Such are the matters which, though preliminary, are yet important to be remembered when I briefly state the direct facts which are relied on as a cause of action against the defendant.

On the night of Dec. 23, 1919, the Palace Theatre gave the first performance of "The Whirligig." The plaintiff proposed to attend that performance with a party of seven friends, and afterwards to join those friends at supper. He had paid for eight tickets for the stalls, four for the first row, and four for the second row. He was in the foyer of the theatre at eight o'clock. Some of his friends had already gone in with the tickets which he had provided. He was awaiting the arrival of his other guests. He was observed by the defendant, who thereupon told Mr. Volny that it was not desirable that the plaintiff should enter the auditorium; that, if he had a ticket, his money was to be handed back to him; and that he was to be told quietly that he would not be allowed to occupy his seat. These instructions were carried out by Mr. Volny. He told the plaintiff that in accordance with the defendant's orders he would not be allowed to enter. The plaintiff naturally became angry and excited. He said that he insisted on taking his seat in the stalls. Mr. Volny repeated that he would not be allowed to do so, and added that he hoped that the plaintiff would not compel him to inflict the indignity of directing the janitors physically to prevent his entrance. The plaintiff sent for the police, but they wisely declined to interfere. It is clear that if the plaintiff had sought to enter the door of the auditorium physical force would have been exercised against him. Ultimately, the plaintiff left with his stall ticket in his pocket. Mr. Volny had offered him his money back. He would not take it. Several of the plaintiff's party were aware that the plaintiff was refused admission. Several of them were not aware of that fact. The defendant's orders were carried out with great tact and courtesy by Mr. Volny, and the ordinary visitors to the theatre were quite ignorant of the unfortunate incident which has led to the present prolonged and costly litigation. Upon these facts, the plaintiff claims damages against the defendant on the ground that he wrongfully and maliciously procured

A the Palace Theatre, Ltd., to break the contract made by selling to the plaintiff tickets for the stalls entitling him to witness the first performance of "The Whirligig" on Dec. 23, 1919.

The circumstances (so far as I have as yet narrated them) appear to be simple, but the question of law raised by the able arguments of counsel are, in many ways, novel, and one at least is of great general importance. It is well to state at once B one or two points with regard to theatres which seem to be well established. In the first place it is settled by *Hurst* v. *Picture Theatres, Ltd.* (1), (a) that the purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the whole performance provided that he behaves properly and complies with the rules of management; and (b) that the licence granted by the sale of the ticket includes a contract not to revoke the licence arbitrarily. This was the view of C Buckley and Kennedy, L.JJ., and is now the law, although, I confess that I recognise the weighty nature of the dissenting judgment of Phillimore, L.J., based on *Wood* v. *Leadbitter* (2). If, therefore, the purchaser of such a ticket is physically removed without adequate reason from his seat, and turned out of the theatre, he may bring an action for assault. This is a cogent decision, and it certainly affords a large measure of protection to the purchasers of tickets (whether for D reserved or unreserved seats) at theatre or the like places of entertainment. The plaintiff in *Hurst* v. *Picture Theatres, Ltd.* (1) had paid 6d., and had received a metal check which entitled him to an unreserved seat. So, too, the purchaser of a ticket is protected if he fails to find an unoccupied seat. In that case he may leave the theatre and demand the return of the money: see *Lewis* v. *Arnold* (3). On the other hand, the theatrical proprietor is safeguarded by the rule of E law (inter alia) that every contract for admission is subject to the implied condition that the person admitted shall behave properly. This rule I do not dwell upon. I need only say, however, that a member of the audience is entitled to express either his approval or his disapproval of the performance, provided he acts reasonably and with due regard also to the rights of the other members of the audience. If he abuses his privilege, then the management, upon his refusal to leave after F being requested to do so, are justified in removing him from the theatre, and in using a reasonable amount of force for the purpose: see per Scrutton, L.J., in *Jay* v. *New Bedford Palace of Varieties* (4). The limits to the rights of approval or disapproval are incidentally referred to in *Clifford* v. *Brandon* (5) and *Gregory* v. *Duke of Brunswick* (6).

In the present case there is no claim for assault, as no assault was actually G committed; nor is it suggested that there was any false imprisonment. The case against the defendant rests solely on the ground that he procured the Palace Theatre, Ltd., to break its contract with the plaintiff. Before the plaintiff can succeed he must establish that there was a binding and subsisting contract between the Palace Theatre, Ltd., and himself on Dec. 23: see *Long* v. *Smithson* (7), per H Avory and Shearman, JJ. In other words, the plaintiff must bring himself within the words of Lord Macnaghten in *Quinn* v. *Leathem* (8), who there said ([1901] A.C. at p. 510):

> "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference."

I Counsel for the defendant submitted that no valid contract existed on Dec. 23 between the Palace Theatre, Ltd., and the plaintiff. Broadly put, he contended that the Palace Theatre, Ltd., had never knowingly contracted with the plaintiff for the sale of tickets for his own use, and that upon discovering that the plaintiff was in fact a purchaser of a ticket for the stalls they would be entitled to put an end to any apparent contract on the ground that where personal considerations enter into a contract error as to the person with whom the contract is made annuls the contract. This contention rested on *Smith* v. *Wheatcroft* (9), decided by

FRY, J. In that case the learned judge cited with approval, POTHIER, TRAITE DES OBLIGATIONS, s. 19, where it is said: A

> "Whenever the consideration of the persons with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." B

This passage was also cited with approval by A. L. SMITH, L.J., in the well-known case of *Gordon* v. *Street* (10).

Before I mention the other authorities on the matter it is best to state some C further facts that bear on this branch of the case. A first night at the Palace Theatre is, as with other theatres, an event of great importance. The result of a first night may make or mar a play. If the play be good, then word of its success may be spread, not only by the critics, but by members of the audience. The nature and social position and influence of the audience are of obvious importance. D First nights have become to a large extent a species of private entertainment given by the theatrical proprietors and management to their friends and acquaintances, and to influential persons, whether critics or otherwise. The boxes, stalls, and dress circle are regarded as parts of the theatre which are subject to special allocation by the management. Many tickets for those parts may be given away. The remaining tickets are usually sold by favour only. A first night, therefore, E is a special event, with special characteristics. As the plaintiff himself stated in evidence, the management only disposes of first night tickets for the stalls and dress circle to those whom it selects. I may add that it is scarcely likely to choose those who are antagonistic to the management, or who have attacked the character of the theatre officials. Shortly before Dec. 23 the plaintiff personally applied to Mr. Darren, who was in charge of the box-office, for tickets for the first F night. Mr. Darren would not sell him tickets and stated that he could only do so by the express permision of Mr. Volny, the manager. The plaintiff then applied a second time and met with the same answer. Mr. Volny never gave permission for the sale of tickets, and if the plaintiff had applied to him he would have met with a direct refusal. Equally emphatic would have been the refusal of Sir Alfred Butt. The reasons for this attitude are clear. Not only the defendant, but also G the other officials of the theatre, had deeply resented the charges made by the plaintiff in September, 1919, charges which had become extensively known, which had been widely published in the press, and which the plaintiff, as the public knew, had definitely and emphatically refused to withdraw. It was by reason of these charges, moreover, that the Palace Theatre, Ltd., in October, 1919, had decided to put an end to the run of "Monsieur Beaucaire." In the circumstances, it would H have been good taste, as well as good sense, if the plaintiff had decided not to seek to attend the first night performance of Dec. 23. It could only cause annoyance to the management to see in the front row of the stalls a gentleman whom they would never have invited, whose accusations were still in their minds, and who they might reasonably anticipate, as he was a somewhat excitable man, might perchance originate or promote an unfavourable demonstration.

In my view, the plaintiff well knew that he could not get tickets in his own I name from the Palace Theatre, Ltd. They had clearly refused to supply them for reasons which were obvious. It happened that Mr. de Courville was the producer of "The Whirligig." He, therefore, had the usual privilege with respect to a certain number of seats in the stalls and dress circle. The management would ordinarily give or sell tickets to his friends or business acquaintances. So the plaintiff, knowing that he could not get tickets in the ordinary way, went to Mr. de Courville. Whether Mr. de Courville was fully aware of the dispute

between the plaintiff and the defendant I know not. But Mr. de Courville was induced to say that the plaintiff could buy from the Palace Theatre, Ltd., eight of the seats which would fall to be allotted within that gentleman's privilege. This, be it observed, was not a sale by the Palace Theatre, Ltd., to the plaintiff. It was merely a courteous allocation by Mr. de Courville of part of his privilege with respect to seats for the first night. The plaintiff did not, therefore, go to the theatre and ask for the tickets in his own name. He sent a friend, a Mr. Pollock, to the box-office, and that gentleman procured and paid for eight tickets in the stalls in his own name. The name of Mr. Pollock was placed on the allocation sheets for those stalls. The Palace Theatre officials had no idea that they were selling to an agent of the plaintiff. If they had known it, they would at once have refused to supply any tickets at all. I find as a fact that the plaintiff used the name of Mr. Pollock in order to disguise the fact that he himself was the purchaser; and I also find that the plaintiff well knew that the Palace Theatre, Ltd., would not have sold him personally a ticket for Dec. 23, 1919. I am satisfied that Mr. Pollock himself was aware of the above-mentioned circumstances. I may point out that a theatre stands on a wholly different footing from a public inn, or a public service such as a railway. A public inn, for example, is under a common law duty to supply to all who come, provided that accommodation exists, and provided also that the guest is of proper character and behaviour. But a theatre stands upon a wholly different footing. It may sell or refuse to sell tickets at its own option. The public cannot compel a theatre to grant admission. In these circumstances the question is whether the plaintiff, as an undisclosed principal of Mr. Pollock, can claim that a binding contract existed between the Palace Theatre, Ltd., and himself. The principle stated in Pothier on Obligations (already cited) is a broad one. It should not, of course, be unduly applied, but it is one of practical utility. The matter is thus put in Fry on Specific Performance, s. 229:

> "The law seems now to be that where one person is deceived as to the real person with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party, or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him, but that where none of these circumstances can be shown to follow from the deception, the contract may be enforced."

This passage seems to accord with *Fellowe's* v. *Lord Gwydyr* (11). The principle was recognised by Knight-Bruce, V.-C., in *Nelthorpe* v. *Holgate* (12) (1 Coll. at pp. 214, 218), and the observations of that distinguished judge are most instructive. It is the basis of the decision in *Boulton* v. *Jones* (13). It was actually applied by North, J., in *Archer* v. *Stone* (14). It was cogently illustrated by the decision of the Court of Appeal in the well-known case of *Gordon* v. *Street* (10) (already cited), the facts of which I need not state. It is not impaired, but merely distinguished by the decision of Horridge, J., in *Phillips* v. *Brooks* (15). It may be usefully considered in the light of such cases as *Hill* v. *Gray* (16) and *Whurr* v. *Devenish* (17).

In my opinion, the defendant can rightly say, on the special circumstances of this case, that no contract existed on Dec. 23, 1919, upon which the plaintiff could have sued the Palace Theatre, Ltd. The personal element was here strikingly present. The plaintiff knew that the Palace Theatre, Ltd., would not contract with him for the sale of a seat for Dec. 23. They had expressly refused to do so. He was well aware of their reasons. I hold that by the mere device of utilising the name and services of Mr. Pollock, the plaintiff could not constitute himself a contractor with the Palace Theatre, Ltd., against their knowledge, and contrary to their express refusal. He is disabled from asserting that he was the undisclosed principal of Mr. Pollock. It follows, therefore, that the plaintiff has failed

to prove that the defendant caused any breach of a contract between the Palace Theatre, Ltd., and himself. A

I realise, however, that the question is one of difficulty; and I, therefore, deem it right to mention the other legal points which arose in the case. One of those points is of such importance that I feel it my duty to deal with it. Let me, therefore, assume that the plaintiff had established a valid contract between the Palace Theatre, Ltd., and himself, upon which he could have sued as a principal. B The defendant's counsel submitted that even upon such assumption the present action must fail, because the defendant in procuring the breach of contract was acting only as the managing director of the Palace Theatre, Ltd. This submission was ably and fully argued by counsel on both sides. It is well to point out that Sir Alfred Butt possessed the widest powers as the chairman and sole managing director of the Palace Theatre, Ltd. He clearly acted within those powers when C he directed that the plaintiff should be refused admission on Dec. 23. I am satisfied, also, that he meant to act, and did act bonâ fide, for the protection of the interests of his company. If, therefore, the plaintiff, assuming that a contract existed between the company and himself, can sue the defendant for wrongfully procuring a breach of that contract, the gravest and widest consequences must ensue. This is the more apparent when it is remembered that it is not D necessary to prove actual malice against a defendant in order to establish a cause of action against him for wrongfully procuring the breach of a third person's contract with the plaintiff, whereby the plaintiff suffers pecuniary damage: see *Pratt* v. *British Medical Association* (18) citing *South Wales Miners' Federation* v. *Glamorgan Coal. Co.* (19). If the plaintiff is right in his contention, it seems to E follow that, whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages, on the principle of *Lumley* v. *Gye* (20) as for a tortious act. So, too, with the manager or other agent of a private firm, who does the like thing. This far-reaching result of the principle here suggested by the plaintiff F is emphasised, when it is remembered that in an ordinary action for breach of contract the plaintiff recovers his pecuniary loss only, whereas in an action for wrongfully procuring a breach of contract the damages against the wrongdoers are at large and may vastly exceed the sum recoverable in a mere claim for breach of contract against the contractor: see *Pratt* v. *British Medical Association* (18) and *Exchange Telegraph Co.* v. *Gregory* (21). Counsel for the plaintiff argued with great G vigour that though the results may be remarkable, yet the principle asserted by the plaintiff is sound. He points out the breadth of the language employed in the well-known cases on the subject from *Lumley* v. *Gye* (20) to the present time. I agree that the language is wide in its scope. The proposition is stated with unrestricted diction—that a person who, without just cause, knowingly procures a man to commit a breach of his contract with another, whereby the latter suffers H pecuniary damage, is liable to an action for tort. But I conceive that none of the judges was thinking of such a case as the present. I have searched in vain for any decision which indicates that a servant is liable in tort for procuring a breach of his master's contract with another. If such a cause of action existed, I imagine that it would have been successfully asserted ere this.

The explanation of the breadth of the language used in the decisions probably I lies in the fact that in every one of the sets of circumstances before the court, the person who procured the breach of contract was, in fact, a stranger, that is, a third person, who stood wholly outside the area of the bargain made between the two contracting parties. If he is in the position of a stranger, he will be primâ facie liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another: see the decisions cited in *Pratt* v. *British Medical Association* (18) and *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (19). But the servant who

A causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and, in my view, an action against the agent under the *Lumley* v. *Gye* (20) principle must, therefore, fail, just as it would fail if brought against the master himself for wrongfully procuring a breach B of his own contract. This, I think, is the true answer to the ingenious arguments of counsel on behalf of the plaintiff on this point. To hold otherwise might create at least three actions whenever a managing director or other authorised agent, knowingly procured a breach of the employer's contract. First, an action based on contract against the employer for the pecuniary loss caused by the breach of the contract; secondly, an action for tort against the agent who had procured the C breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and, thirdly, an action against the employer himself for the tortious wrong committed by his authorised agent in procuring the employer to break his contract with the plaintiff. This extraordinary result shows, I think, that the contention of the plaintiff in this case cannot be sound. If the plaintiff here be right in his submission, then the flood-D gates of litigation would indeed be widely opened. I hold that if a servant acting bonâ fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, E procures his master to wrongfully break a contract with a third person.

Nothing that I have said today is, I hope, inconsistent with the rule that a direct or a servant who actually takes part in, or actually authorises such torts as assault, trespass to property, nuisance, or the like, may be liable in damages as a joint participant in one of such recognised heads of tortious wrong. This point was incidentally dealt with by the Court of Appeal in *Belvedere Fish Guano Co.* v. F *Rainham Chemical Works, Ltd.* (22). If I had been in favour of the plaintiff on the preceding points the question whether he had what is technically known as "just cause" for procuring a breach of contract would have arisen for decision. I ventured to refer to that most difficult question in *Pratt* v. *British Medical Association* (18). It was touched upon by Astbury, J., in his luminous judgment in *Valentine* v. *Hyde* (23), and by P. O. Lawrence, J., in his cogent observations G in *Davies* v. *Thomas* (24) ([1920] 1 Ch. at p. 231), affirmed by the Court of Appeal. It is not necessary to deal with the point in this litigation. I need only say that it may well be that "just cause" exists in the present case. If the plaintiff had here established a cause of action, I should have been called on to assess damages. Upon the whole circumstances of the matter, and in the view I form that the defendant did not act with any actual malice to the plaintiff on the night of H Dec. 23, I should have assessed those damages at the nominal sum of 40s. only. But for the reasons I have given, this action fails, and must be dismissed with costs.

Judgment for defendant.

Solicitors: *Kenneth Brown, Baker, Baker & Co.; Beyfus & Beyfus.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

LORD ADVOCATE *v.* JAFFREY AND ANOTHER

[House of Lords (Viscount Haldane, Viscount Cave, Viscount Finlay, Lord Dunedin and Lord Shaw), June 21, 22, July 16, 1920]

[Reported [1921] 1 A.C. 146; 89 L.J.P.C. 209; 124 L.T. 129; 36 T.L.R. 820; 64 Sol. Jo. 713]

B

Domicil—Change of domicil—Wife's domicil—Change by husband—Conduct by husband entitling wife to divorce or judicial separation—No decree obtained by wife.

A Scotsman, married to a Scotswoman, left Scotland for Australia in 1893 at the instance of the wife, and ceased to communicate with her. In 1902 he went through a form of marriage with another woman, with whom he lived in Queensland until his death in 1918. The wife commenced divorce proceedings against her husband in Scotland, but died in 1915 before the suit came on for trial. On the death of the wife the Commissioners of Inland Revenue, for the purpose of establishing the liability of the wife's estate to legacy and other duties, claimed that her domicil was in Scotland. It was found as a fact that at the time of the wife's death the husband had acquired a domicil in Australia.

C

D

Held (by Viscount Haldane, Viscount Finlay, Viscount Cave and Lord Dunedin): although, by reason of her husband's having committed bigamy in Australia the wife could not have been compelled to live with him and could have obtained a decree of divorce or judicial separation, in the absence of a decree of judicial separation the mere existence of grounds for divorce or judicial separation was not enough to enable the wife to set up a separate domicil, and, therefore, at her death she was domiciled in Australia and not in Scotland.

E

Dolphin v. *Robins* (1) (1859), 7 H.L. Cas. 390, applied.

Per Lord Shaw: I must not be held as assenting to the view that it has ever yet been decided by law that even a judicial separation properly and formally obtained would operate as a change in the so-called, and, in my opinion, very doubtfully named, domicilium matrimonii, permitting thereafter separate domicils to be acquired. I see the greatest difficulty in any invasion of the principle which appears to me to be fundamental, namely, that that unity which the marriage signifies is regulated by one domicil, and one domicil alone, i.e., that of the husband.

F

G

Notes. Considered: *A.-G. for Alberta* v. *Cook*, [1926] All E.R. Rep. 525; *Salvesen (or von Lorang)* v. *Austrian Property Administrator*, [1927] All E.R. Rep. 78; *Herd* v. *Herd*, [1936] 2 All E.R. 1516; *Sealey (otherwise Callan)* v. *Callan*, [1953] 1 All E.R. 942. Referred to: *Nachimson* v. *Nachimson*, [1930] All E.R. Rep. 114; *Re Luck, Walker* v. *Luck*, [1940] 3 All E.R. 307; *Dunne* v. *Saban (formerly Dunne)*, [1954] 3 All E.R. 586; *Robinson-Scott* v. *Robinson-Scott*, [1957] 3 All E.R. 473.

H

As to domicil in relation to marriage and matrimonial proceedings see 7 Halsbury's Laws (3rd Edn.) 88 et seq., and for cases see 11 Digest (Repl.) 455 et seq.

I

Cases referred to:

(1) *Dolphin* v. *Robins* (1859), 7 H.L. Cas. 390; 29 L.J.P. & M. 11; 34 L.T.O.S. 48; 23 J.P. 725; 5 Jur. N.S. 1271; 7 W.R. 674; 3 Macq. 563; 11 E.R. 156, H.L.; 11 Digest (Repl.) 356, *252*.

(2) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011*.

(3) *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 11 Digest (Repl.) 481, *1081*.

(4) *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli. N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, *250*.

(5) *Le Sueur* v. *Le Sueur* (1876), 1 P.D. 139; 45 L.J.P. 73; 24 W.R. 616; sub nom. *Le Sneur* v. *Le Sneur*, 34 L.T. 511; on appeal, sub nom. *Le Sueur* v. *Le Sueur* (1877), 2 P.D. 79, C.A.; 11 Digest (Repl.) 357, *255*.

(6) *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574; Sea. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194; 6 Jur. N.S. 24; 8 W.R. 134; 164 E.R. 866; 11 Digest (Repl.) 471, *1025*.

(7) *Re Mackenzie*, *Mackenzie* v. *Edwards-Moss*, [1911] 1 Ch. 578; 80 L.J.Ch. 443; 105 L.T. 154; 27 T.L.R. 337; 55 Sol. Jo. 406; 11 Digest (Repl.) 357, *256*.

(8) *Pitt* v. *Pitt* (1864), 10 L.T. 626; 10 Jur. N.S. 735; 12 W.R. 1089; 4 Macq. 627, H.L.; 11 Digest (Repl.) 348, *167*.

(9) *Redding* v. *Redding* (1888), 15 R. (Ct. of Sess.) 1102; 25 Sc.L.R. 459.

(10) *Armytage* v. *Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480; 11 Digest (Repl.) 475, *1052*.

(11) *Ogden* v. *Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94, C.A.; 11 Digest (Repl.) 357, *260*.

(12) *Marchioness of Huntly* v. *Gaskell*, [1906] A.C. 56; 75 L.J.P.C. 1; 94 L.T. 33; 22 T.L.R. 144, H.L.; 11 Digest (Repl.) 339, *102*.

(13) *Winans* v. *A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 20 T.L.R. 510, H.L.; 11 Digest (Repl.) 329, *41*.

(14) *Niboyet* v. *Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, *1021*.

(15) *Jack* v. *Jack* (1862), 24 Dunl. (Ct. of Sess.) 467.

Also referred to in argument:

Aikman v. *Aikman* (1861), 4 L.T. 374; 7 Jur. N.S. 1017; 3 Macq. 854, H.L.; 11 Digest (Repl.) 328, *37*.

Appeal from an interlocutor of the First Division of the Court of Session (reported 56 Sc.L.R. 559) recalling an interlocutor of the Lord Ordinary (Lord Ormidale).

The action was brought by the Commissioners of Inland Revenue to establish the liability of the estate of Mrs. Isabella Henderson Mackinnon to legacy and other duties. The questions to be determined were (i) whether at the date of Mrs. Mackinnon's death on Sept. 9, 1915, her husband, Robert Mackinnon, had acquired a domicil in Queensland; and (ii) in the event of its being held that he had, whether the domicil of Mrs. Mackinnon was at the date of her death also in Queensland in respect of the rule that a wife's domicil follows that of her husband? Upon the decision of those questions depended the questions: (i) Whether legacy duty was chargeable in respect of Mrs. Mackinnon's movable estate; and (ii) whether succession duty was payable not merely in respect of her heritable estate in Scotland, but of her whole estate. The evidence tendered was to the effect that Robert Mackinnon was born in Campbeltown in 1844 and served in the navy for twenty-four years. He married Isabella Henderson Watson in 1878. In 1886 he retired from the navy with the rank of petty officer, and lived with his wife in Aberdeen until 1893. There were four children, all of whom predeceased their mother. Owing to Mackinnon's dissipated habits his married life was unhappy, and finally in 1893 he left Scotland for Australia, his passage being paid by his wife's mother. After his departure Mrs. Mackinnon had no communication with him. In 1902 Mackinnon went through a form of marriage with Wilhelmina Bennett, by whom he had two children, and he lived with her in or about Brisbane until his death. He was employed in casual work, generally gardening, but he was mainly dependent for his income upon his pension from the Admiralty. He told his bigamous wife on more than one occasion that he had no intention of going back to Scotland. Mrs. Mackinnon continued to live in Scotland down to the time of her death. She instituted divorce proceedings against

her husband, but these proceedings became abortive by reason of her death. The Lord Ordinary (Lord Ormidale) was of opinion that Robert Mackinnon had abandoned his Scottish domicil and had acquired a domicil in Queensland, but that in the circumstances of the case the wife's domicil remained Scottish. Upon the reclaiming note Lord Mackenzie agreed with the Lord Ordinary on both points, but the majority of the First Division (Lord Skerrington and Lord Cullen) were of opinion that Mrs. Mackinnon's domicil was necessarily dependent on her husband's, and that, as he was domiciled in Queensland, her domicil was also in that State. The Lord Advocate appealed.

The Lord Advocate (*T. B. Morison, K.C.*) and *R. C. Henderson* (both of the Scottish Bar) for the appellant.

Alexander Moncrieff, K.C., and *T. M. Cooper* (both of the Scottish Bar) for the respondents (the trustees of Mrs. Mackinnon's will).

The House took time for consideration.

July 16. The following opinions were read.

VISCOUNT HALDANE (read by Viscount Cave).—On the first of the questions argued by the Lord Advocate, that whether Robert Mackinnon, the husband of the testatrix, died domiciled in Queensland, I think there can be no doubt that our answer must be in the affirmative. The evidence adduced and the concurrent findings of the two courts below are conclusive as to this. A more serious question is, however, raised independently of this answer. It is said that, as her husband had contracted in 1902 a bigamous marriage at Brisbane, and was in effect living in adultery, the testatrix could not have been compelled to live with him, and, indeed, could have obtained a divorce against him. As the result of this, which may well be true, it is further said that she could and did acquire an independent domicil in Scotland, where she died, and that, consequently, the right to succeed to her movable estate and the liability to legacy duty, depended on the law, not of Queensland, but of Scotland. I think it is clear that the one question on which this matter turns is whether, in the circumstances, the lady had acquired a particular and definite juridical status independent of her husband. The status I refer to must be one which would have enabled her to invoke a court, other than that of her husband's domicil, as having jurisdiction to dissolve her marriage. That status must also have been such that the succession to her movables came to depend on the law of her domicil instead of his.

It may well be that, as was said by Lord Watson in *Le Mesurier* v. *Le Mesurier* (1) ([1895] A.C. at p. 526), there may be residence, without the acquisition of complete domicil, sufficient to sustain proceedings for restitution of conjugal rights, for separation, or for aliment. But the status which such residence can confer is far short of that which domicil proper confers. As was pointed out by Lord Watson (ibid. at p. 538), agreeing with what was said by Lord Westbury in *Shaw* v. *Gould* (3) (L.R. 3 H.L. at p. 83), the accepted canon of international law is expressed in the words which they both quote from Rodenburg (De Stat. Divers tit. 1, c. 3, s. 4):

> "Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quaeritur, uni solummodo Judici, et quidem Domicilli, universum in illâ jus sit attributum."

Since *Le Mesurier* v. *Le Mesurier* (2) was decided in terms that gave effect to the spirit as well as to the letter of this principle, it has been clear that nothing short of a full juridical domicil within its jurisdiction can justify a British court in pronouncing a decree of divorce, and that the old notion is now obsolete that there can be, short of such a full domicil, a so-called "matrimonial domicil" which can give the same result. I think that it is implied as a consequence not less plain that there can be only one real domicil. Not only is there no authority for the proposition that under the laws of these islands husband and wife can have, while they

continue married, distinct domicils, but if it were otherwise the consequences in such circumstances as those before us would be extraordinary. Proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results. The status itself resulting from marriage might become modified without judicial interposition. The very evils, the exclusion of which has been said by eminent writers or international law to require the acceptance of the principle of domicil unrestrictedly, would be again introduced, and introduced under conditions so vague that no definite limit could be assigned to their operation. I have considered the authorities referred to by the Lord Advocate in his argument at the Bar. They are not everywhere completely consistent, and there are expressions in them which are not always easy to reconcile. But the principle on which the conclusions to which I have just referred are based is no new one. It is the foundation of the judgment of this House in *Warrender* v. *Warrender* (4), and in no decision which I have found and which is binding on your Lordships has it been departed from. More I do not think it necessary to say. I move your Lordships that this appeal be dismissed with costs.

VISCOUNT FINLAY.—The question in the present case is whether the late Mrs. Isabella Watson, or Mackinnon, the testatrix, was, at the time of her death, domiciled in Queensland, and the liability of her estate in respect of legacy duty and succession duty depends upon the answer to this question. The inquiry falls under two heads: (i) Had Robert Mackinnon, the husband of the testatrix, acquired, at the date of her death, a domicil in Queensland? (ii) If he had, was the testatrix, as his wife, also domiciled in Queensland?

Robert Mackinnon was born and brought up in Scotland. He served in the Royal Navy for twenty-four years. In 1878 he married the testatrix, and from 1886, when he retired from the navy with a pension, until 1893 he resided with her in Scotland. He had contracted drunken and dissipated habits, in consequence of which arrangements were made by the testatrix through her law agent for his leaving this country and going to Australia, the expense of his passage being paid by his mother-in-law. He landed at Sydney, and after some time went thence to Queensland, where he remained until his death in 1918. There was no communication whatever between him and the testatrix from the time when he left this country in 1893. He resided at various places in Queensland, latterly (for some seven years) at Brisbane, and never expressed any desire to return to Scotland. In 1902 he contracted a bigamous marriage with a woman in Queensland, who lived with him until his death. His domicil, when he arrived in Australia, was unquestionably Scottish. The Lord Ordinary (LORD ORMIDALE) found that, having regard to his long continued residence in Queensland, he acquired a domicil of choice in Queensland, and that this domicil had been acquired at the date of his wife's death. There was an appeal to the First Division, and all the judges, LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN, concurred with the Lord Ordinary in holding that Robert Mackinnon had acquired, before his wife died, a domicil in Queensland. There are, therefore, concurrent findings upon this point by the court in the first instance and the Inner House. The burden of proving a change of domicil is, of course, upon those who assert it. As both the courts below have found that there was in this case such a change of domicil, I do not think that upon the facts in evidence in this case it would be proper to disturb the conclusion at which they have arrived. It must, therefore, be taken that Robert Mackinnon was, at the date of the death of the testatrix, domiciled in Queensland. It remains to consider whether the testatrix, as the wife of Robert Mackinnon, shared his domicil in Queensland. On this point the judges in the Court of Session were equally divided. The Lord Ordinary in the first instance, and LORD MACKENZIE in the Inner House, took the view that the special circumstance of this case the ordinary rule that the domicil of the wife is that of the husband had no application, and that he retained her Scottish domicil,

But the majority of the judges in the Inner House held that there were no circumstances in the present case sufficient to exclude the application of the rule of law that the domicil of the wife is that of the husband.

The appellants, the Commissioners of Inland Revenue, relied upon what was said by LORD CRANWORTH in *Dolphin* v. *Robins* (1) (7 H.L. Cas. at p. 418) and SIR ROBERT PHILLIMORE in *Le Sueur* v. *Le Sueur* (5) (1 P.D. at p. 142). LORD CRANWORTH in the first of these cases indicated that the inclination of his opinion was that if the wife had obtained a decree of judicial separation that would be enough to exclude the general rule as to the domicil of a wife being that of her husband. He observed, however, that it did not at all follow that the existence of facts which would have enabled the wife to obtain a decree for judicial separation would have the same effect in the absence of an actual decree. LORD CRANWORTH added that there might be exceptional cases which, even without a judicial separation, would exclude the general rule. He refers to cases in which the husband "has abjured the realm, has deserted his wife and established himself permanently in a foreign country, or has been convicted for felony and been transported." The first and third of these cases need not be considered. The abjuration of the realm has disappeared with the right of sanctuary, and transportation for felony would not in itself involve a change of domicil on the part of the husband. As regards the second case suggested by LORD CRANWORTH—desertion—there was, as a matter of fact, in the present case no desertion by the husband. On the contrary, it was at the express desire of the wife that, no doubt for very sufficient reasons, he was shipped off to Australia. In *Le Sueur* v. *Le Sueur* (5) SIR ROBERT PHILLIMORE expressed the opinion that desertion by the husband would entitle the wife, without a decree of judicial separation, to choose a new domicil for herself. For the reasons which I shall hereafter state, this opinion appears to me to be erroneous, and I am unable to concur with the decision given by SIR ROBERT PHILLIMORE upon this point.

As no judicial separation was obtained in the present case, it is unnecessary and undesirable to express any opinion on the question whether such a decree would have prevented the wife's domicil from following that of the husband. This is a point of great importance, and its decision should be deferred until it arises on the facts of some particular case.

What we have to consider is whether, in the absence of any judicial decree, conduct by the husband which would have enabled the wife to obtain such a decree if she had applied for it, or which would have justified her in point of law in refusing to live with her husband, can, after her death, be sufficient to establish that she had a domicil of her own different from that of her husband. It appears to me clear that they cannot.

The view that I take upon this point is in accordance with the opinion of LORD CRANWORTH himself in a passage in his judgment in *Dolphin* v. *Robins* (1), to which I have already referred. There was no desertion by the husband either in going to Australia, which was at the instance of his wife, or in his remaining there, which was by her desire. The fact, however, that Robert Mackinnon contracted a bigamous marriage in Australia would undoubtedly have enabled the wife, if she had sued in the proper tribunal, to obtain a decree of judicial separation. But there are the strongest reasons for saying that, however clear the facts may be that the wife was not bound to adhere, this cannot of itself suffice to prevent the wife's domicil being that of her husband. That questions of succession should depend upon an inquiry after the death of the parties into their conduct would be dangerous in the last degree. It would introduce great uncertainty as to the rights of the parties to the succession, and when the parties are dead it might not be possible to arrive at any satisfactory conclusion upon such a question of fact. LORD KINGSDOWN in *Dolphin* v. *Robins* (1) expressed dissent from LORD CRANWORTH's dicta as to the effect of a judicial separation in questions of succession. However this may be, it appears to me that it would be contrary to all principle to allow succession to be

A regulated by the result of an inquiry after death as to the existence of circumstances which might have given ground for a decree.

A great many authorities have been referred to on the subject of marriage and domicil which suggest most interesting questions for consideration. These questions, however, it is, for purposes of the present case, quite unnecessary to consider. I rest my decision simply on the fact that the testatrix died without obtaining a B decree for judicial separation, and that, therefore, the ordinary rule of law as to domicil must be applied. As to the existence of the rule there is no doubt. It would at once be undesirable and mischievous to enter into an examination of the reasons on which the rule was based, and, if it should appear on inquiry after the death of one or both of the parties that these reasons might not apply in any particular case, to say that the rule should be treated as inapplicable. In my opinion, C this appeal should be dismissed.

VISCOUNT CAVE.—The appellant, the Lord Advocate, put forward two contentions, namely, first, that there is no proof that Robert Mackinnon had lost his Scottish domicil and acquired a domicil in Queensland; and, secondly, that, even if this be proved, his misconduct in Queensland had the effect of excluding the general rule D that the domicil of the wife follows that of her husband, and accordingly that Mrs. Mackinnon retained her Scottish domicil.

As to the first question, which is one of fact, I agree entirely with the findings of the Lord Ordinary and the First Division of the Court of Session. Mackinnon in 1893 signed a contract of separation from his wife, and with her consent, and, indeed, by her desire, emigrated to Australia. In or about 1899 he went to Brisbane E and settled there. In 1902 he contracted a bigamous union with a woman by whom he had children, and lived with her in or near Brisbane until his wife's death in 1915, and thenceforth until his own death in 1918. I think it is clear that he abandoned his Scots domicil and acquired a domicil in Queensland in or before 1902.

Upon the second question, which is one of law, the argument put forward by the appellant was to the effect that the rule as to a wife's domicil following that of her F husband is founded upon the duty of the wife to live with her husband; that by reason of Mackinnon's unfaithfulness his wife was freed from that obligation; and that, accordingly, the rule as to domicil had no application to her. The decision of the Lord Ordinary to the above effect was reversed by the First Division, and your Lordships have to determine whether it should be restored. I doubt whether the rule as to a wife's domicil following that of her husband is founded only upon her G obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie: see Code XII. I. 13; STAIR, INSTITUTES, 1. iv. 9; PHILLIMORE ON DOMICIL, s. 40. And while the rule is no doubt abrogated by a divorce a vinculo, and possibly (although this has not yet been finally decided) by a divorce a mensa et thoro or a judicial separation, I do not think there is any reliable authority for the proposition H that the mere existence of grounds for a decree of divorce or separation is of itself enough to enable a wife to set up a separate domicil. Indeed, the decision of your Lordships' House in *Dolphin* v. *Robins* (1) appears to be an express authority to the contrary. In that case the wife of a domiciled Englishman, having obtained in Scotland a decree of divorce on the ground of her husband's adultery in that country, went through a ceremony of marriage with a domiciled Frenchman and lived with I him in France until her death. It was held, first, that the Scottish decree of divorce was void as there was no Scottish domicil, and, secondly (on an argument first raised in this House), that the adultery of the husband did not entitle the wife to choose a domicil for herself in France. On the latter point LORD CRANWORTH said:

> "It was, indeed, argued strongly that here the facts show that the husband never could have compelled his wife to return to him. The allegation of the appellant, it was contended, contains a distinct averment that the husband had committed adultery; and this would have afforded a valid defence to a suit for

restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which, it is alleged, he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence. It may be that, where there had been a judicial proceeding enabling the wife to live away from her husband, and she has accordingly selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture. But it does not at all follow that it can be open to anyone, after the death of the wife, to say, not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right or preventing the husband from insisting on her return. It would be very dangerous to open the door to any such discussions; and, as was forcibly put in argument at the Bar, if the principle were once admitted it could not stop at cases of adultery. For if the husband, before the separation, had been guilty of cruelty towards the wife, that, no less than adultery, might have been pleaded in bar to a suit for restitution of conjugal rights. It is obvious that to admit questions of this sort to remain unlitigated during the life of the wife, and to be brought into legal discussion after her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper."

LORD CAMPBELL, the Lord Chancellor, agreed with the above view, saying:

"The first marriage in 1822 remained in full force; there was no dissolution of that marriage, nor any judicial separation de corps, as the French call it; there was no such separation as would even amount to a divorce a mensa et thoro. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicil separate from that of her husband."

The other learned Lords concurred, LORD KINGSDOWN even expressing a doubt as to the power of a wife to acquire a separate domicil after a judicial separation. This decision, which was followed in *Yelverton* v. *Yelverton* (6) appears to me to conclude this case, but doubt has been caused by some further observations, added by LORD CRANWORTH in the same speech when he said:

"I have already observed that the decision in this case will be no precedent where there has been a decree for judicial separation; and, before quitting the subject, I should add that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife and established himself permanently in a foreign country, or has committed felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show that the able argument of Sir Hugh Cairns has not been lost sight of. It is sufficient to say that in the appeal now before the House no such case of exception is to be found."

These observations were cited with approval by SIR R. PHILLIMORE in *Le Sueur* v. *Le Sueur* (5) and were again referred to by SWINFEN EADY, J., in *Re Mackenzie*, *Mackenzie* v. *Edwards-Moss* (7) and they formed the basis of the judgment of the Lord Ordinary in the present case. I am disposed to think that the argument based upon LORD CRANWORTH'S dictum—which was general and tentative in form—has been carried too far. LORD CRANWORTH can hardly have intended to suggest that in every case where a husband deserts his wife and settles abroad the wife retains her former domicil; for such a suggestion would be inconsistent with his own earlier reasoning quoted above and with the actual decision in *Dolphin* v. *Robins* (1). Possibly he had in mind the case of a husband who, having been guilty of desertion or some other matrimonial offence in this country, endeavours to deprive his wife of her remedy by changing his domicil, and there is no doubt authority which it is

not now necessary to examine for the proposition that in such a case the husband will not be allowed to set up his own wrong as an argument for prejudicing his wife's rights: see *Pitt* v. *Pitt* (8) (4 Macq. at pp. 640 and 647); *Redding* v. *Redding* (9); *Armytage* v. *Armytage* (10) ([1898] P. at p. 185); *Ogden* v. *Ogden* (11) ([1908] P. at p. 78). But, if so, the proposition can have no bearing upon the present case, where the husband emigrated with his wife's consent, and before any matrimonial offence had been committed, and where it is not the guilty husband, but the representative of the wife, who insists that her domicil followed his. In my opinion, therefore, the argument for the appellant fails, and the decision of the Court of Session is right and should be affirmed.

LORD DUNEDIN (read by Lord Shaw).—All the learned judges of the Court of Session came to the conclusion that Mackinnon at the time of Mrs. Mackinnon's death had acquired a domicil in Queensland. From this conclusion I am not prepared to differ. It is a question of fact, and I am satisfied that their Lordships approached that question of fact in full recognition of the onus lying upon anyone who asserts that a domicil of origin has been abandoned—a doctrine laid down in many cases, and particularly by this House in *Marchioness of Huntley* v. *Gaskell* (12) and *Winans* v. *A.-G.* (13). That the domicil of the wife is that of the husband and follows any change which he makes, even though she is not de facto resident with him, is acknowledged law and not controverted by the appellant. His only argument is that there is an exception to this general rule when the circumstances are such that a wife, had she chosen, would have been entitled to divorce or at least to judicial separation. The case of divorce need not be considered, for, if there is divorce, the foundation of the rule is gone. She has no longer a husband, and she could not, therefore, be bound by the changes of domicil of a person to whom she is connected by no family tie.

The sheet anchor of the appellant's argument is a certain dictum of Lord Cranworth in *Dolphin* v. *Robins* (1). In that case Mrs. Dolphin, the wife of a domiciled Englishman, had obtained a decree of divorce in the Scottish courts on the ground of adultery against her husband, who, at that time, was temporarily resident in Scotland. She had then gone to France, where she had gone through the ceremony of marriage with a Frenchman. The question in the case was whether Mrs. Dolphin on her death was by domicil an Englishwoman or a Frenchwoman. This House first decided that the Scottish decree of divorce was null for want of jurisdiction, no courts having a power to divorce a vinculo except the courts of the country of the domiciled husband—a view followed long after in *Le Mesurier* v. *Le Mesurier* (2) —and then put the question for argument:

> "Whether the circumstances are such as to render the wife capable of gaining for herself a domicil, and, if so, did she do it?"

The noble and learned Lords unanimously held that, the null decree of divorce being in no sense equivalent to a decree of separation, Mrs. Dolphin remained a married woman not separated from her husband by judicial decree, and, therefore, incapable of acquiring a different domicil from that of her husband. I confess I think that decision rules this case, and, with great deference to Lord Cranworth, I cannot hold his remarks as free from the criticism of self-contradiction. Having indicated a doubt whether, if there was a decree of judicial separation, the wife might not have acquired a domicil different from that of her husband—nay, having almost expressed his preference for the view that she might—he proceeds as follows:

> "On this question it is unnecessary and it would be improper to pronounce an opinion, for here there was no judicial sentence of divorce a mensa et thoro, no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband.

For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that without such a decree it must be considered that the marital rights remain unimpaired."

He then goes on to say, and it is on these words that the appellants found:

"Before quitting the subject I should add that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported."

I cannot reconcile these words with the plain sentence "without such a decree marital rights remain unimpaired." LORD KINGSDOWN carefully withheld his assent to the idea that even a judicial separation would be sufficient. He does not give a decisive opinion, and I think, considering the importance of the subject, it will be well that we should follow his example and wait till the circumstance arises.

It is true that in *Le Sueur* v. *Le Sueur* (5) SIR R. PHILLIMORE puts into effect the suggestion of LORD CRANWORTH. Against that may be put the decision of SIR CRESSWELL CRESSWELL in *Yelverton* v. *Yelverton* (6), where he said (1 S.W. & Tr. at p. 584):

"The domicil of the husband is the domicil of the wife, and, even supposing him to have been guilty of such misconduct as would provide her with a defence to a suit as for restitution of conjugal rights, she could not on that ground acquire another domicil for herself."

He adds: "As was recently held by the House of Lords in *Dolphin* v. *Robin* (1)," which shows that the learned judge took the same view of that case as I do. The practical consequences of the other view would be, I think, extremely inconvenient. In the present case it is left in doubt at what precise date the husband acquired his Australian domicil. It may well have been before the adultery was committed. Assuming it was so, it seems impossible to suppose that a supervening adultery would alter the wife's domicil. There would, therefore, have to be inquiry as to the precise date. In other cases there may be allegations of adultery of dubious proof, and finally, as was ingeniously and I think soundly, argued by counsel for the respondents, if the wife under this doctrine is entitled to assert a different domicil from that of her husband it would induce great difficulty in carrying out the views in *Le Mesurier's Case* (2), for if either spouse wished a divorce a vinculo which would be the court which would be empowered to grant it? I think the only safe course is to keep close to the well-established rule that the domicil of a husband and wife, undivorced and unseparated, is one and the same, and I am therefore of opinion that this appeal fails.

LORD SHAW.—A demand has been made by the Commissioners of Inland Revenue upon the trustees of the late Mrs. Mackinnon for payment of legacy duty, residue duty, and a certain proportion of succession duty, and the foundation of the claim of the Crown is that these payments are due out of Mrs. Mackinnon's estate, in respect that she died domiciled in Scotland. If the foundation—as to domicil—fails, the case of the Crown disappears.

[HIS LORDSHIP stated the facts and continued:] Upon these facts, and upon other details brought out in evidence, I have no hesitation in agreeing with the judgments of the court below, and in holding it to be proved that Mackinnon's domicil was in Queensland. It is perfectly true that his domicil of origin was Scottish. It is also perfectly true that facts must be clear and unambiguous before it can be concluded that such a domicil has been permanently changed. A long residence abroad is not sufficient to change it. Yet the question still remains in all such cases. Did the citizen leave this country and betake himself to another for good; did he remain in his new abode sine animo revertendi?

A After all, that is a question of fact, and I cannot bring myself to hold that Mackinnon ever had any intention of again becoming a Scottish citizen. He formed a home in Queensland, he worked there, and such interests as he had in life were all there. With the exception of drawing his pension, he definitely cut every link binding him to his home in his native country, and he showed no sign whatsoever of returning. It was argued, however, that when he contracted B a bigamous marriage he interfered with his own freedom in returning or even in communicating with his domicil of origin. Probably he did, but I see no ground for thinking that he did so against his will or that a court is entitled to conclude that his true intentions as to domicil are to be assumed to have been that he meant to return, but could not. Such views are too astute to be practical. The man's intentions are best judged by his habits and his acts if he has never given any C other expression or signification to them, and, in my view, his habits and his acts squared with his intention, which was to settle permanently in Australia. The first question in the case, i.e., as to Robert Mackinnon's domicil, is thus, therefore, settled. He was domiciled in Queensland.

The second question is whether, the husband being thus domiciled in Queensland, his wife remained domiciled in Scotland. I do not doubt that she did not. D If she did, the case would form a notable and unique exception from what, in my opinion, is a sound, reasonable, and long-settled principle of law. Assuming that Mackinnon went out to Australia in the circumstances mentioned, cutting, as I have said, the ties with Scotland completely, and becoming domiciled in Australia. I am of opinion that the case is a clear one for the application of the ordinary principle to which I have referred. The wife continued to have the domicil of E a married woman, a derivative domicil, the domicil of her husband. When that changed, the derivative result changed; the wife's domicil was changed from Scottish to Australian. Any doubts that there are in the case have arisen in the legal sphere, but even there they have not arisen on account of the application of any well-known doctrines in law, but substantially upon a conjecture by way of reserve, for I call it so—a conjecture, by way of reserve—expressed by LORD F CRANWORTH in *Dolphin* v. *Robins* (1). That conjecture has been repeated and repeated in text-books and succeeding cases. No case crystallising it in fact has ever yet arisen in which any exception to or aversion from the general doctrine of domicil has been given effect to.

To begin with, I am clearly of opinion that the present case is certainly not G one to which any such conjectural exception could apply. I entirely agree with what has been said by my noble and learned friend LORD DUNEDIN with regard to LORD CRANWORTH's observations in *Dolphin* v. *Robins* (1). But I may be permitted to put the leading citations in this order. LORD CRANWORTH says (7 H.L. Cas. at p. 416):

H "In the case of a wife, the policy of the law interferes, and declares that her home is necessarily the home of her husband; at least it is so primâ facie. But where, by judicial sentence, the husband has lost the right to compel the wife to live with him, and the wife can no longer insist on his receiving her to partake of his bed and board, the argument which goes to assert that she cannot set up a home of her own, and so establish a domicil different from that of her husband, is not, to my mind, altogether satisfactory. The power to do I so interferes with no marital right during the marriage, except that which he has lost by the divorce a mensa et thoro. She must establish a home for herself, in point of fact; and the only question is, supposing that home to be one where the laws of succession to personal property are different from those prevailing at the home of her husband, which law, in case of her death, is to prevail? Who, when the marriage is dissolved by death, is to succeed to her personal estate; those entitled by the law of the place where, in fact, she was established, or those where her husband was established? On this

question it is unnecessary, and it would be improper, to pronounce an opinion, for here there was no judicial sentence of divorce a mensa et thoro, no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband. For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that without such a decree it must be considered that the marital rights remain unimpaired."

To pause there, the judgment applies directly to the present case. This case is one, so to speak, of a domicil of succession, and it is one in which Mrs. Mackinnon had obtained no decree of judicial separation. In these circumstances it seems somewhat unnecessary to go on to consider the conjecture—for the learned lord has declared that the marital rights were to be unimpaired without such a decree—to go on to consider the possible case in circumstances where there was no such decree, and yet curiously enough such impairment. The passage to which I refer is as follows (ibid. at pp. 418, 419):

"I have already observed that the decision in this case will be no precedent where there has been a decree for judicial separation; and before quitting the subject I should add that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed a felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show that the able argument of Sir Hugh Cairns has not been lost sight of. It is sufficient to say that in the appeal now before the House no such case of exception is to be found."

This passage put LORD KINGSDOWN on his guard at once, and he declared as follows (ibid. at p. 420):

"One thing only I am anxious to guard against. If any expressions of my noble and learned friend have been supposed to lead to the conclusion that his impression was in favour of the power of the wife to acquire a foreign domicil after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House."

LORD CAMPBELL, L.C., expressed his view as follows (ibid. at p. 423):

"The first marriage in 1822 remained in full force; there was no dissolution of that marriage, nor any judicial separation de corps, as the French call it; there was no such separation as would even amount to a divorce a mensa et thoro. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicil from that of her husband. Upon the other question to which my noble and learned friend has referred I abstain from giving any opinion. It is quite clear that the mere consent of the husband that she should live elsewhere would confer no right upon her to acquire a foreign domicil."

I have ventured to assert in my address these quotations for this particular purpose. I must not myself be held as assenting to the view that it has ever yet been decided by law that even a judicial separation properly and formally obtained would operate as a change in the so-called, and, in my opinion, very doubtfully named, domicilium matrimonii. I see the greatest difficulty in any invasion of the principle which appears to me to be fundamental, namely, that that unity which the marriage signifies is regulated by one domicil, and one domicil alone, i.e., that of the husband. I am quite sure that LORD WATSON in *Le Mesurier* v. *Le Mesurier* (2) not only treated the matrimonial domicil as the real domicil, and

nothing but the real domicil, which is the real domicil of one person, i.e., the husband. Much confusion may be caused by the introduction of the idea of there being two domicils of the marriage or two domicils of succession while the marriage tie continues. I desire further to say that I think in this connection too little regard has been paid to the judgment of this House in *Warrender* v. *Warrender* (4). The case was powerfully argued by Sir J. Campbell, Attorney-General, on the one side, and Sir William Follett on the other; and the point with which I am dealing was a matter of direct controversy. Sir J. Campbell's argument was: "The application of the legal fiction which makes the husband's house the legal and proper domicil of the wife, is excluded in this case by the deed of separation." This was strongly countered by Lord Brougham, who thus deals with the point (2 Cl. & Fin. at p. 523):

> "It is admitted on all hands that, in the ordinary case, the husband's domicil is the wife's also. . . . Actual residence—residence in point of fact—signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. . . . Had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be—with her husband. Does the execution of a formal instrument, recognising such an understanding, make any difference in the case?"

His Lordship then proceeds to discuss whether the agreement founded on in the case was sufficient for this purpose, and finds that there is a fundamental difficulty in so holding. But the Lord Chancellor did not leave the matter there; he adds this sentence (ibid. at p. 526):

> "But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing. I am of opinion that there is nothing in the separation, supposing it had been ever so formal, and ever so full in its provisions, which can by law displace the presumption of domicil raised by the marriage, and subsisting in full force as long as the marriage endures."

So far Lord Brougham in *Warrender* v. *Warrender* (4). I do not find that this, stated as a general principle, has ever been departed from. Smaller inconveniences may be remedied and jurisdiction assumed almost ex necessitate to find a remedy for these on the spot, but in the great fundamental issues of status and succession the domicil of the wife is the domicil of the husband until divorce a vinculo matrimonii has been obtained.

This view humbly appears to me to be in entire accord with that of Lord Watson when in *Le Mesurier* v. *Le Mesurier* (2), and dealing with *Niboyet* v. *Niboyet* (14), and the appeal made to the remedial provisions of the English statute of 1857, his Lordship observed:

> "It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment, but it does not follow that such residence must also give jurisdiction to dissolve the marriage."

His Lordship refers to a so-called "matrimonial domicil," having quoted with manifest approval the judgment of Lord Deas in the Scottish case of *Jack* v. *Jack* (15), where that distinguished judge observed:

> "Neither can I solve this case by what has been sometimes called the domicil of the marriage. The phraseology appears to me to be calculated to mislead. It is figurative, and wants judicial precision. There is no third domicil involved apart from the domicil of the husband and the domicil of the wife. Domicil

belongs exclusively to persons. Having ascertained the domicil of the husband and the domicil of the wife, the enquiry into domicil is exhausted."

After an exhaustive summary of the cases both in England and in Scotland, LORD WATSON in *Le Mesurier* v. *Le Mesurier* (2) concludes:

"When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognised rule of general law to the effect that a so-called matrimonial domicil gives jurisdiction to dissolve marriage."

It appears to me to be a question which has certainly never been settled in the affirmative whether even a judicial decree of separation can affect the domicil of the spouses, permitting thereafter separate domicils to be acquired. The ordinary rule has not yet been so invaded. It works conveniently. It prevents confusion. It regulates succession by one set of rules instead of possibly by two, and it preserves that unity of idea and fact with regard to the domicil of married parties which has hitherto always been upheld by law. I should desire further to observe that I should have the greatest doubt, in any event, whether, if one of the spouses fails during the continuance of the marriage to obtain a divorce a vinculo matrimonii it is legitimate to raise the question after the death of the other. A fortiori, my Lords, I think this to be also the case when the question is raised after the death of the spouse, as in the present case, in order to promote or regulate ulterior interests. I agree that the appeal fails.

Solicitors: *H. Bertram Cox*, Solicitor to the Board of Inland Revenue, for *Stair A. Gillon*, Solicitor to the Board of Inland Revenue, Edinburgh; *Botterell & Roche*, for *Morice & Wilson*, Aberdeen, and *Macpherson & Mackay*, W.S., Edinburgh.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law*.]

MOORE *v.* FLANAGAN

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), January 23, 1920]

[Reported [1920] 1 K.B. 919; 89 L.J.K.B. 417; 122 L.T. 739]

Agent—Judgment against agent for debt—Bar to action against principal—Husband and wife—"Necessaries"—Claim for goods supplied to wife—Judgment obtained against wife—Bar to action against husband.

If a plaintiff has a claim against two persons, one of whom is an agent of the other, and judgment is signed against the one who is the agent, that is a conclusive bar to an action against the principal.

The plaintiff, a milliner and dressmaker, brought an action by means of a specially indorsed writ against a husband and his wife claiming against them jointly to recover the price of goods supplied to the wife. An application by the plaintiff for leave to sign final judgment was granted, and judgment was entered accordingly. From this the husband alone appealed, with the result that the judgment against him was set aside and he was given leave to defend. At the trial the judge found that the goods supplied to the wife were necessaries and so the wife was the agent of the husband in respect of their purchase and there was no joint liability, but he held that, although the plaintiff had taken judgment against the wife, she had not by doing so elected to treat her as a principal, and, therefore, she was entitled to recover from the husband. On appeal,

Held: as the remedy against husband and wife was not joint but alternative,

A the plaintiff, having recovered judgment against the wife, could not afterwards recover against the husband in respect of the same debt, and, therefore, the husband was not liable.

Morel Bros & Co., Ltd. v. *Earl of Westmorland* (1), [1904] A.C. 11, applied.

Notes. As to the effect of judgment obtained against wife see 19 HALSBURY'S B LAWS (3rd Edn.) 858, and for cases see 27 DIGEST (Repl.) 177. As to election to treat agent as principal see 1 HALSBURY'S LAWS (3rd Edn.) 219, and for cases see 1 DIGEST 575 et seq.

Cases referred to:

(1) *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland*, [1903] 1 K.B. 64; 72 L.J.K.B. 66; 87 L.T. 635; 51 W.R 290; 19 T.L.R. 43, C.A.; affirmed C [1904] A.C. 11; 73 L.J.K.B. 93; 89 L.T. 702; 52 W.R. 353; 20 T.L.R. 38, H.L.; 27 Digest (Repl.) 177, *1302*.

(2) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 21 Digest 224, *577*.

(3) *Hammond* v. *Schofield*, [1891] 1 Q.B. 453; 60 L.J.Q.B. 539; 7 T.L.R. 300, D.C.; 21 Digest 219, *546*.

D (4) *King* v. *Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest 218, *538*.

(5) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 21 Digest 218, *540*.

E Also referred to in argument:

Cross & Co. v. *Matthews and Wallace* (1904), 91 L.T. 500; 20 T.L.R. 603, D.C.; 21 Digest 223, *575*.

French v. *Howie*, [1906] 2 K.B. 674; 75 L.J.K.B. 980; 95 L.T. 274, C.A.; 27 Digest (Repl.) 177, *1303*.

McLeod v. *Power*, [1898] 2 Ch. 295; 67 L.J.Ch. 551; 79 L.T. 67; 47 W.R. 74; F 42 Sol. Jo. 634; 21 Digest 220, *549*.

Appeal by the plaintiff from an order of LUSH, J., at the trial of the action without a jury.

The plaintiff, a milliner and dressmaker, brought an action against the defendants, who were husband and wife, the writ being specially indorsed under Ord. 3, r. 6, with a claim for "£147 12s. for the balance of the price of goods G sold and delivered and supplied to the wife in 1916." The plaintiff applied for leave to sign final judgment under Ord. 14, r. 1, against both defendants, and the affidavit made on her behalf stated that the defendants "are justly and truly indebted to the above-named plaintiff in the sum of £147 12s. for goods supplied." The wife made no affidavit, but the husband made an affidavit in which he denied that he was indebted to the plaintiff, and stated that from the indorsement on H the writ of summons it appeared that the goods, which he believed were exclusively articles of personal adornment, were supplied to his wife on her personal credit, and that "at the date the goods were alleged to have been supplied I was a lieutenant in the R.N.V.R. and my salary and allowance did not at any time exceed £275 per annum, and I had no private income whatsoever, as is well known to the plaintiff who in the first instance sued my wife separately." The master I gave leave to sign final judgment against both defendants, and judgment was signed accordingly. The husband alone appealed. The judge in chambers set aside the judgment against the husband and gave him leave to defend. The judgment against the wife proved fruitless.

At the trial no evidence was called for the defendant. LUSH, J., said that, primâ facie, the goods were within the description of necessaries for the wife, and primâ facie, the husband was liable as the principal, and the wife was not liable. He found that there was no joint liability in the husband and wife. That being so, if

the plaintiff had sued the wife to judgment that would have been an election to treat the wife as principal, and the plaintiff could not afterwards have sued the husband. But the plaintiff had made no such election. She had sued both husband and wife, and obtained judgment under Ord. 14 against both. The fact that the wife did not appeal, and that the husband appealed and succeeded in getting the judgment against him set aside, leaving the judgment against the wife standing, could not make the plaintiff a contractor who had made an election. The acquiescence of the wife in the judgment signed against her could not affect the plaintiff's rights and make her an elector. She could not compel to wife to appeal. In his view *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (1) was distinguishable, and the plaintiff was entitled to judgment against the husband. He accordingly gave judgment for the plaintiff for the amount claimed. The husband appealed.

Randolph, K.C., and *du Parcq* for the defendant, the husband.
E. B. Charles, K.C., and *Valentine Ball* for the plaintiff.

BANKES, L.J.—This appeal raises a question of some importance. The action was brought by a specially indorsed writ against husband and wife, claiming against them jointly to recover the price of goods supplied by the plaintiff to the wife. An application was made under Ord. 14, r. 1, for leave to sign final judgment against both defendants, and the master gave leave to sign judgment against both, and judgment was signed accordingly. The husband appealed, and the judge varied the order by setting aside the judgment against him, and gave him leave to defend, and ordered the action to be put into the short cause list for trial. The judgment against the wife, who did not appeal, remained undisturbed. When the action came on for trial counsel for the husband took the point that unless there was a joint liability in husband and wife, inasmuch as judgment had been signed against the wife, it was not competent to give judgment against the husband; that, as the true position was that the wife ordered the goods as the agent of the husband, the plaintiff could not recover against both principal and agent in respect of the same debt, and that, therefore, the judgment against the wife barred the recovery of judgment against the husband. LUSH, J., came to the conclusion that the action having been brought on the footing of a joint liability, the plaintiff never had the opportunity of electing as between husband and wife, and that, therefore, she never did elect to sue the wife alone. The learned judge thought that *Morel* v. *Earl of Westmorland* (1) was distinguishable, and he gave judgment for the plaintiff against the husband.

In my view the present case is concluded by *Morel's Case* (1). In that case the action was brought against husband and wife jointly, and an application was made under Ord. 14, r. 1, for leave to sign final judgment for the amount claimed against both as on a joint liability. The master gave the plaintiff leave to sign judgment against the wife, and judgment was signed against her, and he gave the husband unconditional leave to defend. The only distinction between the two cases is that in *Morel's Case* (1) it may possibly be said that the plaintiff might have said to the master, "No, I will not accept an order against the wife alone," whereas it may be said here that the plaintiff did not have that opportunity. Does that make any real distinction between the two cases? The judgments in the Court of Appeal and in the House of Lords in *Morel's Case* (1) seem to me to rest upon the principle that if a plaintiff has a claim against two persons, one of whom is an agent for the other, and judgment is signed against the one who turns out to be the agent, that is a conclusive bar to an action against the principal. I find that principle stated by COLLINS, M.R., in *Morel's Case* (1), where, after coming to the conclusion that there was no evidence of a joint liability, he said that he would look at the case on the footing of a several or alternative liability, and proceeded:

"The plaintiffs, having obtained judgment against the countess on the footing that she was severally liable as the principal, cannot now turn round and

A say that she was an agent for the purpose of imposing liability upon her husband as the principal. In this point of view the liability of the husband and wife is not joint, but the liability of one is inconsistent with the liability of the other . . . The plaintiffs cannot recover against both . . . The result of the whole case is that the judgment against the husband cannot be sustained on the basis of the liability being joint; and, if it be sought to sustain it on
B the ground that the action must be treated as if brought in respect of a several liability of one or other of the defendants alternatively, then judgment, having been signed against the wife on the footing that she was liable for the price of the goods as a principal the plaintiffs cannot afterwards obtain judgment for the same amount against the husband on the footing that the wife was his agent in ordering the goods."

C Applying that principle, and even accepting the contention of the plaintiff's counsel that the only judgment knowingly signed was against both husband and wife as joint contractors, still the plaintiff, having recovered judgment against the wife, cannot also recover judgment against the husband as principal. In *Morel's Case* (1) in the House of Lords, LORD HALSBURY, V.-C., stated the same principle:

D "The plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two."

E LORD HALSBURY was there dealing with the facts as they appeared at the trial, and the court must look at the position of the parties as then proved. It is true that LORD DAVEY treated the case as one in which election was material, but he said:

"But if the proof which they [the plaintiffs] tendered at the trial shows, not a joint debt by the two, but an alternative claim against one or the other, then
F I think that by signing judgment against one they have, on the principle of *Scarf* v. *Jardine* (2) elected to take their remedy against that one, and cannot afterwards sue the other who is not jointly, but alternatively liable."

It is to be noted that that language was used in answer to an argument that the plaintiffs never elected to release or abandon the claim against the husband, the very argument now advanced. I am constrained to say that the case is covered
G by *Morel's Case* (1) and the appeal must be allowed.

SCRUTTON, L.J.—I do not feel quite satisfied in having to allow this appeal. I feel that the rule is extremely technical. But we sit here to administer and not to make or amend the law, and I have no choice except to give judgment for the appellant. It is clear that at common law before Ord. 14, in the case of a joint
H contract, judgment against one joint contractor barred an action against the other. The reason for the rule was probably not founded on election. I am disposed to agree with VAUGHAN WILLIAMS, J., in *Hammond* v. *Schofield* (3), where he said:

"The basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action in the same contract to insist, though not a party to
I the first action, on the rule that there shall not be more than one judgment on one entire contract."

Another technical way of putting the matter is to say that the contract is merged in the judgment, and therefore the cause of action on the contract is gone. A more substantial way of putting it is that each joint contractor has a right to have his co-contractors joined as parties, so as to have them all before the court. The law upon the point was laid down in *King* v. *Hoare* (4), and other cases, and finally by the House of Lords in *Kendall* v. *Hamilton* (5). So also in the case of

an alternative remedy, as in the case of principal and agent, the plaintiff cannot after recovering judgment against the agent proceed against the principal. Here again, the technical ground may be merger of the contract in the judgment.

In that state of the law, amendments in procedure were introduced by Ord. 14, and the question at once arose as to what should be done when one defendant was dealt with summarily and the other at the trial. The rules provided for some cases, but not for all. By r. 5 when one defendant has a good defence and any other defendant has not and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter: See also Ord. 13, r. 24, and Ord. 27, r. 3. The House of Lords decided in *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (1) that r. 5 of Ord. 14 is limited to joint contractor, and does not apply where the right of action is in the alternative against one or other of two defendants. That case also decides that the fact that the plaintiff has taken judgment under that rule against one on the mistaken footing of a joint liability will not assist him if it turns out that the liability was alternative. The plaintiffs signed judgment there against the wife under Ord. 14 on the footing of a joint liability, and the husband was given leave to defend, but at the trial a joint liability was not proved, the wife being merely the agent of the husband, and it was held that the plaintiff could not recover judgment against the principals. The only possible distinction between that case and the present, is that put by counsel for the defendant, namely, that judgment was taken against both husband and wife, and therefore the plaintiff could not be said to have made an election between them. But to my mind that is not a sufficient distinction. The true legal position of the parties in the present case is this. The plaintiff applied under Ord. 14 for judgment against both husband and wife. She succeeded before the master. The husband appealed, and when the appeal came on for hearing the judge, who knew that the judgment against the wife remained standing, set aside the judgment against the husband, and gave him leave to defend. The application before the judge was in reality a continuation of the application before the master, and it was open to the plaintiff to say, "I will not take that order; I ask for an adjournment to enable me to serve notice on the wife to appear when the whole matter can be gone into." The plaintiff did not do so, and must be deemed to have deliberately taken judgment under Ord. 14 against his wife alone. The matter is very technical, but in these circumstances the law says that the plaintiff cannot subsequently recover against the husband. Upon these grounds I think that the appeal must be allowed.

ATKIN, L.J.—I am of the same opinion. I cannot say that I feel any misgivings as to the justice of our decision. Any ill result to the plaintiff arises from her abuse of the procedure under Ord. 14. She issued a specially indorsed writ, which on its face showed a joint claim against husband and wife. She then applied for leave to sign final judgment against both as on a joint liability, and made an affidavit that the defendants were jointly indebted. In spite of the husband's affidavit she induced the master to give leave to sign judgment against both. Upon appeal by the husband the judge set aside the judgment against him, and gave him leave to defend. When the case came on for trial in the short cause list it was found that there was no joint liability in the defendants, and the plaintiff then turned round and said that the husband alone was liable. That offends against the rule, which is founded on good sense, that a plaintiff cannot sue an agent to judgment and then sue the principal. Having recovered judgment against the agent he cannot sue the principal. This depends not on election, but on the construction of the contract. By the language of the contract the plaintiff is prevented, owing to something she has done, from recovering judgment against the husband. Election is a separate principle which may bar the remedy which a person would otherwise have against the principal. That is the law as laid down in *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (1). The material facts

A are the same as in the present case. The action was against the husband and wife on a similar writ, indorsed with a similar claim, and the master gave leave to sign final judgment against the wife, but gave the husband leave to defend. Both the Court of Appeal and the House of Lords held that, as there was no joint liability, the judgment recovered against the wife must be treated as recovered against her as principal, and the plaintiff could not afterwards sue the husband as B principal. Order 14, r. 5, protects the plaintiff in the case of joint contractors, but not where the liability is in the alternative.

Appeal allowed.

Solicitors: *Hutchinson, Sons & Gomm; Orr, Dignam & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

C

D

R. *v.* DYMOND

[COURT OF CRIMINAL APPEAL (Earl of Reading, C.J., Shearman and Sankey, JJ.), March 9, 1920]

E

[Reported [1920] 2 K.B. 260; 89 L.J.K.B. 876; 123 L.T. 336; 84 J.P. 103; 36 T.L.R. 421; 64 Sol. Jo. 571; 26 Cox, C.C. 621; 15 Cr. App. Rep. 1]

Criminal Law—Demanding money with menaces—Defence—Belief by prisoner that she had reasonable or probable cause to make demand—Larceny Act, 1916 (6 *& 7 Geo. 5, c.* 50), *s.* 29 (1) (*i*).

F The appellant was charged with uttering, knowing the contents thereof, a letter demanding money of A. B. with menaces, and without any reasonable or probable cause, contrary to s. 29 (1) (i) of the Larceny Act, 1916. It was stated on behalf of the appellant that she honestly believed that she had reasonable or probable cause for demanding the money.

G **Held:** to meet a charge under s. 29 (1) (i) the defence must prove that the prisoner had reasonable and probable cause in fact for demanding the money, and, therefore, proof that the appellant honestly believed that she had reasonable and probable cause for making the demand did not afford her a defence.

H **Notes.** Considered: *Thorne* v. *Motor Trade Association*, [1937] 3 All E.R. 157. Referred to: *R.* v. *Denyer*, [1926] 2 K.B. 258; *Hardie and Lane, Ltd.* v. *Chilton*, [1928] All E.R. Rep. 36; *R.* v. *Bernhard*, [1938] 2 All E.R. 140.

As to extortion by threats see 10 HALSBURY'S LAWS (3rd Edn.) 797 et seq., and for cases see 15 DIGEST (Repl.) 1121 et seq. For the Larceny Act, 1916, see 5 HALSBURY'S STATUTES (2nd Edn.) 1011.

I Cases referred to:

(1) *R.* v. *Miard* (1844), 1 Cox, C.C. 22; 15 Digest (Repl.) 1123, *11,199.*

(2) *R.* v. *Hamilton* (1843), 1 Car. & Kir. 212; 15 Digest (Repl.) 1124, *11,210.*

(3) *R.* v. *Chalmers* (1867), 16 L.T. 363; 15 W.R. 773; 10 Cox, C.C. 450, C.C.R.; 15 Digest (Repl.) 1123, *11,198.*

(4) *R.* v. *Craig* (1858), 7 C.P. 239; 15 Digest (Repl.) 1241, **7332.*

Also referred to in argument:

R. v. *Cracknell and Walker* (1866), 10 Cox, C.C. 408; 15 Digest (Repl.) 1126, *11,230.*

Hicks v. *Faulkner* (1881), 8 Q.B.D. 167; 51 L.J.Q.B. 268; 46 L.T. 127; 46 J.P. 420; 30 W.R. 545, D.C.; affirmed (1882), 46 L.T. 130, C.A.; 33 Digest 467, *18.*

R. v. *Richard* (1868), 11 Cox, C.C. 43; 18 Digest (Repl.) 1126, *11,231.*

Appeal on a point of law against a conviction before DARLING, J., at the Devonshire Assizes for uttering a letter demanding money with menaces.

The appellant was indicted at the Devonshire Assizes for having uttered a letter, knowing the contents thereof, demanding property with menaces contrary to s. 29 (1) (i) of the Larceny Act, 1916. She wrote a letter to the prosecutor giving him notice that she was going to summon him for insulting her on the night of Saturday, Dec. 27, 1919, by "putting his hand in under my clothes." The letter also contained the following sentences: "I leave this to you to think what you are going to do, paid or gett summons; you can please yourself what to do. I expect a message this afternoon. . . . If you like to paid for this I won't say anything, but if you don't, I shall . . ." and more to the same effect. The prosecutor at the trial gave evidence in chief, and counsel for the appellant then informed the court that the answer to the charge was that the prosecutor had committed an indecent assault upon the appellant, and that she honestly believed that she had reasonable and probable cause for writing the letter. Counsel submitted on the authority of *R.* v. *Miard* (1) that he was entitled to cross-examine the prosecutor, and also to call evidence for the defence, so as to bring out facts relevant to the defence which was put forward. The learned judge held that belief by the appellant that she had reasonable and probable cause for writing the letter was not a good defence to the indictment, and refused to allow the prosecutor to be cross-examined with the view of showing that an assault of the nature indicated had been committed. The prosecutor was not cross-examined, and no evidence for the defence was called. The appellant was convicted and the learned judge gave a certificate that the case was a proper one for appeal. Sentence was therefore postponed pending the hearing of the appeal.

R. E. Dummett for the appellant.
Sir R. D. Muir and *W. T. Snell* for the Crown.

Cur. adv. vult.

Mar. 17. **EARL OF READING, C.J.,** read the following judgment of the court.—The appellant was convicted on an indictment under s. 29 (1) (i), of the Larceny Act, 1916, charging her with uttering, knowing the contents thereof, a letter to A. B. with menaces and without any reasonable or probable cause. Sentence was postponed by DARLING, J., pending the hearing of the appeal to this court upon the certificate of the learned judge, and the accused was released on bail on her own recognisances to surrender herself to receive judgment if called upon. After the case had been opened and the prosecutor had given his evidence in chief, counsel for the accused indicated the defence he intended to put forward, and invited the learned judge's ruling as to the materiality and regularity of a cross-examination which he proposed to administer to the prosecutor for the purpose of eliciting facts relevant to the issue which he intended to raise as a defence. He contended that if he could establish that she believed she had reasonable or probable cause for writing the threatening letters she would be entitled to an acquittal upon the authority of TINDAL, C.J., in *R.* v. *Miard* (1). After argument, DARLING, J., came to the conclusion that if the accused did establish that she believed she had reasonable or probable cause for making the demand, it would be no defence unless she could establish that she had, in fact, reasonable or probable cause for making it. Counsel then intimated that he could take no further part in the trial as, although he made no admissions, he was not instructed to put forward any defence other than that indicated by him upon which the learned judge had ruled against him.

The question before this court depends upon our view of the words of the statute, which are:

"Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing . . . shall be guilty of felony . . ." :

see s. 29 (1) (i), of the Larceny Act, 1916. In substance the language used in this consolidating statute is a re-enactment of the offence constituted by 7 & 8 Geo. 4, c. 29, s. 8. In *R.* v. *Hamilton* (2) it was decided by Rolfe, B., that the words "without any reasonable or probable cause" in 7 & 8 Geo. 4, c. 29, s. 8, applied to the money demanded and not to the accusation constituting the threat. The decision in *R.* v. *Chalmers* (3) is to the same effect. In that case Kelly, C.B., left it to the jury to determine whether there was any reasonable or probable cause for demanding money. In the argument in that case before the Court for Crown Cases Reserved reference was made to *R.* v. *Miard* (1), and it was contended that the question whether the accused honestly believed that she had reasonable ground for making the demand should have been left to the jury, but the court, being of opinion that there was no circumstance proved upon which any just demand, or belief in such demand could have been founded, affirmed the conviction without expressing any opinion on the decision of Tindal, C.J.

In our judgment, the question must be determined solely by reference to the language of the statute. The words are "without any reasonable or probable cause," and nothing in the original statute or in the consolidating statute suggests that an honest belief by the accused in a reasonable or probable cause for the demand would negative the crime. In order to constitute the offence it must be proved that the accused (i) uttered the writing; (ii) demanded property or a valuable thing with menaces; (iii) knew the contents of the writing; and (iv) had no reasonable or probable cause for making the demand. It is for the jury to decide whether there was a reasonable or probable cause for making the demand, and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it. The belief of the accused may, of course, be taken into consideration by the judge in passing sentence, but, in our view, it is not material in ascertaining whether the crime has been committed. We do not think that the direction in *R.* v. *Miard* (1), which was given at assizes on the facts of a peculiar case, and introduces words not found in the statute, is one which has been, or should be, followed. It is interesting to observe that in *R.* v. *Craig* (4), a decision of the Supreme Court of Victoria, the judges held that *R.* v. *Miard* (1) should not be followed, as it did not leave the question to the jury in the words of the section. Nothing that we have said in the present case is intended to cover more than that which is strictly necessary for the decision of this case. It is undesirable to deal with hypothetical cases which are not before us. It must be remembered that the decision of the learned judge was given after a statement by counsel as to the question he wished to raise, and was not a ruling that counsel could not put specific questions or that specific evidence tendered should be rejected. It was merely a decision that the belief by the accused that she had reasonable or probable cause for making the demand of money by proving that she believed the prosecutor had committed an indecent assault upon her would not entitle her to an acquittal. The result of our decision is that the appeal is dismissed and the appellant must surrender at the next assizes for sentence.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

BAKER *v.* LLOYDS BANK

[King's Bench Division (Roche, J.), March 25, 26, 1920]

[Reported [1920] 2 K.B. 322; 89 L.J.K.B. 912; 123 L.T. 330; [1920] B. & C. 128]

Bank—Banker's lien—Deed of assignment by customer for benefit of creditors—Lien or customer's account—Set-off—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 30 (3), (4), (8), *s.* 31.

In February, 1914, a firm, who were customers of the defendant bank, by deed assigned all their property to the plaintiff as trustee for the benefit of their creditors. The deed provided that payments to the creditors should be made on the basis of a distribution of property in bankruptcy and that secured creditors should have the same rights as under a bankruptcy. At the date of the execution of the deed, there was £2,934 to the credit of the firm's current account at the bank, and the bank also held certain shares as security for an advance to the firm. These shares were sold after the date of the assignment, and, after repayment of the advance, there was a balance of £812. At the date of the assignment the bank had discounted for the firm a number of bills of exchange which subsequently matured, and, in respect thereof, the firm became indebted to the bank for £19,941. The plaintiff claimed to be entitled to the two sums of £2,934 and £812 under the deed of assignment, and the bank claimed that they were entitled either to set-off against the liability to pay the two sums a sufficient amount of the £19,941, or, alternatively, a lien on the two sums.

Held: the bank was entitled both to a set-off and to a lien.

Notes. As to a banker's lien and set-off, see 2 Halsbury's Laws (3rd Edn.) 210 et seq.; and for cases see 3 Digest 285 et seq. For the Bankruptcy Act, 1914, s. 30 and s. 31, see 2 Halsbury's Statutes (2nd Edn.) 364, 365.

Cases referred to:

(1) *Jeffryes* v. *Agra and Masterman's Bank* (1866), L.R. 2 Eq. 674; 35 L.J.Ch. 686; 14 W.R. 889; 3 Digest 294, *923*.

(2) *Young* v. *Bank of Bengal* (1836), 1 Moo. Ind. App. 87; 1 Moo. P.C.C. 150; 1 Deac. 622; 18 E.R. 34, P.C.; 3 Digest 294, *926*.

(3) *Alsager* v. *Currie* (1844), 12 M. & W. 751; 13 L.J.Ex. 203; 3 L.T.O.S. 59; 152 E.R. 1402; 3 Digest 294, *921*.

(4) *Collins* v. *Jones* (1830), 10 B. & C. 777; 109 E.R. 638; 4 Digest (Repl.) 441; *3892*.

(5) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest (Repl.) 288, *2637*.

Also referred to in argument:

Read v. *Brown* (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250; 37 W.R. 131; 5 T.L.R. 97, C.A.; 8 Digest (Repl.) 611, *525*.

Watson v. *Mid Wales Rail. Co.* (1867), L.R. 2 C.P. 593; 36 L.J.C.P. 285; 17 L.T. 94; 15 W.R. 1107; 40 Digest (Repl.) 426, *193*.

Baker v. *Adam* (1910), 102 L.T. 248; 11 Asp. M.L.C. 368; 15 Com. Cas. 227; 40 Digest (Repl.) 425, *188*.

Roxburghe v. *Cox* (1881), 17 Ch.D. 520; 50 L.J.Ch. 772; 45 L.T. 225; 30 W.R. 74, C.A.; 3 Digest 286, *883*.

Misa v. *Currie* (1876), 1 App. Cas. 554; 45 L.J.Q.B. 852; 35 L.T. 414; 24 W.R. 1049, H.L.; 3 Digest 291, *906*.

Brandao v. *Barnett* (1846), 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525; 136 E.R. 207, H.L.; 3 Digest 290, *902*.

Davis v. *Bowsher* (1794), 5 Term Rep. 488; 101 E.R. 275; 3 Digest 289, *899*.

Re Bowes, Earl of Strathmore v. *Vane* (1886), 33 Ch.D. 586; 56 L.J.Ch. 143; 55 L.T. 260; 35 W.R. 166; 3 Digest 289, *895*.

Jones v. Peppercorne (1858), John 430; 28 L.J.Ch. 158; 32 L.J.O.S. 240; 5 Jur. N.S. 140; 7 W.R. 103; 70 E.R. 490; 32 Digest 241, *264*.

Ponsford, Baker & Co. v. *Union of London and Smith's Bank, Ltd.*, [1906] 2 Ch. 444; 75 L.J.Ch. 724; 95 L.T. 333; 22 T.L.R. 812; 13 Mans. 321, C.A.; 5 Digest (Repl.) 690, *6059*.

Action.

By an indenture, dated Feb. 3, 1914, a firm known as Fry, Miers & Co. assigned to the plaintiff as trustee on the trusts appearing in the deed, certain real and personal estate of the assignors for the benefit of their creditors. By cl. 5 of the deed it was provided that the plaintiff, as trustee, should apply the trust property after certain prior payments

> "(c) In payment to the creditors . . . of all such debts and claims as would be entitled to rank for dividend against the trust property if the same were being administered and distributed in bankruptcy, and in such priorities and in accordance with such rules and equities as are applicable to the administration and distribution of joint and separate estates in bankruptcy."

By cl. 14, it was provided that it should be lawful for

> "any creditor who holds any mortgage, lien, pledge, charge, or other security on or over any joint or separate property of the debtors, or any of them to take the full benefit of such mortgage, charge, lien, pledge, or other security subject to the provisions of Sched. II of the Bankruptcy Act, 1883 [now Sched. II of the Bankruptcy Act, 1914], so far as they refer to proofs by secured creditors."

The defendants, who were at all material times the bankers for the assignors, had notice of the assignment at latest by Feb. 4, 1914. The notice was given orally and in writing by the assignors, and also by the assignee. At the date of the notice, the defendants had in their bank a sum of £140 7s. 7d. owing by the defendants on current account to one of the assignors; (ii) a sum of £2,934 8s. 9d. owing by the defendants on current account to the assignors; (iii) certain preference shares (called "the Can Shares") belonging to the assignors, but held by the defendants on account of an advanced secured by the deposit thereof. On Feb. 3, 1914, there were outstanding twelve bills of exchange of the face value of some £25,000 which fell due shortly after that date and were dishonoured and the assignors became indebted to the defendants for £19,941 12s. 10d. The defendants had since paid the £140 7s. 7d. On Feb. 26, 1914, the defendants informed the plaintiff that the "Can Shares" were sold. The balance of the sum realised by the defendants on the sale of the Can Shares, after paying the sums owing in respect thereof, was £812 3s. 7d. The defendants claimed to retain the £2,934 8s. 9d. and the £812 3s. 7d. by reason of a set-off on account of the indebtedness of the assignors to them arising subsequent to the date of the assignment. Alternatively, they claimed a lien on those sums, or, further, to have the benefit of the Bankruptcy Act, 1883, s. 38, or the Bankruptcy Act, 1914, s. 31. The plaintiff claimed a declaration that he became entitled, on the assignment, and notice thereof to the defendants, to the £2934 8s. 9d. and to the £812 8s. 7d., as part of the property of the assignors passing by the deed.

Schiller, K.C. and *A. M. Latter* for the plaintiff.

R. A. Wright and *E. W. Hansell* for the defendants.

ROCHE, J., stated the facts and continued: The case for the respective parties is as follows. The plaintiff says he is entitled to these two credit balances on the separate accounts of the assignors without allowing to the defendants any set-off or credit in respect of the deficiency on those bills which were dishonoured. The defendants, on the other hand, say that they are entitled to retain those two sums

because they are entitled either to set-off against their liability to pay those two sums the amount that is due to them in respect of those bills, or, alternatively, they have a lien on those two sums or securities from which the sum of £812 resulted. The matter turns mainly, if not entirely, on the construction of the deed of assignment. The defendants were assenting parties to that deed, and they rely on the provisions of cl. 5 (c) and of cl. 14. Their effect may be summarised in the case of cl. 5 (c) by saying that it amounts to a provision that payment to creditors to be made on the basis of a bankruptcy distribution of the property, and that cl. 14 provides that creditors who are secured creditors are to have the same rights as they would have under a bankruptcy. That does not pretend to be a literal transcription of those clauses, but, in my judgment, that is the effect of them in the present case. The defendants, in my judgment, are right and justified in relying on them. The plaintiff objects that the defendants have no right to rely on them, or that there is no use in relying on them, because no right either of set-off or lien can be asserted in respect of the sums that might fall due on the bills, because, at the date of the assignment, the liability of the assignors in respect of the bills was only a contingent and not an actual liability. It is true that the liability was contingent in this sense, that the amount that would become due in respect of the bills was not ascertained, but it was, in my judgment, certain that there would be a deficiency, and a deficiency of a considerable amount, in respect of the bills of which the assignors were acceptors. They had at the date of the assignment, declared that they were insolvent. With regard to the bills of which they were indorsers, an indorser undertakes that the bills on which his name appears a party shall be paid at maturity. The declaration by the assignors that they were insolvent and unable to meet their liabilities amounted to a repudiation of their ability to perform that undertaking. Accordingly, in my judgment, both by the rules of bankruptcy and common law there was an actual liability in respect of the bills.

As regards the cases, the plaintiff relies on *Jeffryes* v. *Agra and Masterman's Bank* (1), and *Young* v. *Bank of Bengal* (2), but, in my judgment, those cases are not applicable to the circumstances of the present case, and the defendants are justified in relying on *Alsager* v. *Currie* (3), and on *Collins* v. *Jones* (4). The last two mentioned cases show that, on Feb. 3, there was, according to bankruptcy rules, a debt which could be set-off in respect of those bills as between the assignors and the defendants. I find that the same rule of set-off applies in the circumstances of this case as between the defendants and the assignee, the plaintiff in this action. *Hardy* v. *Fothergill* (5) shows that a claim such as this will be a provable debt in bankruptcy.

With regard to the objection urged with persistency and force by counsel for the plaintiff that those rules and cases do not apply inasmuch as this is not a bankruptcy, I find, for the reasons which I have indicated in the earlier part of my judgment, that the same rule applies in this case, because it was a declared insolvency, and because, by para. (c) of cl. 5 of the deed, there was a special provision for distribution as in bankruptcy. It is said that para. (c), read literally, only provides for payment to the creditors of dividends in the same manner as they would be paid if there were a bankruptcy, and not for the measurement of their claims and the enforcement of their rights in the same manner. But, in my judgment, if payment is to be made under that clause in accordance with the bankruptcy rules of distribution, the fair construction of the clause is that the debts which are to be paid are to be proved and established and dealt with according to the same rules. Those rules include both the provisions as to mutual credit and set-off to which I have already referred. That is contained in s. 31 of the Bankruptcy Act, 1914. Another rule which is material, and to which I have been referred, is contained in s. 30, (3), (4) and (8).

That would be sufficient to dispose of the case except as regards the shares which were held by way of security. With regard to those, and indeed to the whole of the case, the defendants rely, and in my judgment rightly, on cl. 14 of the deed. The defendants, unless indeed they are defeated for one reason with which I shall deal

A in a moment, had a lien on the balance due on the general account of the assignors and on the shares deposited by the assignors. In my judgment, cl. 14 maintains for them that right. The argument against the assertion of the right in respect of the Can Shares is aptly expressed in para. 5 of the statement of claim as follows: "The relevant conditions of the advances" which were under discussion "were that a special and distinct account should be opened on account of the advance in respect B of the said shares, and that the defendants should hold the said shares on behalf of the [assignors] as security for the specific advance thereon and such advance only." I am unable to find—indeed, I find the contrary—that there was any special bargain that the shares should be held "for the specific advance and such specific advance only"; still less was there any agreement that any surplus over the amounts advanced on the shares should be repaid to the defendants "free from any lien or C set-off in respect of any other transactions whatever." There was no such express agreement, and, in my judgment, no such agreement is to be implied.

There is one last matter I should mention, and that is this. Counsel, in summing-up the case for the defendants, contended that, for yet another reason, the defendants were entitled to judgment. That reason was that the defendants had assented to the deed of assignment, as they did in June, 1914, on the basis of their debt being D dealt with in the fashion in which I have dealt with it in this judgment, that is to say, on the basis of their being secured creditors or entitled to set-off the various sums the one against the other. With regard to that, it is true and significant that, from the time when a draft statement of affairs was issued in February, 1914, and a more detailed account was rendered by the trustee, the present plaintiff, in March, E 1914, no question was raised, but that the defendants were in the same position as they will be in under this judgment. The accounts which were issued dealt with the defendants as secured creditors and entitled to this set-off. I am satisfied that the defendants never would have dreamt of assenting to this deed had they been otherwise dealt with. It is hardly disputed that, in bankruptcy, they would have been entitled to these rights. I am satisfied that they never would have waived the rights which they would have enjoyed under bankruptcy, but would have F put the assignors into bankruptcy, and would not have assented to this assignment, unless it had been on the basis of the accounts which they had already got. It is unnecessary for me to decide on this ground, because I have already decided in favour of the defendants on the other ground. It is sufficient for me to say that the case has been made, and, in my judgment, it would require very serious consideration if it arose for decision. It is unnecessary to decide it, because, in my judgment, the G plaintiff, during the first two or three years with which he was dealing with this matter, dealt with it rightly and in accordance with law. What is wrong is that the present claim is ill-founded. There will be judgment for the defendants on the claim and on the counter-claim, which is consequential on the claim, with the costs of the action.

Judgment for defendants.

Solicitors: *Gilbert, Samuell & Co.; Linklaters & Paines.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

GERRARD *v.* CROWE AND ANOTHER

[PRIVY COUNCIL (Viscount Cave, Lord Moulton and Lord Phillimore), October 19, 21, November 16, 1920]

[Reported [1921] 1 A.C. 395; 90 L.J.P.C. 42; 124 L.T. 486; 37 T.L.R. 110]

Water—Flooding—Embankment erected by riparian owner to protect land against flood—Flooding of neighbour's land.

The appellant and the respondents owned land on opposite banks of a river. With the object of preventing flood waters from the river spreading over the land, the respondents erected an embankment on their land running about half a mile from the river diagonally to its bank. The effect of this was to increase, in time of heavy flood, the amount of water flowing over the appellant's land. On a claim by the appellant against the respondents for damages and an injunction, it was found that the appellant had failed to prove the existence or obstruction of any flood channel, or that there was any ancient or rightful course for the flood waters across the respondents' land.

Held: the respondents had a right to build the embankment on their land to protect themselves from the flood water, and, as they had neither accumulated water on their own land nor discharged it by active steps on to the appellant's land, the action failed.

Farquharson v. *Farquharson* (1) (1741) 3 Bli. N.S. at p. 421, *R.* v. *Pagham Sussex Sewers Comrs.* (2) (1828) 8 B.C. 355, and *Nield* v. *London and North-Western Rail. Co.* (1874) L.R. 10 Ex. 4, applied. *Hurdman* v. *North Eastern Rail. Co.* (4) (1878), C.P.D. 168, and *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (5) (1884), 13 Q.B.D. 131, distinguished.

Notes. Referred to: *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing and Finishing Co., Ltd.*, [1926] All E.R. Rep. 230; *Marriage* v. *East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021.

As to escape and overflow of water, see 33 HALSBURY'S LAWS (2nd Edn.) 630 et seq., and for cases see 44 DIGEST 58 et seq.

Cases referred to:

(1) *Farquharson* v. *Farquharson* (1741), cited in 3 Bli. N.S. at p. 421; 4 E.R. 1389, H.L.; 44 Digest 27, *201.*

(2) *R.* v. *Pagham Sussex Sewers Comrs.* (1828), 8 B. & C. 355; 2 Man. & Ry. K.B. 468; 108 E.R. 1075; sub nom. *R.* v. *Bognor Sewers Comrs.*, 6 L.J.O.S.K.B. 338; 44 Digest 81, *625.*

(3) *Nield* v. *London and North Western Rail. Co.* (1874), L.R. 10 Exch. 4; 44 L.J.Ex. 15; 23 W.R. 60; 36 Digest (Repl.) 322, *673.*

(4) *Hurdman* v. *North Eastern Rail. Co.* (1878), 3 C.P.D. 168; 47 L.J.Q.B. 368; 38 L.T. 339; 26 W.R. 489, C.A.; 36 Digest (Repl.) 289, *365.*

(5) *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B.D. 131; 53 L.J.Q.B. 285; 50 L.T. 472; 48 J.P. 500; 32 W.R. 711, C.A.; 36 Digest (Repl.) 289, *366.*

(6) *Menzies* v. *Breadalbane* (1828), 3 Bli. N.S. 414; 4 E.R. 1387, H.L.; 44 Digest 29, *218.*

(7) *R.* v. *Trafford* (1831), 1 B. & Ad. 874; reversed sub nom. *Trafford* v. *R.* (1832), 8 Bing. 204; 2 Cr. & J. 265; 1 Moo. & S. 401; 2 Tyr. 201; 1 L.J.Ex. 90; 131 E.R. 397, Ex.Ch.; 38 Digest (Repl.) 452, *1012.*

(8) *Greyvensteyn* v. *Hattingh*, [1911] A.C. 355; 80 L.J.P.C. 158; 104 L.T. 360; 27 T.L.R. 358, P.C.; 36 Digest (Repl.) 323, *678.*

(9) *Maxey Drainage Board* v. *Great Northern Rail. Co.* (1912), 106 L.T. 429; 76 J.P. 236; 10 L.G.R. 248; sub nom. *Massey Drainage Board* v. *Great Northern Rail. Co.*, 56 Sol. Jo. 275, D.C.; 36 Digest (Repl.) 323, *675.*

(10) *Bickett* v. *Morris* (1866), L.R. 1 Sc. & Div. 47; 14 L.T. 835; 30 J.P. 532; 12 Jur. N.S. 802, H.L.; 44 Digest 14, *65.*

(11) *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839, H.L.; 44 Digest 106, *838.*

Appeal from a judgment of the Court of Appeal of New Zealand, dated April 17, 1918, reversing a judgment of the Supreme Court.

The facts are set out in the judgment of the Board.

Tomlin, K.C., and *Errington* for the appellant.

Romer, K.C., and *Northcote* for the respondents.

VISCOUNT CAVE.—This is an appeal from an order of the Court of Appeal of New Zealand reversing a judgment of the Supreme Court in favour of the appellant, the plaintiff in the action. The question involved in the appeal is whether the respondents are liable to the appellant in damages by reason of their having constructed an embankment to protect their lands from flood.

The facts of the case, as found by SIM, J., at the trial, are as follows: The plaintiff is the owner of a farm on the east bank of the Oreti River. The defendants are the owners of certain land on the opposite bank of the river. Part of this land is intersected by a creek known as Hillend Creek, which flows into the Oreti River. Before the year 1913 when the river was in flood and rose above its banks some of the flood waters flowed over the western bank at a point on the defendant Michael Crowe's land about half a mile above the junction of the Hillend Creek with the river. The waters then flowed in a south-westerly direction across the defendants' lands, and ultimately found their way back into the river bed at some point or points further south and below the plaintiff's farm. About the end of the year 1913 the defendants erected an earthen embankment on their land. It is about ninety chains in length and about two feet in height. It begins at a point about half a mile from the western bank of the river, and runs in a southerly direction to a point close to the river bank. The object of the defendants in erecting this embankment was to prevent the flood waters spreading over their land to the west. And that has been its effect. Its effect also has been to increase the volume of water in the river opposite the plaintiff's land and thus to throw on to that land in times of heavy flood more water than otherwise would have gone there. The appellant, accordingly, brought this action, alleging that the embankment caused his farm to be flooded to a greater extent than would otherwise have been the case, and claiming damages and a mandatory injunction to compel the respondents to remove their embankment. The trial judge found as a fact that the appellant had failed to prove the existence of any flood channel such as was held to have been obstructed in *Menzies* v. *Breadalbane* (6). and had also failed to prove that there was any ancient and rightful course for the flood waters of the river across the respondents' land so as to bring the case within the law as laid down by TINDAL, C.J., in the Exchequer Chamber in *Trafford* v. *R.* (7), and added:

> "It is clear, I think, from the evidence that in times of flood the waters of the river did not flow in any defined course, but simply spread over the country in a south-westerly direction, and found their way back to the river at different points to the south of the plaintiff's land."

Notwithstanding these findings, the learned judge, for a reason to be hereafter noticed, gave judgment for the appellant; but on appeal that judgment was reversed by the Court of Appeal, who, by a majority, gave judgment for the respondents, and thereupon this appeal was brought.

The general rule as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In *Farquharson* v. *Farquharson* (1), the rule was stated as follows (3 Bli. N.S. at p. 421):

> "It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the

whole overflow in time of flood upon his ground; but it was found not lawful to use any operation in the alveus."

In *R.* v. *Pagham Sussex Sewers Comrs.* (2), it was held that owners of land exposed to the inroads of the sea have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others; and LORD TENTERDEN expressed himself as follows (8 B. & C. at p. 360):

"But it is contended that this new groyne has caused the sea to flow with greater violence against the land of Mr. Cosens, and make a greater inroad upon it, than possibly it might otherwise have done, and that as the commissioners, acting for the benefit of the level, have occasioned this damage, they must make compensation for it. It may be conceived that such is the effect of the groyne; but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several landowners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavour to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing."

To the same effect is *Nield v. London and North Western Rail. Co.* (3); and in *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (5) LINDLEY, L.J., said (13 Q.B.D. at p. 140):

"It seems to me established by those cases [i.e., *Menzies* v. *Breadalbane* (6) and *Nield* v. *London and North Western Rail. Co.* (3)] that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it."

Later applications of the rule are to be found in *Greyvensteyn* v. *Hattingh* (8), and *Maxey Drainage Board* v. *Great Northern Rail. Co.* (9).

It was argued on behalf of the appellant that the right of a landowner to protect himself against floods is conditioned by the maxim sic utere tuo ut alienum non lœdas, and cannot be exercised if, as a consequence of his operations, more water flows on to his neighbour's land and thereby damage is caused; and reliance was placed on *Menzies* v. *Breadalbane* (6), and *Trafford* v. *R.* (7), and on a dictum of LORD CHELMSFORD in *Bickett* v. *Morris* (10) (L.R. 1 Sc. & D. at p. 56). To import such a condition would be directly contrary to the rule as stated in the authorities above cited and would, indeed, render those authorities meaningless; for it would surely have been unnecessary to invoke the authority of the courts in order to establish the proposition that a man may erect an embankment on his own land if no damage ensues to others. But, in fact, the authorities cited are, in their Lordships' opinion, insufficient to support the proposition contended for. In *Menzies* v. *Breadalbane* (6) there was a regular flood channel which, although dry when the river was low, became filled with water at times of flood; and it is plain that such a channel forms part of the alveus of the river and cannot be obstructed. In *Trafford* v. *R.* (7), LORD TENTERDEN, C.J., no doubt said (1 B. & Ad. at p. 887) that

"it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another,"

and appears to have expressed the view that no sound distinction can be drawn between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quality has been accustomed to take at particular seasons. But on the case being removed into

A the Exchequer Chamber on error, the above judgment was reversed and a venire de novo awarded, partly on the ground that it did not appear by the verdict that the course which the flood water had taken was the "ancient and rightful course" which it ought to take, nor whether it had been so carried for such a period of years over the lands of different persons, as to constitute a right of watercourse in time of flood in the direction described by the special verdict. The case is not further B reported; and in view of the decision in the Exchequer Chamber it cannot be relied on as a safe authority for the contention put forward. *Bickett* v. *Morris* (10) was a case of injury to the alveus; and the sentence quoted from Lord Chelmsford's judgment does not appear to have been necessary for the decision of the case: (see on this case *Orr Ewing* v. *Colquhoun* (11) (2 App. Cas. at pp. 839, 845, 853)). Possibly the dicta relied on mean no more than this, that a landowner, in protecting C his land from the common enemy, must use reasonable care and skill and must not do more than is reasonably necessary for that purpose; but, however that may be, they cannot be held to derogate from the express decisions above referred to. In their Lordships' opinion, therefore, this contention fails.

A further point, founded on the decision of the trial judge, was taken on behalf of the appellant. It was said that the effect of the respondents' embankment, D which was not erected on the bank of the river Oreti, but stood back a little distance on the respondents' property and left some fourteen acres of land unprotected, was to throw the flood water on to those fourteen acres, and, accordingly, that the respondents were liable for the damage caused by its escape; and in support of this contention *Hurdman* v. *North Eastern Rail. Co.* (4) and *Whalley* v. *Lancashire* E *Rail. Co.* (5) were cited. It would be strange if a landowner, not being liable for protecting the whole of his land against floods by raising the bank of a river, became liable by reason of the fact that he had set his embankment further back and so had left a portion of his land unprotected; and it does not appear to their Lordships that this is the law. In *Hurdman* v. *North Eastern Rail. Co.* (4), the defendant had erected on his property a mound of earth, which caught the rain F naturally and ordinarily falling on his own land and discharged it on to the land of his neighbour. In *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (5), the defendants had allowed a pool of water to accumulate on their property, and had subsequently taken active steps to discharge it on to the plaintiff's property. In the present case, the respondents neither accumulate water on their own land nor discharge it by active steps on to the appellant's land. It is the river—the G "common enemy"—which first floods the fourteen acres and then carries away the flood; and the injury to the appellant is not increased, but is probably diminished, by the fact that the fourteen acres are left open and unembanked. There is, in fact, neither injuria nor damnum proved under this head. This contention, therefore, fails.

For the above reasons their Lordships are of opinion that this appeal should be H dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co.; Makrell, Maton, Godlee & Quincey.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

Re LEEDS & BATLEY BREWERIES & BRADBURY'S LEASE. BRADBURY *v.* GRIMBLE & CO., LTD.

[CHANCERY DIVISION (Peterson, J.), July 13, 14, 1920]

[Reported [1920] 2 Ch. 548; 89 L.J.Ch. 645; 124 L.T. 189; 65 Sol. Jo. 61]

Landlord and Tenant—Lease—Option to purchase—Holding over—Tenancy from year to year—Incorporation of option in yearly tenancy.

An option to purchase the reversion contained in a lease is wholly outside the relation of landlord and tenant, and, therefore, is not one of the terms of the lease which is incorporated in a tenancy from year to year created by the tenant holding over and paying rent after the expiry of the lease, and so is no longer exercisable by a tenant who is so holding over.

Dictum of ROMER, L.J., in *Woodall* v. *Clifton* (1), [1905] 2 Ch. at p. 279, applied.

Notes. PETERSON, J.'s, dictum in this case as to the effect of an extension of a lease must be read subject to the decisions in *Sherwood* v. *Tucker*, [1924] All E.R. Rep. 354, *Batchelor* v. *Murphy*, [1925] All E.R. Rep. 176, and *Hill* v. *Hill*, [1947] All E.R. 54, as to when an option to purchase will be incorporated in an extended lease.

Applied: *McIlroy* v. *Clements* (1923), 67 Sol. Jo. 402. Distinguished: *Rider* v. *Ford*, [1923] All E.R. Rep. 562. Considered: *Sherwood* v. *Tucker*, [1924] All E.R. Rep. 354; *Re Johnston's Application*, *Johnston* v. *Shobrook*, [1950] 1 All E.R. 613. Referred to: *Batchelor* v. *Murphy*, [1925] Ch. 220; *Lowther* v. *Clifford*, [1926] All E.R. Rep. 290.

As to nature of option to purchase see 23 HALSBURY'S LAWS (3rd Edn.) 420, as to the terms implied in a yearly tenancy see ibid. 513, 514, and for cases see 31 DIGEST (Repl.) 58–61.

Cases referred to:

(1) *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581, C.A.; 30 Digest (Repl.) 495, *1395*.

(2) *Digby* v. *Atkinson* (1815), 4 Camp. 275, N.P.; 31 Digest (Repl.) 58, *2152*.

(3) *Hyatt* v. *Griffiths* (1851), 17 Q.B. 505; 18 L.T.O.S. 74; 117 E.R. 1375; 31 Digest (Repl.) 59, *2158*.

(4) *Dougal* v. *McCarthy*, [1893] 1 Q.B. 736; 62 L.J.Q.B. 462; 68 L.T. 699; 57 J.P. 597; 41 W.R. 484; 9 T.L.R. 419; 4 R. 402, C.A.; 31 Digest (Repl.) 59, *2156*.

(5) *Morgan* v. *William Harrison, Ltd.*, [1907] 2 Ch. 137; 76 L.J.Ch. 548; 97 L.T. 445, C.A.; 31 Digest (Repl.) 35, *1914*.

(6) *Cole* v. *Kelly*, [1920] 2 K.B. 106; 80 L.J.K.B. 819; 123 L.T. 105; 36 T.L.R. 262, C.A.; 31 Digest (Repl.) 341, *4738*.

(7) *Buckland* v. *Papillon* (1866), 2 Ch. App. 67; 36 L.J.Ch. 81; 15 L.T. 378; 12 Jur. N.S. 992; 15 W.R. 92, L.C.; 31 Digest (Repl.) 70, *2267*.

Originating Summons to determine the effect of a covenant to sell the reversion contained in a lease.

By an underlease, dated May 19, 1903, and made between the Leeds and Batley Breweries, Ltd. (referred to as "the lessors"), and the plaintiff William Bradbury (trading as A. Bradbury & Co., and referred to as "the lessee"), the lessors demised to the plaintiffs certain premises, including a brewery, for the term of seven years from June 1, 1903, at the rent and subject to the covenants and stipulations therein contained. These premises were vested in the lessors for a term of 999 years as from Dec. 25, 1886, and the underlease contained a proviso that

"if the lessee shall be desirous of purchasing the unexpired residue of the term of years granted in the said premises by the said indenture dated May 16, 1893 [being the original lease], subject to the lessees' covenants reserved by

A and contained in the said indenture, at the price of £3,000, and shall at any time six calendar months before the determination of this lease give to the lessors or their secretary or leave at their registered offices aforesaid a notice in writing to that effect, then and in such case the person giving or leaving such notice shall be the purchaser of the unexpired residue of the said term subject as aforesaid at the price of £3,000 as from the date of such notice,"

B subject to certain conditions as to the completion of the purchase. The plaintiff continued in possession throughout the lease, and at the end of the term the lessors at his request agreed by letter to extend the term for a further twelve months from June 1, 1910. After the termination of the extended lease the plaintiff remained on as tenant from year to year until the commencement of

C these proceedings. On May 1, 1919, the lessors contracted to sell the premises to the defendants for the residue of the term. On July 15, 1919, the lessors by their agents gave the plaintiff notice to quit the premises, such notice to take effect on June 1, 1920. By written notice on Nov. 12, 1919, signed by his solicitors, the plaintiff gave the lessors notice in writing claiming to exercise the option to purchase conferred on him by the underlease, and one Nov. 25, 1919, he also served a copy

D of this notice on the defendants. On Dec. 29, 1919, the lessors by deed assigned the premises for the residue of the term of 999 years to the defendants. The plaintiff then called on the lessors to give effect to the notice which he had served on them, by assigning their interest to him, but this they refused to do, contending that the notice was ineffective and that the option to purchase was not exercisable after the expiration of the underlease, or alternatively of the extension thereof for twelve

E months, which was subsequently granted to him.

Hughes, K.C., and *C. Church* for the plaintiff.
Cunliffe, K.C., and *G. H. Devonshire* for the defendants.

PETERSON, J.—On May 19, 1903, a lease was executed by which the Leeds and Batley Breweries, Ltd., demised certain premises to Mr. Bradbury, the plaintiff

F in the present proceedings, for a term of seven years from June 1, 1903. The term, therefore, expired in 1910. The lease contained the following clause:

"Provided always and it is hereby further agreed and declared that if 'the lessee' shall be desirous of purchasing the unexpired residue of the term of years granted in the said premises by the said indenture date May 16, 1893, subject to the lessee's covenants reserved by and contained in the said indenture

G at the price of £3,000, and shall at any time six calendar months before the determination of this lease give to the lessors or their secretary or leave at their registered office aforesaid a notice in writing to that effect, then and in such case the person giving or leaving such notice shall be the purchaser of the unexpired residue of the said term subject as aforesaid at the price of £3,000 as from the date of such notice,"

H subject to certain conditions.

As the term created by the demise of 1903 would expire at the end of May, 1910, the plaintiff wrote in February, 1910, to the brewery company as follows: "We understand from Mr. J. Matthews that you are willing for our present lease to be extended for another twelve months from June 1, next. Please confirm this and

I oblige." The answer from the brewery company is dated Feb. 9, 1910, and reads: "Your letter of 7th inst. was read before the directors yesterday, when they instructed me to write you confirming Mr. Matthews' offer to extend the lease for a further period of twelve months from June 1 next." The result of these two letters is, I think, that the term created by the original lease was extended for twelve months from June 1, 1910, that is to say, to May 31, 1911. These letters operated as if the lease had originally been created for eight years instead of seven. At the end of the extended time in 1911, the plaintiff did not go out. He continued in possession, and, therefore, he became a tenant at sufferance, but when he paid

rent, he became a tenant from year to year. In 1919 the brewery company entered into a contract to sell the premises to the defendants in the present case. In November, 1919, the tenant gave notice to the brewery company of his intention to purchase the unexpired residue of the term of 999 years at the price of £3,000 in accordance with the terms of the proviso contained in the indenture of lease.

The question is whether in the circumstances the option is subsisting, and he is entitled to exercise it. Various cases were cited—*Digby* v. *Atkinson* (2), *Hyatt* v. *Griffith* (3), *Dougall* v. *McCarthy* (4), *Morgan* v. *William Harrison, Ltd.* (5), and *Cole* v. *Kelly* (6). The result of these cases is that the tenant who holds over with the consent of the landlord holds upon the terms of the tenancy created by the lease as far as they are applicable to a tenancy from year to year, but this does not mean that he has the benefit of all the provisions of the expired lease, whether they are terms of the tenancy or not. In the present case there was an option (taking the lease and the extension of the terms under the documents of 1910 together) on the part of the lessee to purchase the reversion at any time six calendar months before May 31, 1911.

That was a conditional offer by the landlord or a contract for sale on the performance of a condition, the condition being that six calendar months before May 31, 1911, the lessee should give notice in writing of his intention to purchase. The plaintiff, however, contends that the landlord by accepting the lessee as tenant from year to year, has entered into a contract under which the tenant is entitled to exercise the option in any year during which he is a tenant from year to year, if he gives six calendar months' notice of his intention to purchase prior to the expiration of the year of tenancy, and that the option is exercisable as long as he remains a tenant from year to year notwithstanding the possibility that in course of time the property will probably increase in value. It is one thing for a landlord to give an option at a fixed price within a time limited to seven or eight years; but it is a very different thing to suppose that a landlord could have intended to have conferred upon a tenant a right to purchase at the original sum of £3,000, although the right may not be exercised for fifteen or twenty years. The real question is what are the terms under the lease which are applicable to a tenancy from year to year, or, in other words, what are the terms regulating the relations between the landlord as landlord and the tenant as tenant which are to be treated as incorporated in the tenancy from year to year? In my opinion an option to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy. It is a provision which is outside the terms which regulate the relations between the landlord as landlord and the tenant as tenant.

In *Buckland* v. *Papillon* (7), an owner of a long term agreed to let the land for three years, and also when called upon by the tenant to grant him a lease for three years, seven years, or the whole term. There was no limitation placed upon the period within which the tenant could call upon the landlord to grant him the extended term. The tenant continued in occupation beyond the three years, and became bankrupt. The assignee sold the bankrupt's interest to a purchaser, and the question was whether the option of the tenant to take the lease had or had not gone at the end of three years. The Lord Chancellor says (2 Ch. App. at p. 70):

> "It must be observed that there was no limitation whatever of the time within which Bloxam (the tenant) was to exercise his option. . . . Undoubtedly supposing that at the end of three years Bloxam had chosen to leave the place, that would have determined his option."

In other words, it was to be treated as the abandonment of his option, the option only being exercisable so long as he was in occupation of the premises,

> "but he continued in possession and so became tenant from year to year under the terms of the original agreement."

Then the Lord Chancellor proceeds:

> "I do not mean to include in those words [that is to say, the terms of the original agreement] the right to demand a lease, for that had nothing to do with the tenancy from year to year, but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had nothing whatever to preclude him from demanding that lease at any time."

In other words, the Lord Chancellor took the view that an option given in an agreement for a lease for three years to call upon the lessor to grant a lease for a longer period would not be one of the terms of the original agreement under which the tenant from year to year holds the premises after the determination of the original term. His view was that the option to have a longer term had nothing whatever to do with the tenancy from year to year. There is a similar observation in *Woodall* v. *Clifton* (1). In that case there was a lease of land for ninety-nine years, which contained a proviso that in case the lessee, his heirs and assigns at any time during the term should be desirous of purchasing the fee simple of the land at the rate of £500 per acre, the lessor, his heirs and assigns, on receipt of the purchase money, would execute a conveyance of the land in favour of the lessee, his heirs and assigns. But the lease and the reversion were assigned. The assignee of the lease gave notice to the consignee of the reversion of his desire to exercise his option, and brought an action against the consignee to compel conveyance of the land accordingly. WARRINGTON, J., held that the option was invalid on the ground of remoteness. It was held by the Court of Appeal, without determining the question of perpetuity that the proviso did not come within the statute Hen. 8, c. 34, so as to make the liability to perform it run with the reversion, and that consequently the action could not be maintained against the defendants, who were the assignees of the reversion. ROMER, L.J., in delivering the judgment of the court, said ([1905] 2 Ch. at p. 279):

> "The covenant is aimed at creating at a future time the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded it cannot, in our opinion, be said directly to affect or concern the land, regarded as the subject matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger of the lease could be said to do so."

Then after some other observations which related to the statute of Henry VIII, he says this:

> "The option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option if exercised would or might be to destroy the tenancy. It is to our minds concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing."

In my opinion the option in this case is a matter which is wholly outside the relation of landlord and tenant, and therefore is not one of the terms of the original tenancy on which the lessee held the property when he became tenant from year to year. The result, therefore, is that this option is not now exercisable.

Solicitors: *Norris, Allens & Co.*, for *Norris & Sons*, Liverpool; *Golding Hargrove & Golding.*

[*Reported by* F. PORTER FAUSSET, ESQ., *Barrister-at-Law.*]

POLE-CAREW *v.* WESTERN COUNTIES AND GENERAL MANURE CO.

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), January 22, 23, 26, 27, 28, 29, 30, February 2, 20, 1920]

[Reported [1920] 2 Ch. 97; 89 L.J.Ch. 559; 123 L.T. 12; 36 T.L.R. 322]

Landlord and Tenant—Tenant's fixtures—Substantial structures resting by own weight on brick walls and piers—Landlord's fixtures—Structure not attached to soil—Onus of proof on landlord.

By a lease dated Mar. 16, 1912, the plaintiff demised to the defendants for a term of fourteen years a piece of land, which had been occupied by them for many years under previous leases, "together with the manure manufactory and other buildings now standing and being thereon." On this land, before 1912, the defendants had erected a sulphuric acid manufacturing plant consisting of acid chambers (of substantial size, being 140 ft. long, 20 ft. wide, and 13 or 14 ft. high) resting by their own weight on brick walls and brick piers which, admittedly, were attached to the soil, and two towers each standing on four legs, each of which dropped into an iron shoe standing on a stone foundation fixed in the ground and kept in position by a projecting boss fitting into a hole in the foundation, the towers being connected with the acid chambers by pipes.

Held: that, in view of the general character of the structures, they were not chattels or tenant's fixtures which the defendants were entitled to remove on the termination of the lease.

Per LORD STERNDALE, M.R.: On such a question attachment or non-attachment to the freehold or something attached to it is a most important matter to be considered, but not absolutely conclusive. Where the articles claimed to be chattels are not so attached, the onus lies heavily on those who deny them to be chattels.

Landlord and Tenant—Fixtures—Tenant's fixtures—Right of tenant to remove—Surrender of lease—Grant of new lease—Inclusion in new demise of tenant's fixtures affixed during previous lease.

Per WARRINGTON, L.J.: After a surrender of the term in the land to which tenant's fixtures are attached and a subsequent lease to the same tenant, the latter can no longer remove the tenant's fixtures unless his existing right to remove them is reserved expressly or by necessary implication; there was no such reservation here; and, therefore, it was impossible for the lessees, after the execution of the lease of 1912, successfully to insist on a right to remove any of the erections then in existence.

Notes. Considered: *Jordan* v. *May*, [1947] 1 All E.R. 231. Referred to: *Webb* v. *Frank Bevis, Ltd.*, [1940] 1 All E.R. 247; *Hulme* v. *Brigham*, [1943] 1 All E.R. 204.

As to the ownership of fixtures see 23 HALSBURY'S LAWS (3rd Edn.) 489 et seq., and for cases see 31 DIGEST (Repl.) 199 et seq.

Cases referred to:

(1) *R.* v. *Otley Suffolk* (*Inhabitants*) (1830), 1 B. & Ad. 161; 9 L.J.O.S.M.C. 11; 109 E.R. 747; 31 Digest (Repl.) 202, *3329*.

(2) *R.* v. *Londonthorpe* (*Inhabitants*) (1795), 6 Term Rep. 377; 101 E.R. 604; 31 Digest (Repl.) 202, *3331*.

(3) *Elwes* v. *Maw* (1802), 3 East, 38; 102 E.R. 510; 31 Digest (Repl.) 213, *3454*.

(4) *Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674; 22 L.J.Q.B. 177; 20 L.T.O.S. 259; 17 Jur. 758; 118 E.R. 589; 31 Digest (Repl.) 202, *3333*.

(5) *Mather* v. *Fraser* (1856), 2 K. & J. 536; 25 L.J.Ch. 361; 27 L.T.O.S. 41; 2 Jur. N.S. 900; 4 W.R. 387; 69 E.R. 895; 31 Digest (Repl.) 201, *3320.*

(6) *Place* v. *Fagg* (1829), 4 Man. & Ry. K.B. 277; 7 L.J.O.S.K.B. 195; 31 Digest (Repl.) 204, *3346.*

(7) *Martyr* v. *Bradley* (1832), 9 Bing. 24; 2 Moo. & S. 25; 1 L.J.C.P. 147; 131 E.R. 523; 31 Digest (Repl.) 228, *3646.*

(8) *Wansbrough* v. *Maton* (1836), 4 Ad. & El. 884; 6 Nev. & M.K.B. 367; 5 L.J.K.B. 150; 111 E.R. 1016; sub nom. *Wandsborough* v. *Maton*, 2 Har. & W. 37; 31 Digest (Repl.) 202, *3330.*

(9) *D'Eyncourt* v. *Gregory* (1866), L.R. 3 Eq. 382; 36 L.J.Ch. 107; 15 W.R. 186; 31 Digest (Repl.) 201, *3322.*

(10) *Earl of Mansfield* v. *Blackburne* (1840), 6 Bing. N.C. 426; 8 Scott, 720; 10 L.J.C.P. 178; 133 E.R. 165; 31 Digest (Repl.) 229, *3647.*

(11) *Whitehead* v. *Bennett* (1858), 27 L.J.Ch. 474; 22 J.P. 257; 6 W.R. 351; 31 Digest (Repl.) 214, *3472.*

(12) *Leschallas* v. *Woolf*, [1908] 1 Ch. 641; 77 L.J.Ch. 345; 98 L.T. 558; 31 Digest (Repl.) 230, *3655.*

(13) *Walsh* v. *Lonsdale* (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 W.R. 109, C.A.; 31 Digest (Repl.) 255, *3905.*

Also referred to in argument:

Slough Picture Hall Co., Ltd. v. *Wade; Wilson* v. *Neville, Reid & Co., Ltd.* (1916), 32 T.L.R. 542; 31 Digest (Repl.) 221, *3584.*

Appeal by the defendant company from an order of SARGANT, J.

By a lease dated Mar. 16, 1912, the plaintiff, Sir Reginald Pole-Carew, demised to the defendants, Western Counties and General Manure Co., Ltd., a plot of land situate at Torpoint, Cornwall, containing certain measurements and therein more particularly described, "together with the manure manufactory and other buildings now standing and being thereon," and together with the appurtenances, to hold the said premises for the term of fourteen years from Sept. 29, 1911, at a rent of £150.

The lease contained among other covenants, a covenant by the defendant company to put the building in repair, and thereafter to well and sufficiently repair the buildings, and a covenant to yield up the buildings in good and substantial repair, together with all the things fastened thereto coming within the denomination of landlord's fixtures. Secondly, there was a covenant to insure the buildings thereby demised to their full value, and if the buildings were destroyed by fire to apply the moneys recovered in rebuilding, and if the moneys were not sufficient, to make good the deficiency. The defendant company were given a power of determining the lease by six months' notice on any quarter day. In February, 1916, a fire took place and considerable parts of the works were damaged or destroyed, including, among other things, the total destruction of one acid chamber and damage to three other acid chambers, the destruction of a lean-to shed, leaning against one of the acid chambers, and the destruction of two towers at the end of the kiln house. In December, 1916, notice was given to determine the lease, and on June 24, 1917, the property was given up. It was then found that the damage by fire had not been made good, and that, between the date of the fire and the giving up, the acid chambers, the lean-to shed, and the towers had been removed. The plaintiff claimed those structures, and some £9,000 damages. The defendant company pleaded that the items in question were not in the nature of fixtures, that they were not in any way attached or fixed to the freehold, but were merely chattels. They further said that if they were of the nature of fixtures at all, they were originally of the nature of tenant's fixtures and had never lost that character by anything that had taken place. They also denied that the structures in question were within the express words of the lease of 1912. SARGANT, J.,

gave judgment for the plaintiff, and from that decision the defendant company appealed.

Upjohn, K.C., and *Gover*, K.C., for the defendants.
Luxmoore, K.C., *Foà*, and *H. B. Vaisey* for the plaintiff.

Cur. adv. vult.

Feb. 20. The following judgments were read.

LORD STERNDALE, M.R.—This appeal from SARGANT, J., raises a question of the rights of the parties under a lease of Mar. 16, 1912, granted by the plaintiff to the defendants.

The lease demised to the defendants

> "all that plot of land situate at Torpoint, in the parish of Antony, in the county of Cornwall, containing 58,815 square feet statute measure, or thereabouts, together with the manure manufactory and other buildings now standing and being thereon . . ."

The lease contained covenants by the defendants to repair and yield up in good repair and to insure, which were in the following terms:

> "And also will at their own expense forthwith put the said buildings in good and substantial repair and thereafter as occasion shall require during the said term well and sufficiently repair maintain paint glaze pave empty cleanse amend and keep in good and substantial repair all the erections and buildings now standing and all future erections and buildings to be erected and built on the said demised plot of land and the drains thereof and at the end or other sooner determination of the said term will quietly yield up the same in good and substantial repair together with all things which at any time during the said term shall be in any way fastened to the said demised premises or to any future erections to be made thereon and shall come under the denomination of landlords' fixtures. And also that it shall be lawful for the lessor or his agent for the time being with or without workmen or others at all reasonable times in the daytime during the last seven years of the said term to enter upon the said demised premises and to take a schedule of the fixtures and things to be yielded up as aforesaid. And also by himself and his agent to enter upon and examine the state and repair of the said demised buildings and premises and if he shall upon or after such examination deliver to the company or leave upon the said demised premises a written notice of any defect or want of reparation in respect of the same or any future erections or buildings to be made thereon then that they the company will so often as the same shall happen and within three calendar months next after delivery or leaving of such notice well and sufficiently repair and reinstate the premises according to such notice. And also that the company shall not at any time make any alteration whatsoever in the elevations of the buildings hereby devised or any future erections to be built on the said demised plot of land or any part thereof or in the boundary walls of the same without the consent in writing of the lessor or his agent for the time being, and will not erect or set up any further erections or buildings in or upon any part of the plot of land hereby demised without such consent as aforesaid, and the company will not at any time cut or injure any of the principal timbers or walls of the buildings from time to time standing, or being on the said ground. . . . And also shall forthwith insure the buildings hereby demised to the full value thereof, and will as soon as may be after the erection of any further or other buildings insure the same to the full value thereof in the name of the lessor either alone or jointly with the company in some responsible office in London or Westminster to be approved of by the lessor and will keep the same respectively so insured during the term hereby granted and will upon the request of the

A lessor or his agent produce and show the policy of such insurance and the receipt for the premium for such insurance for the then current year and that if and so often as the said demised premises or any future erections that may be erected thereon shall be destroyed or damaged by fire the monies which shall be recovered in respect of such policy shall be forthwith expended in repairing and rebuilding the premises and if such monies shall be insufficient the B deficiency shall be made good by the company."

In February, 1916, a fire took place by which a great part of the works, which were being carried on by the defendants as a manure manufactory, were destroyed. The parts wholly or partially destroyed included four acid chambers used for the purpose of the making of sulphuric acid for the purpose of manure manufacture, C two towers adjoining the chambers and connected by pipes with them and with the pyrites kilns to be mentioned later, and a lean-to shed at the back of one of the acid chambers. One of the four acid chambers, called No. 3, had been cut down so as to leave nothing of the chamber remaining, except the tank at the bottom. But, in my opinion, that alteration made no difference, and that chamber must be dealt with as if the alteration had not taken place. It was admitted that the D lean-to shed must abide the result of the decision as to No. 4 chamber.

The first lease to the company was in 1857, and at that time none of the things now in question was in existence. The first three chambers, including that reduced to a tank, were constructed between that date and 1868, when a second lease was granted, and the fourth chamber and the lean-to shed between 1868 and 1912, when a third lease was granted. I shall refer later to the terms of the leases and E the circumstances in which they came into existence. The lessor claimed damages under the covenants of the lease for breaches of the covenant to repair and leave in repair and also of the covenant to insure and use the insurance money in reinstating the property, and in case of its being insufficient to make up the deficiency. It is immaterial under which covenant the claim is made. The defendants deny their liability in respect of three items (i) the acid chambers, F (ii) the lean-to shed, (iii) the towers, on the grounds, first, that they are chattels, and, therefore, do not come within the terms of the covenants, and, secondly, that, even if not chattels, they are tenant's fixtures removable by the tenants and so not included in the covenants. The plaintiff denies that any of these items was a chattel, and contends that they were all buildings or erections, and, therefore, within the express words of the covenants. He also contends that, if fixtures, G they were not tenant's fixtures, and that, even if they had at any time the character of tenant's fixtures, they had at the time of the fire lost that character by reason of certain surrenders and grants which took place in the years 1868 and 1912.

To ascertain whether these or any of them were chattels, it is necessary to examine the nature of their construction. The evidence was not quite clear in H some details, but substantially there was not much difference between the parties on the matter. There was some slight difference between the chambers in point of construction, but for the purposes of this case those differences were, in my opinion, immaterial. To take chambers 1, 2, and 3 first, the description given below applies to all of them, there being only this difference, that in Nos. 1 and 2 the beams ran longitudinally in respect of the substructure hereinafter mentioned, I with the joists running across them, while in No. 3 the beams ran transversely and the joists longitudinally. In each case the space below the chamber was surrounded by walls built with footings in the ordinary way. The outside walls had doors and windows and the space inside was used as a storehouse. The beams rested on these walls at the ends and were supported by brick piers, and also by iron columns which stood on prepared foundations, but were not in any way fastened to the foundations. Where the beams rested on the walls, they were sometimes laid upon the wall itself, on which a thin layer of mortar had been

spread, and sometimes upon pieces of timber called wall plates, which were also laid in mortar. In some instances the beams were described by the manager of the defendants' works as going through the walls. By this I do not think that he meant that they were entirely surrounded by masonry, but that they were so surrounded on their sides but not at the top, the wall either being cut down in places to receive them, or built up on each side of them, when in situ. Where the beams are supported by columns, they were fastened by either nails or screws to caps on the top of the columns. These caps were of two kinds, some channelled to receive the beam and some flat, and in each case the cap was made with a stud which fitted in the hollow column in order to steady it, but was not fastened to the column in any other way. There was some question whether the columns and the walls and piers were all erected at the same time. But I think there was eventually no dispute that substantially they were all erected at the same time, though some columns might have been added at a later date. The joists were not morticed into the beams, but were cut so as to fit over them and remain firmly in the position in which they were placed. On the joists a floor was laid which made a roof for the space underneath, and above that on sill pieces fastened to the floor there was a wooden superstructure, not inaptly described as like a large crate, the top of which was formed of joists. At the bottom of this crate there was a shallow lead tank, and from the joists a lead chamber, open at the bottom was hung by lead straps fastened to the upper joists. This lead chamber did not come quite down to the bottom of the tank, but was suspended a little above it for purpose of the manufacture which it is not necessary to detail. As I have said the superstructure of No. 3 had been cut down leaving only the tank remaining. No. 4 chamber differed in this respect, that it had not a wall surrounding it, but only a wall at one end upon which the ends of the beam rested. There were no brick piers, and the beams were supported along their length and at the other end by columns standing by their own weight, like those in Nos. 1, 2, and 3, and with similar caps attached to the beams. The beam at one side of this chamber rested on the projecting ends of the beams of No. 3.

At one end of this group of four chambers, there were two towers, called, we are told, Glover and Gay Lussac towers respectively, consisting of a rectangular wooden framework with a leaden chamber within it. It is not necessary to describe the construction of the towers except so far as it relates to the uprights of the wooden framework. In order to support these, concrete or masonry foundations were made with a hole or recess in the middle. Iron shoes made with a stud to fit into these holes or recesses stood on the top of these foundations, and the timber uprights fitted into these shoes. The shoes were not in any way fastened to the foundations, and the uprights were not fastened to the shoes. On the other side of the towers there were pyrites burners. The towers were connected with the pyrites burners and the chambers by pipes. There was no evidence specifically directed to these pipes, but, as it was admitted the gases from the burners passed from the burners to the Glover tower, from there through the chambers to the Gay Lussac tower, and from there through the Glover tower back to the burners, it is obvious that there must have been such pipes. The description of the process given in Newth's Inorganic Chemistry (1916) at p. 431, was admitted to be a sufficiently accurate description of the process. It is as follows:

"The gases from the double row of pyrites burners are led through the Glover tower where they effect the denitrification of the nitro-sulphonic acid. From this tower they are delivered into the series of chambers where they meet with the necessary supply of steam. The acid collects upon the floor of the chambers and samples are constantly drawn off by means of an arrangement known as a drip pipe which, acting in a manner similar to a rain gauge, indicates the process going on within. The gases, after being drawn through the entire series of

chambers by means of the draught caused by the tall chimney, are finally passed up the Gay Lussac tower where all the nitrogen peroxide is absorbed and returned to the chambers through the intervention of the Glover tower as above described."

The pipes were probably bolted together at the flanges in the ordinary way, but their exact construction is immaterial.

On these facts it was contended that the superstructures of the chambers, that is, the beams and everything above them, were chattels not attached to the substructure, and could be removed as chattels by taking the beams from the walls, piers, and columns, bringing with them, of course, the detachable caps of the columns. Many cases were cited to us, and it is not from any disrespect to the authorities, or to the arguments of counsel, that I refrain from examining them in detail, but because I agree with the statement in Foa on Landlord and Tenant (5th Edn.), at p. 680:

> "Every case depends on its own circumstances, and therefore one decision can seldom be a guide to another."

I think they decide generally that attachment or non-attachment to the freehold or to something which is attached to it is a most important matter to be considered but not absolutely conclusive. But where the articles claimed to be chattels are not so attached, the onus lies heavily on those who deny them to be chattels. The first point, therefore, for decision, is whether these chambers are chattels. It was contended that though they were of great size (140 ft. long, 20 ft. wide and 13 ft. or 14 ft. high) and of great weight (about twenty tons when empty), they each constituted an independent structure which was completely severable from the walls and underlying structure, and apart from the difficulty arising from their great size and weights, could be lifted up from the substructure, leaving it intact and undisturbed. I do not think this contention is sound.

As a great deal of argument was address to us on the subject of the mortar, I think it better not to pass it without observation. I do not think it is of any importance. I think the object was probably to make an even bed for the beam or wall plates, although some slight adhesion might take place. The beams seem to me to have been placed as they were in ordinary building, except that the walls were not carried above their level, and, therefore, there was no necessity for brickwork above them, and they were kept in their place by the weight of the superstructure. If, however, these chambers had been removed the result would have been to unroof the substructure which was used as a storehouse and to have the walls where the beams had gone, as the manager called it, through them, in a condition described by one of the learned counsel as crenellated. The beams which would come away were at different levels and would carry away with them the movable caps of the columns. The chambers seem to me to bear no analogy to self-contained structures such as small windmills: *R.* v. *Otley Suffolk* (*Inhabitants*) (1); *R.* v. *Londonthorpe* (*Inhabitants*) (2); barns: *Elwes* v. *Maw* (3), or granaries: *Wiltshear* v. *Cotterell* (4); which can be lifted up and taken away without disturbing in any way the supports on which they rest. I wish to adopt the language of Sargant, J., on this point:

> "If you look at the size and permanence and the general character of the structure and the absence of any definite line of demarcation or division, the absence of any unity in the upper structure as distinguished from the lower structure, I think one is driven to the conclusion that the whole structure forms one single unit and is of the nature of a building, that it is not a chattel, that it is a fixture and that the lower portion of this unit being embedded in the land by ordinary foundations, it cannot be considered a tenant's fixture and must be considered from the beginning as being something permanently annexed to the freehold of the nature of a building."

The towers present more difficulty. From their construction, which I have already described, there would be some reasonable ground, if they stood alone and unconnected with anything else, for contending that they were chattels, but they were not isolated or unconnected. They were connected with pipes, as I have described, with the burners and chambers, and were a necessary and integral part of a sulphuric acid plant, and, in my opinion, they must be considered as a part of the whole structure, in the same way that movable parts of an engine are considered as an integral part of the engine *Mather* v. *Fraser* (5); or detached mill stones as an integral part of a mill: *Place* v. *Fagg* (6); *Marty* v. *Bradley* (7). The lean-to shed, it is admitted, follows the decision as to No. 4 chamber, and that chamber, I think, cannot be distinguished in principle from the others. It rests more upon columns and less upon walls, but it does rest at one end on a wall, and at one side it rests on the beams of No. 3, which themselves rest on the walls of the substructure. For these reasons I come to the conclusion on the facts that the whole of the things claimed to be chattels are buildings or parts of buildings, and are, therefore, directly within the covenants of the lease. I do not think it necessary to consider what would be the proper conclusion if the chambers were supported entirely on pillars resting by their own weight, as may be the case in the sketch on p. 431 of Newth's Inorganic Chemistry. I think, therefore, the appeal should be dismissed.

Sargent, J., decided the case in favour of the plaintiff on another point, which arises in this way. In 1868 the defendants were tenants of the greater part of the land used by them as a manure manufactory under the lease I have mentioned of 1857, and also a small part under a yearly tenancy. In that year a new lease was taken of the whole of the land occupied by the defendants for the same period of lives at a rent which represented the combined rent of the two tenancies previously existing. In fact the only difference between the two tenancies was that the defendants obtained a lease for the small piece of land which they had previously held under a yearly tenancy. This lease of 1868 recited the surrender of the lease of 1857. But no deed of surrender seems to have been executed, and the surrender probably occurred by operation of law when the new lease was accepted. The parcels were differently described in the two leases, and a good deal of argument was addressed to us on that point and on other points in connection with the lease, which became immaterial in the view I have expressed as to the facts. In 1910 the lease of 1868 came to an end by the dropping of the last life, that of His Majesty King Edward VII. But the defendants, still continued in occupation of the land. In 1911 an agreement was made between the plaintiff and the defendants for a new lease on certain terms different from those of the old lease. This agreement seems to me to have been a valid one and enforceable against either party. It was not, however, performed according to its terms, but a new lease on terms somewhat different from those of the agreement was granted in 1912. There was no reservation by the defendants on any of these changes of tenancy of their right to tenants' fixtures, if any. Sargent, J., held that in 1912 there was a surrender of the tenancy created under the enforceable agreement of 1911, and that by reason of the surrenders of 1868 and 1912 the defendants had lost their rights to remove the things in question, even if they were tenants' fixtures and had taken a grant of them from the landlords, thus bringing them within the covenants as to buildings and erections contained in the lease of 1921. In the view which I take of the facts, it is not necessary to consider this part of the case. I express no opinion upon it. The appeal must be dismissed with costs.

WARRINGTON, L.J.—The plaintiff is the lessor and the defendants are the lessees under a lease dated Mar. 16, 1912, of a plot of land at Torpoint in Cornwall with the manure manufactory and other buildings thereon. In the year 1916 a fire occurred on the demised premises causing very considerable damage. Among the property damaged or destroyed were a series of structures—to use a word intended

not to beg any question to be decided—employed in the manufacture of sulphuric acid, an ingredient of artificial manures, the preparation and sale of which was the business of the defendants. The remains not absolutely destroyed of these structures were removed by the defendants, and they have failed either to make good the damage to them caused by the fire or to restore what they have removed. The present action was an action for damages for breach of a covenant to repair contained in the lease. The dispute is whether the structures I have referred to were within the terms of the covenant, the defendants insisting that they were either chattels or at least trade fixtures removable by the tenants and that in either case they are not within the covenant. SARGENT, J., has not accepted the defendants' contention, and has pronounced a judgment declaring that the lease included the structures the subject of the dispute, that the covenants to repair and so forth in the lease contained apply to them, that the defendants were not entitled to remove the same as either chattels or trade fixtures, and that the same belonged to the plaintiff, with consequential directions for ascertaining the amount of damages. The defendants appeal.

The structures in question are three acid chambers, a tank, two towers and a lean-to shed, and they constitute together an apparatus for the manufacture of sulphuric acid. Each of the several elements of the apparatus (except perhaps the lean-to shed which is of trifling importance) plays an essential part in the process of manufacture, and would be of no use by itself. The defendant company, as its name indicates, was established with the object of manufacturing artificial manure. It was incorporated in the year 1856, and shortly afterwards acquired the remainder of a term created in 1849 over the greater part of the land afterwards comprised in the leases of 1868 and 1912. In 1857, on the termination of the term created by the lease of 1849, a new lease was granted to the defendants. There appears at that time to have been no building on the ground except one described as having formerly been used as a varnish factory. The term under this lease of 1857 was for ninety-nine years or three lives, one of which was the late King Edward VII, then Prince of Wales. It may, I think, be inferred that this lease was taken and granted in order that the land might be used in the company's business. Prior to the lease of 1868 the company acquired a short tenancy of a small piece of land adjoining the land comprised in the lease of 1857 and this piece of land was included in the demise of 1868. On the land of which they thus became the tenants the company proceeded to erect for the purpose of their manure manufactory certain buildings as to which no questions arise, and they also placed thereon the structures in dispute except one of the acid chambers and the lean-to shed, which came into existence after 1868. At the time of the construction of this last chamber one of the three then existing chambers was converted into an open tank. From this time until their destruction in 1916 the structures in question remained unaltered. By the lease of 1868, in consideration of the execution by the company of the lease of 1857, and in consideration of the rents, heriots, covenants, and rights thereinafter reserved and contained, the then lessor (the predecessor of the plaintiff) demised to the company "all that manufactory (being a manure factory) with the storehouses, machine houses, sheds, yard, quay, and premises now in the occupation of the said company." The dimensions and boundaries are then specified. The term was for ninety-nine years if the same three persons who were named in the lease of 1857 or any of them should so long live. The annual rent was £26 10s., and a heriot was reserved payable on the falling in of each of the three lives. The covenant to repair was in the following terms:

> "And also shall and will repair maintain and keep the said manufactory and premises in good and substantial repair and condition as well in houses walls roofs rails gates fences stiles drains sinks and sewers and any buildings and erections now or hereafter during the said term standing or being on the said

demised premises or any part thereof as also every other part thereof during the said term and at the end or other sooner determination thereof shall have leave and yield up the same in such good and substantial repair and condition."

There is another covenant relating to

"any building now erected or hereafter to be erected on the said hereby demised premises."

King Edward VII was the survivor of the three persons named in the lease. He died on May 6, 1910, and the term thereby created then came to an end after a duration of forty-two years. The defendants remained in possession of the demised premises, and, as the result of letters passing between the parties, in July, 1910, the plaintiff, in whom the property was then vested, agreed to grant, and the defendants agreed to accept, a lease for fourteen years, at a rent of £150 on condition of their putting and keeping the premises throughout in good and tenantable repair. The defendants remained in possession, paying rent at the new rate as from May 6, 1910. In February, 1912, the agreement was modified by providing that the new term should commence on Sept. 29, 1911, and that the company should have the option of determining the lease on giving six months' notice.

[His Lordship referred to the provisions of the lease of Mar. 16, 1912, which have already been set out and continued.] After the fire the defendants exercised their option and quitted the premises in May, 1917, having previously removed the débris of the structures referred to. The structures in question are two acid chambers conveniently referred to as Nos. 1 and 2, a tank (previously to the alteration above mentioned, an acid chamber), referred to as No. 3, another acid chamber with the lean-to shed attached, referred to as No. 4, and two towers. The whole together form a single apparatus for the manufacture of sulphuric acid, an essential ingredient in the preparation of artificial manures. Sulphuric acid can, of course, be bought. But practically all manure manufacturers on any considerable scale make their own. The acid is produced from the combustion of iron pyrites in kilns adjoining the apparatus. The gases thus formed pass into one of the towers and thence into the acid chambers, where they undergo a chemical reaction as the result of which the acid is formed. The residuary gases then return into the other tower undergoing further changes, and again pass through the first tower and the acid chambers, and so on. There is thus a constant circulation provided for by pipes connecting the various portions of the apparatus. It is unnecessary to state in any detail the construction of the several structures mentioned above. The lower parts of Nos. 1, 2 and 3 consist of one area surrounded by enclosing walls, pierced with windows and doors at intervals. In the case of Nos. 1 and 2 the walls on the longer sides are finished with a wall plate, sometimes, I think, improperly referred to as a beam, laid in mortar, and providing a level surface for the ends of the joists. I may say in passing that I do not attribute any importance to the fact that the wall plates are laid in mortar, or that the beams in some cases rests on mortar. The area within the walls is traversed from end to end by beams resting on the end walls and supported along their length partly by brick piers and partly by iron columns. The walls and the brick piers are admittedly attached to the soil. The columns are of iron, and hollow, and they rest on the soil without attachment. The beams are nailed to a movable cap resting on the top of the column, and held in place by a boss dropped into the hollow column itself. On the beams and wall plates rest joists to which floor boards are nailed, and on this base a superstructure of wood and lead is erected, surrounded by joists carrying a roof. The ends of the beams are described by the defendants' witness, Northcott, as going "through" the walls, by which I understand that they do not merely rest on the top but lie in spaces left for them in the walls, or that the top part of the wall is built round them.

I think on the whole, the beams should be regarded as physically attached to the

A walls, and, therefore, to the land. The superstructure, however, from the joists upwards does, I think, rest on the beams by its own weight without physical attachment. No. 3 as originally constructed was, for the present purpose, in substantially the same position as Nos. 1 and 2. The beams, however, were laid transversely to the longer axis of the area enclosed by the stone work, and were supported in the middle by a single row of iron columns such as are described above. Their ends on
B the side furthest from Nos. 1 and 2 projected from the wall sufficiently far to allow a passage way outside the chambers. This chamber was afterwards converted into an open tank by removing the superstructure, leaving only the floor with a shallow tray or tank of lead resting upon it. At the same time No. 4 was constructed. This is identical with Nos. 1 and 2 except that the beam nearest to the then existing structures was laid on the projecting ends of the beams supporting No. 3. Two
C other beams were supported only by iron columns. The lean-to shed is only a slanting roof fixed at the top to the superstructure of No. 4, and with its bottom resting on iron columns. The columns themselves merely rested on the ground. It is admitted that the lean-to shed "stands or falls with No. 4." The enclosed areas beneath Nos. 1, 2 and 3 were used as store houses to which the superstructure afforded
D an efficient covering.

The defendants seek to separate the several structures Nos. 1, 2, 3 and 4 into their component parts. They admit that the walls and the brick piers are attached to the inheritance, and I hold that the wall plates and the beams supporting Nos. 1, 2 and 3 are also so attached. But they contend that so much of each structure as merely rests by its own weight on that which supports it, whether
E the latter be the soil itself or something attached to the soil, constitutes a chattel. In my opinion, the several structures cannot be thus separated. I think the entire series of structures must, for the purposes of this case, be regarded as one composite building, composed of four parts, each of which is also a building, and if that composite building or any one of the minor buildings composing it (treating the building in each case as a single whole) is attached to the inheritance, then
F the whole of such building is so attached. In the case of Nos. 1, 2 and 3, the walls enclosing what is substantially a ground floor are clearly attached to the inheritance, and the whole structure is, in my opinion, attached. No. 4, though it has no enclosing walls, derives its support from No. 3, and cannot be regarded otherwise than as an extension of the previously existing building, and therefore (with the lean-to) attached to the inheritance.

G If I am right in the view that no part of the structure in question can be separated from the rest and dealt with by itself, none of the cases relied upon by the defendants will help them. The wooden barn on staddles in *Wansbrough* v. *Maton* (8), the granary in *Wiltshear* v. *Cottrell* (4), and the windmills in *R.* v. *Londonthorpe* (*Inhabitants*) (2) and in *R.* v. *Otley Suffolk* (*Inhabitants*) (1), were all separate and independent buildings, and not part of a whole, which was itself a building.
H A closer analogy is that of the horizontal slab of marble supported on stone supports fixed in the ground, which though itself unfixed was treated as having lost its character of a chattel being part of a garden not attached to the soil by the supports : *D'Eyncourt* v. *Gregory* (9).

So far I have said nothing about the towers. Each of these stands on four legs, and each leg is dropped into an iron shoe standing on a stone foundation fixed in the
I ground. Each shoe is kept in position by a projecting boss dropped into a hole in the stone foundation. The shoes are in no way affixed to the stone. Looked at by themselves apart from the chambers and from the purposes which they are intended to serve, these towers would, I think, be properly held to be chattels. Like the barn and the granary on staddles, the mill resting on the ground, and the other mill resting on but not attached to a brick foundation, they are in no way affixed and would be capable of being moved without disturbing the soil. But I think that they cannot properly be regarded by themselves. They are an essential part of the

apparatus, the chambers constituting the bulk of it would be useless without the towers, and the towers would be useless without them. The chambers and the towers are, and must be, connected together, and if, as I think is the case, the chambers have been so constructed that they cannot be regarded as chattels, the same result must, in my opinion, follow in respect of the towers which are an accessory to the rest of the apparatus: *Earl Mansfield* v. *Blackburne* (10).

The defendants, therefore, in my opinion, fail in their effort to establish that the structures in question, or some parts of them, are chattels. But they say, if they are not chattels, they are at all events tenants' fixtures which they had a right to remove. But, as I have said, I think they constitute a composite building not merely resting by its own weight on the soil or on a foundation, but with its walls built into and thus forming part of the soil like the walls of any ordinary building. I can find no authority for holding that such a building can ever be regarded as a tenant's fixture—that is, something which, though attached to and passing with the inheritance, unless removed is removable by the tenant. There is one authority against such a view, viz., the judgment of KINDERSLEY, V.-C., in *Whitehead* v. *Bennett* (11). He there decided that buildings, though erected for the purposes of trade, could not be removed as trade fixtures. I think this an authority we ought to follow, and to hold that the several structures in question are not, and never were, trade fixtures removable by the tenants.

But, assuming that I am wrong in this view and that when first erected they were removable by the tenant, it remains to consider whether the subsequent dealings with the premises to which they are attached have not destroyed their quality of removability. I think it is clear that after a surrender of the term in the land to which tenant's fixtures are attached and a subsequent lease to the same tenant, the latter can no longer remove the tenant's fixtures unless his existing right to remove them is reserved expressly or by necessary implication: *Leschallas* v. *Woolf* (12). Chambers 1 and 2, the tank No. 3, and the towers were all in existence prior to the lease of 1868. This was expressed to be made "in consideration of the surrender" of a prior lease of the same land, viz., the lease of 1857. The lease itself, so far from reserving to the lessee any right to remove the erections in question, is expressed in terms which would include them in the demise, and the covenant to repair and to leave at the end of the term is wide enough to cover them. In my opinion, it was impossible for the lessees, after the execution of that lease, successfully to insist on a right to remove any of the erections then in existence. As to chamber No. 4 and the lean-to, the facts are different. They were erected after the lease of 1868. On the sudden determination by the death of King Edward VII of the term thereby created, the lessees had a right to remove their tenants' fixtures during a reasonable period after that event. They did not do so, but accepted a new lease granted in pursuance of a previous agreement in terms which are sufficiently wide to cover as part of the demised premises the chamber No. 4 and the lean-to shed. SARGENT, J., has held that the last-mentioned lease also was made upon a surrender of a former term, or involved the surrender of that term by operation of law, the term so surrendered being that created in equity by the agreement: *Walsh* v. *Lonsdale* (13). I doubt, however, whether, in such circumstances, there is any surrender in point of law of the equitable term. I am rather inclined to treat the former lease as a confirmation rather than a destruction of the equitable term. The result, however, is, in my opinion, the same, namely, that, the defendants having accepted a lease of the demised premises in terms which included the fixtures, and having made no stipulation reserving the right to remove them, they have lost any right so to do. In my opinion, the appeal fails, and must be dismissed with costs.

YOUNGER, L.J.—I agree that this appeal should be dismissed, and I desire to adopt, if I may be permitted to do so, the reasons for that conclusion expressed by the Master of the Rolls in his judgment, reserving, as he has done, any expression of opinion upon what I may call the surrender point, one of great difficulty, as I

think. I confess that I have felt some hesitation in reaching the conclusion that the towers may properly be regarded, upon the true construction of this lease, as buildings. I have, however, been convinced on this point by the consideration that upon the facts these towers must be regarded as integral portions of buildings, more strictly so called, and properly comprehended, on this lease in that description.

Appeal dismised.

Solicitors: *Ravenscroft, Woodward & Co.*, for *E. R. Ward*, Plymouth; *Walker, Martineau & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

SCOTT *v.* SCOTT

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), December 6, 1920]

[Reported [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 37 T.L.R. 158]

Divorce—Maintenance of wife—Time for making order—"On any decree"—At same time as decree or within reasonable time afterwards—Matrimonial Causes Act, 1907 (7 *Edw.* 7. *c.* 12), *s.* 1 (1).

By s. 1 (1) of the Matrimonial Causes Act, 1907 [now Matrimonial Causes Act, 1950, s. 19 (2)], the court "may, if it thinks fit, on any decree for dissolution or nullity of marriage" order the husband to secure to the wife such gross or annual sum as to the court might seem reasonable. "On any decree" in this sub-section means at the same time as the decree or within a reasonable time afterwards, and not within such time as the court, in the exercise of its discretion, thinks fit.

Where, therefore, a wife obtained a decree absolute for divorce in July, 1913, received thereafter from her husband payments by way of permanent maintenance of £500 a year which had been agreed by the solicitors of the parties, and in 1919 sought leave to file a petition for maintenance at the rate of £1,250 a year on the ground that her husband's income had substantially increased while the value of the £500 received by her under the agreement had decreased,

Held: there was nothing in the circumstances of the case which rendered it reasonable to allow the application to be made more than six years after decree absolute, and, therefore, leave must be refused.

Notes. By s. 29 of the Matrimonial Causes Act, 1950, proceedings for maintenance can be begun at any time after the presentation of the petition for divorce or nullity of marriage.

Considered and Explained: *Legge* v. *Legge* (1928), 45 T.L.R. 157; Considered: *Fisher* v. *Fisher*, [1942] 1 All E.R. 438; *Kilford* v. *Kilford*, [1947] 2 All E.R. 381; *Hastings* v. *Hastings*, [1947] 2 All E.R. 744; *Bennett* v. *Bennett*, [1952] 1 All E.R. 413; *Shott* v. *Shott*, [1952] 1 All E.R. 735; *Deacock* v. *Deacock*, [1958] 2 All E.R. 633. Referred to: *Fox* v. *Fox*, [1925] All E.R. Rep. 683; *Shearn* v. *Shearn*, [1930] All E.R. Rep. 310; *Stephen* v. *Stephen*, [1931] P. 197; *Fergusson* v. *Fergusson* (1931), 146 L.T. 212; *Mould* v. *Mould*, [1933] All E.R. Rep. 122; *Mills* v. *Mills*, [1940] 2 All E.R. 254; *Combe* v. *Combe*, [1951] 1 All E.R. 767; *Cooper* v. *Cooper*, [1952] 2 All E.R. 857; *Simmonds* v. *Simmonds*, [1955] 2 All E.R. 481.

As to permanent maintenance see 12 HALSBURY'S LAWS (3rd Edn.) 430–440, and for cases see 27 DIGEST (Repl.) 611 et seq.

Cases referred to:

(1) *Bradley* v. *Bradley* (1878), 3 P.D. 47; 47 L.J.P. 53; 39 L.T. 203; 26 W.R. 831; 27 Digest (Repl.) 634, *5948*.

(2) *Sidney* v. *Sidney* (1867), 36 L.J.P. & M. 73; 15 W.R. 1094, H.L.; 27 Digest (Repl.) 593, *5550.*

(3) *Robertson* v. *Robertson and Favagrossa* (1883), 8 P.D. 94; 48 L.T. 590; 31 W.R. 652, C.A.; 27 Digest (Repl.) 615, *5753.*

(4) *R.* v. *Arkwright* (1848), 12 Q.B. 960; 3 New Mag. Cas. 74; 18 L.J.Q.B. 26; 12 L.T.O.S. 271; 13 J.P. 4; 13 Jur. 300; 116 E.R. 1130; 16 Digest 422, *2820.*

(5) *Re Leigh*, *Leigh* v. *Leigh* (1888), 40 Ch.D. 290; 58 L.J.Ch. 306; 60 L.T. 404; 37 W.R. 241; 5 T.L.R. 138, C.A.; 28 Digest (Repl.) 716, *2279.*

Appeal from an order of DUKE, P., on the petition by a wife for maintenance.

In 1891 the parties were married. In 1895 the wife filed a petition for judicial separation, and claimed alimony pendente lite, which on admissions by the husband as to his means was ordered to be paid to her at the rate of £96 per annum. The husband, however, left the country, and made no payment under the order. In 1902 he returned from abroad, and the wife obtained a decree of judicial separation, custody of the child of the marriage, and an order for permanent alimony at the rate of £160 per annum. In July, 1912, the wife took proceedings for dissolution of the marriage, to which the husband appeared, but filed no answer, and in October, 1912, she filed a petition for alimony pendente lite, in which she alleged that his income was from £2,000 to £3,000 a year. Communications took place between the solicitors of the parties, and on Oct. 14, the husband's solicitors wrote to the wife's solicitors in these terms:

> "Confirming our interview with you, our client is willing to pay alimony at the rate of £500 per annum, the understanding being that your client will agree to accept permanent maintenance at the same rate. Will you kindly confirm this and let us have a form of order for approval."

On Oct. 15 the wife's solicitors replied as follows:

> "We are in receipt of your letter of yesterday's date, and our client accepts the offer therein contained. We will let you have draft order for approval in due course."

In pursuance of this understanding the solicitors attended before a registrar on Oct. 18, and the registrar made an order by consent for alimony pendente lite at the rate of £500 per annum, as from the date of service of the citation. Payment of the wife's costs to date and security for her costs of the hearing were also ordered, and her costs were taxed and paid. A decree nisi for dissolution of the marriage was made on Jan. 17, 1913, and on July 28, 1913, the decree was made absolute. From November, 1912, to July, 1913, the husband made payments to the wife at the rate of £160 per annum. After July, 1913, he made payments at the rate of £500 per annum. In June, 1919, the wife, through her solicitors, requested an increase of the provision for her maintenance to £1,250 a year, partly on the ground that the husband's income had increased, and also because £500 was of much less value in 1919 than in 1912. The husband's solicitors offered an additional £50 per quarter, upon condition of the husband being thenceforward free of any further demand, but no agreement was arrived at, and the wife applied before a registrar for leave to file a petition for permanent maintenance. On Nov. 14, 1919, leave to file a petition was given, and a petition was filed on Nov. 17. The wife's affidavit in support of her petition stated the husband's income from his business at £10,000 a year, and his fortune at £300,000. In January, February, March, and April, 1920, the husband obtained five successive extensions of time for his answer to the wife's petition, and in May, he delivered his answer, in which he left the amount of his income at large, but stated that the capital in his business was from £70,000 to £80,000. An appointment for hearing of the petition was given, and at the hearing the husband's solicitors attended and disputed the jurisdiction of the registrar to make any order. Thereupon the wife issued the present summons for leave to file a petition. On Oct. 14, 1920, it was decided by SIR HENRY DUKE, P., that the agreement between

A the parties did not oust the jurisdiction of the court to increase the amount payable thereunder if satisfied that the husband's means had increased. The husband appealed.

Bayford, K.C., and *T. Bucknill* for the husband.
Sir Ellis Hume-Williams, K.C., and *Durley Grazebrook* for the wife.

B **LORD STERNDALE, M.R.**—This appeal raises a difficult question.

The decree in the case was pronounced in July, 1913. There was no application by the wife for maintenance after the decree was made until some six years afterwards, and the reason given is that there was an arrangement, constituted by letters between the solicitors, by which the wife was receiving £500 a year from her husband after the decree. The letters dealt with matters both before and after C the decree, that is to say, pendente lite, and then subsequently. But we have nothing to do now with the agreement as to the payment pendente lite. The wife now comes and asks under the Matrimonial Causes Act, 1907, for an order for maintenance. Section 1 (1) of that Act [see now Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388), s. 19 (2)] provides as follows:

D "The court may, if it thinks fit, on any decree for dissolution or nullity of marriage order that the husband shall, to the satisfaction of the court, secure to my wife [a sum of money]; and for that purpose may refer the matter to any one of the conveyancing counsel of the court to settle and approve of a proper deed or instrument to be executed by all necessary parties and the court may, if it thinks fit, suspend the pronouncing of its decree until such E deed shall have been duly executed."

Subsection (2) [s. 19 (3) of Act of 1950] provides as follows:

"In any such case the court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable, F and any such order may be made either in addition to or instead of an order under the last preceding sub-section."

There are two provisos [see now s. 28 of Act of 1950]: (i) That the amount payable under this subsection may be reduced if the husband becomes unable to pay it, and (ii) that where the means of the husband have been increased the amount payable under the order may be increased. It was rightly said, I think, G that in substance what the wife wishes to do is to get an increase to the sum of £500 a year which is payable to her. But the application is not an application to increase an order, because there is no order under which a payment is directed to be made, and, therefore, there is no sum payable under an order which can be increased. The application is that the wife may be allowed to file a petition asking for an original order for maintenance under either s. 1 (1) or s. 1 (2) of the Act, H whichever the court may think applicable, and that she may do so, as I say, at the expiration of seven years.

The letters which constituted the arrangement or agreement, whichever it may be called, are in these terms:

I "Confirming our interview with you, our client is willing to pay alimony at the rate of £500 per annum, the understanding being that your client will agree to accept permanent maintenance at the same rate. Will you kindly confirm this and let us have form of order for approval?"

Therefore, it was contemplated that there should be an order, and an order was made so far as alimony pendente lite was concerned. The answer to that is:

"We are in receipt of your letter of yesterday's date and our client accepts the offer therein contained. We will let you have draft order for approval in due course."

For some reason which does not appear, alimony pendente lite was paid under that, not at the rate of £500 a year, but at the rate of £160 a year. Apparently it was done by some arrangement as to which we have no information, and it was only after the decree that the payment of £500 per annum which is mentioned in those letters was made. The learned President held that a petition for maintenance filed on Nov. 17, 1919, is to stand as filed within the time limited for filing such petition. There he is referring, I think, to r. 95 of the Divorce Rules, which says that a petition must be filed as soon as it can be under the statutes, or within a month after, or within such time as the judge may otherwise order [see now Matrimonial Causes Rules, 1957 (10 HALSBURY'S STATUTORY INSTRUMENTS), r. 44 (1)].

The first question is, what is the meaning of "on any decree for dissolution." I was inclined to think at one time that it meant at the same time as the decree was made, or, as it could not precede it, at any rate immediately following upon it. I think, looking at the decision of SIR JAMES HANNEN in *Bradley* v. *Bradley* (1), and *Sidney* v. *Sidney* (2) in the House of Lords which he followed, and also at *Robertson* v. *Robertson and Favagrossa* (3), that what SIR JAMES HANNEN calls a more elastic meanings must be given to the word "on," and that it does not mean "on" in the very narrow sense that I at first thought it ought to be taken to mean. But it seems to me, at any rate, that it must be limited to this extent —it must be at the same time as the decree or within a reasonable time afterwards. A "reasonable time," no doubt, must depend on all the circumstances of the case. I do not think that the learned President has quite taken that view. I think that he has taken the provision as meaning at the same time as or immediately after or within such time as the judge in his discretion may think fit for the petition to be presented.

I think that is too wide. I know "a reasonable time" is not a very easy thing to define, but we have some guide, although I do not think it is one that is an absolute hard-and-fast rule, in what was said by SIR GEORGE JESSEL, M.R., in *Robertson* v. *Robertson and Favagrossa* (3). He said (8 P.D. at p. 96):

> "In the first place, it appears that there is no instance of an application of this nature being made at so late a period as the present application. Whatever meaning may be given to the word 'on' in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word 'on.' 'On,' if not confined to the time of making the decree, must mean shortly after."

In that case the time was eighteen months. But as the decision of the court went in agreement with the learned President on the merits of the application and not on the question of time—or, at any rate, not really on the question of time—that cannot be taken as a decision, and I do not think it ought to be taken as a decision that that was the absolute limit. I think, however, that it does point in the direction I have already expressed—that the words in the statute do not mean an unlimited time within the judge's discretion, but that it does mean a reasonable time within all the circumstances of the case.

That reduces, to my mind, the present case to a very short question. Is the effect of the agreement or arrangement, whatever it may be called, having been made between the parties a circumstance that extends the reasonable time in this case to seven years? In my opinion, it does not. It may be that the parties were not quite clear as to the actual effect of the agreement or arrangement which they had made. It may be that they, or their advisers, were under the impression that an order had been obtained for this money. I do not think either of those circumstances justifies postponing the application for an order for maintenance for this period. Really, as I say, it is in substance an application to increase the amount because the husband's means have increased—that is the substance of it—and if it

were not that that was the object, I do not suppose an application for an order would ever have been made. The application for an order would have been unnecessary so long as the £500 per annum was considered a reasonable sum. I do not think that this order can be maintained, because I think, with all respect to the learned President, that he has proceeded upon a wrong principle, namely, that there is no limit to the judge's discretion, whereas I think that there is a limit and that it must be what SIR GEORGE JESSEL, M.R., expressed as shortly after, or what I express as being a reasonable time after considering the circumstances. I think, therefore, that this appeal must be allowed and the order set aside.

WARRINGTON, L.J.—The learned judge in the court below has made an order that a petition for maintenance filed on Nov. 17, 1919, do stand as if filed within the time limited for filing such a petition, and the real question which we have to decide is whether the learned judge was right in making that order. In substance, no doubt, the object of the wife was to obtain, not merely an order for maintenance, but an increase in the maintenance which had been hitherto allowed her under the agreement. But in order to get that increase it is necessary that there should be an order. Therefore, in reality, her application was an application then for the first time for an order for permanent maintenance. The decree nisi was made on Jan. 17, 1913, and the decree absolute on July 28, 1913. It is, therefore, now more than seven years since the making of the decree absolute.

The question turns upon the construction of s. 1 (1) and (2) of the Matrimonial Causes Act, 1907, which were substituted for s. 32 of the Matrimonial Causes Act, 1857, and s. 1 of the Matrimonial Causes Act, 1866. The question of construction turns upon what is meant by the provision in the Act of 1907 that the court may, if it thinks fit, on any decree for dissolution of marriage, first order the securing of an annual sum, and, secondly, under sub-s. (2), instead of making such an order make an order on the husband for payment of a monthly or a weekly sum for maintenance. What is sought in the present case is an order for payment of a sum for maintenance which I suppose would be a weekly or monthly sum equal to so much per annum. What is the meaning then of the words, "on any decree for dissolution"? It was decided by SIR JAMES HANNEN in *Bradley* v. *Bradley* (1) that the word "on" was not to be construed in the narrow sense as meaning either that the court may incorporate it in the decree or, if it makes a separate order, may make such an order only at the same time as the decree. All that he decided was that the order for maintenance may be a separate order, and that it need not be contemporaneous with the decree, but may be made after it. If it is to be made after it, what, according to the true construction of the statute, is the limitation to be placed upon the word "after," which has now been introduced? It was contended before use that it might mean within such time after as the court in its discretion might think proper. In my judgment, with all respect to the learned President, who seems to have acted upon that view, that cannot be the construction of the statute. The only construction that is possible, I think, to give to the statute, when once you have got it that the order may be made after the decree, is that it must be made within some reasonable time, and I do not doubt but that that was the view taken by SIR GEORGE JESSEL, M.R., in *Robertson* v. *Robertson and Favagrossa* (3) in this court. In that case he said:

> "Whatever meaning may be given to the word 'on' in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word 'on.' 'On,' if not confined to the time of making the decree, must mean shortly after."

It is to be noticed that the judgment was a reserved judgment and was delivered some fortnight after the argument had taken place, and in that argument *Bradley* v. *Bradley* (1) had been cited. Therefore, it would seem that the learned judge

had in his mind the decision of the President that the order might be made after the decree, and on that he made the remarks which I have read.

I think that certainly does not support any such contention as has been put forward before us in the present case, that the order may be made at such time after the decree as the judge in his discretion may think proper. It seems to me it can only mean at the same time as the decree, or within a reasonable time afterwards. What is a "reasonable time" must be decided, not by any resort to a judicial discretion, but on the circumstances of the particular case, and it becomes a matter of law what circumstances would justify the judge in coming to the conclusion that the time is reasonable. On that point I have nothing to add to what has been said by the learned Master of the Rolls. It is enough for me to say that, speaking for myself, I entirely agree with his view, and I can find nothing in the circumstances of this case which renders it reasonable to allow the application to be made more than seven years after the decree absolute was pronounced. I, therefore, agree that the order must be set aside.

SCRUTTON, L.J.—In differing from the decision of the learned judge in the court below, I will express my judgment in my own words as shortly as I can.

Mrs. Scott obtained a decree absolute for the dissolution of her marriage in July, 1913. In 1919, more than six years afterwards, she came to the court to get leave to issue a petition for maintenance. But it appears to me clear that the registrar had not power originally to give such leave under the rules, and I do not propose in this case to express any opinion as to what the effect of the appearance was, whether it would in any way give the registrar jurisdiction which he had not before, because the question here is whether the learned judge in 1920 had power to give the leave which he did give. Whether or not the learned judge had power to give that leave depends on the true construction of s. 1 of the Matrimonial Causes Act, 1907, which gives the court power "on any decree for dissolution or nullity of marriage," and in any such case to make an order for payment of a monthly or weekly sum. The words "in any such case" appear to me to relate to "any decree for dissolution or nullity of marriage," and the question is, therefore, what limit is imposed for the making of an application "on any decree for dissolution or nullity of marriage."

In *R.* v. *Arkwright* (4), LORD DENMAN said:

> "The words 'on' or 'upon' (it has been decided) may 'either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require'; 'with reference to the context and the subject-matter of the enactment'."

A series of cases on various branches of the law has been decided in which the word "on" has been given one or other of those meanings. LORD DENMAN did not say in that case, as he might have said: "I think it means all three." I think that in the present case it does mean all three. The section expressly provides that the court may suspend the pronouncing of its decree until the deed which it has ordered to be executed has been executed, and, therefore, "on any such decree" may cover a case before the decree is made. Obviously the order for security may be embodied in the decree. The word "on" may be, therefore, meaning simultaneously. Thirdly, in the view of the House of Lords in *Sidney* v. *Sidney* (2), the order may be made after the decree, not embodied in the decree, but made after it. In view of the fact that there are to be considered the ability and fortune of the husband the order for security of maintenance may be made after the decree for dissolution or nullity of marriage.

But there still arises the question whether, although the order may be made after the decree for dissolution or nullity of marriage, there is any limit of time within which it may be made? Can the wife come and say: "I am going presently to present a petition for dissolution of marriage, and in the meanwhile I make an

application for permanent maintenance in case I succeed?" Obviously not. Obviously that would have been made an unreasonable time before the hearing of the suit. Can she say: "Twenty years ago your Lordship gave me a decree for dissolution of marriage, now will you make an order for permanent maintenance?" Again, it seems to me equally obviously not. There is some limitation to be implied in the temporary nature of the order for security as to the order or decree for dissolution. In my view, that limitation is that, inasmuch as the matters to be considered are matters which should be in the mind of the judge at the time when he is making the decree for dissolution of marriage, the limitation is that the order for maintenance should be made within a reasonable time from the decree of dissolution of marriage. As to what sort of time that means one has the guidance of SIR GEORGE JESSEL'S view in *Robertson* v. *Robertson and Favagrossa* (3) to which we were referred, but at that time there was no case in which the power had been exercised more than a year after, and he could hardly conceive a case in which it could be a year. In that case the time was eighteen months. I see that the same limitation has been held in *Re Leigh*, *Leigh* v. *Leigh* (5), where the power of the court was sought to make a settlement upon or in contemplation of the marriage. There had been a dispute whether those words give the court power to compel a post-nuptial settlement to be made, and in that case COTTON, L.J., said:

> "But I see nothing . . . which would in any way favour the conclusion that this settlement can be considered as a settlement made upon the occasion of the marriage when there was this considerable length of time intervening between the marriage and the order of the court."

"This considerable length of time," which COTTON, L.J., thought prevented the settlement being made upon the occasion of the marriage was eight months in that case, and he thought that was too long a period to allow the settlement to be made eight months after the marriage.

Without going through the other cases—there are seven or eight of them which have been referred to while counsel have been arguing—I think that a maintenance order must be made within a reasonable time of the decree of dissolution, and I see nothing whatever in the circumstances of this case to justify an application being made six or seven years after the dissolution. It is not necessary to discuss whether there was an agreement, although I have no doubt about there being a consideration for the agreement, or as to what exactly was the agreement made. But I can see nothing whatever in the present case which would allow any judge to say that there are circumstances in it from which he could find in his discretion that seven years was a reasonable time to wait before making the order. For these reasons I concur in the judgments which have been given.

Appeal allowed.

Solicitors: *J. D. Langton & Passmore; Reid, Sharman & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

Re STEEL WING CO., LTD.

[Chancery Division (P. O. Lawrence, J.), November 30, December 7, 1920]

[Reported [1921] 1 Ch. 349; 90 L.J.Ch. 116; 124 L.T. 664; 65 Sol. Jo. 240; [1920] B. & C.R. 160]

B

Chose in Action—Assignment—Equitable assignment—Debt—Assignment of part of debt—Assignee a creditor in equity.

Company — Winding-up — Petition — Presentation by "creditor" — Equitable assignee of part of debt—Need to join persons interested in remainder of debt.

C

An equitable assignee of a definite part of a debt is none the less a creditor in equity in respect of that part because, according to the accepted rules of procedure, the court requires him to join the persons interested in the remainder of the debt as parties to any action he may bring to recover his part of the debt.

Such an assignee **held** to be entitled to present a winding-up petition under s. 137 of the Companies (Consolidation) Act, 1908 [see now Companies Act, 1948, s. 224], without joining the persons interested in the remainder of the debt as co-petitioners or respondents.

D

Notes. Considered: *Bank of Liverpool and Martins* v. *Holland* (1926), 43 T.L.R. 29. Distinguished: *Earle* v. *Emsworth R.D.C.* (1928), 44 T.L.R. 29. Applied: *Walter and Sullivan, Ltd.* v. *J. Murphy & Sons, Ltd.*, [1955] 1 All E.R. 843. Referred to: *Williams* v. *Atlantic Assurance Co.*, [1932] All E.R. Rep. 32.

As to assignments of choses in action see 4 Halsbury's Laws (3rd Edn.) 483 et seq., and as to grounds for winding-up a company see ibid., vol. 6, pp. 531–533. For cases see 8 Digest (Repl.) 547 et seq., and 10 Digest (Repl.) 852 et seq. For Law of Property Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 427, and for Companies Act, 1948, see ibid., vol. 3, p. 452.

E

Cases referred to:

(1) *Skipper and Tucker* v. *Holloway and Howard*, [1910] 2 K.B. 630; 79 L.J.K.B. 91; 26 T.L.R. 82; 8 Digest (Repl.) 553, *81.*

F

(2) *Forster* v. *Baker*, [1910] 2 K.B. 636; 79 L.J.K.B. 664; 102 L.T. 522; 26 T.L.R. 421, C.A.; 8 Digest (Repl.) 554, *84.*

(3) *Conlan* v. *Carlow County Council*, [1912] 2 I.R. 535; 8 Digest (Repl.) 554, **44.*

(4) *Durham Bros.* v. *Robertson*, [1898] 1 Q.B. 765; 67 L.J.Q.B. 484; 78 L.T. 438, C.A.; 8 Digest (Repl.) 570, *216.*

G

(5) *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190; 71 L.J.K.B. 630; 86 L.T. 794; 50 W.R. 660; 18 T.L.R. 654, C.A.; 8 Digest (Repl.) 571, *220.*

(6) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch.D. 99; 59 L.J.Ch. 26; 61 L.T. 582; 38 W.R. 67; 6 T.L.R. 7; 1 Meg. 393, C.A.; 8 Digest (Repl.) 584, *310.*

H

(7) *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, *230.*

(8) *Re Montgomery Moore Ship Collision Doors Syndicate, Ltd.* (1903), 72 L.J.Ch. 624; 89 L.T. 126; 19 T.L.R. 554; 10 Mans. 327; 10 Digest (Repl.) 873, *5757.*

I

Also refered to in argument:

Brice v. *Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, *78.*

Jones v. *Humphreys*, [1902] 1 K.B. 10; 71 L.J.K.B. 23; 85 L.T. 488; 50 W.R. 191; 18 T.L.R. 54; 46 Sol. Jo. 70, D.C.; 8 Digest (Repl.) 555, *90.*

Winding-up Petition.

Prior to the month of October, 1917, one George Pauling held the controlling interest in, and was managing director of, the Steel Wing Co. He made advances

to the company in respect of which the company became largely indebted to him. In October, 1917, Pauling, for valuable consideration, transferred the whole of his shares in the company and assigned the whole of his debt to Dermot Joseph Mooney, who thereupon became the managing director of the company. The assignment of the debt was effected by an undated document under the hand of Pauling, which, after setting out certain particulars showing a balance of £4,632 2s. 2d. then due to him from the company, proceeded as follows: "And it is this balance that Mr. George Pauling hereby transfers to Mr. Mooney for his benefit." This assignment was brought to the attention of the company by Mooney on Oct. 12, 1917, and thereupon the following resolution was passed at a board meeting: "Mr. Mooney produced an assignment to himself of the debt amounting to £4,632 2s. 2d. due by the company to Mr. George Pauling. It was resolved that a cheque for £300 be drawn on the London Joint Stock Bank and it be paid to Mr. Mooney in part satisfaction of the debt." By an indenture dated July 30, 1920 (which was executed as the result of certain litigation between Mooney and the petitioner), Mooney, for valuable consideration, assigned to the petitioner, Frederick Thomas Lord, "an equal half part of the sum of £4,632 2s. 2d. referred to in the minutes of the directors of the company of Oct. 12, 1917, as aforesaid and the full benefit and advantage thereof to hold the same unto the said Frederick Thomas Lord absolutely." Notice in writing of this assignment was given to the company on Aug. 5, 1920, and by the same notice the company was required to pay to the petitioner forthwith the sum of £2,316 1s. 1d., being one equal half part of the said sum of £4,632 2s. 2d. The company having made default in payment of the sum demanded, the petitioner, on Oct. 28, 1920, presented this petition for the winding-up of the company. It was not disputed that the company was insolvent and unable to satisfy the petitioner's demand, but nevertheless the company opposed the making of a winding-up order.

C. E. E. Jenkins, K.C., and *Roope Reeve* for the petitioner.
Serjeant Sullivan, K.C., and *Maurice Healy* for the company.

Cur. adv. vult.

Dec. 7. **P. O. LAWRENCE, J.**—The main question arising on this petition is whether or not the petitioner, Frederick Thomas Lord, the assignee of a definite part of a debt owing by the company, is a creditor of the company entitled to present a winding-up petition within the meaning of s. 137 (1) of the Companies (Consolidation) Act, 1908 [now Companies Act, 1948, s. 224]. The first point taken by the company is that the undated document by which Pauling transferred the debt of £4,632 2s. 2d. to Mooney was not in fact an assignment of the debt operating in præsenti, but merely an agreement to assign intended to operate in futuro on the happening of certain events. It was sought to establish this by a letter dated July 30, 1917, and by certain parol evidence. In my opinion, neither this letter nor this parol evidence is admissible to contradict or vary the written assignment the terms of which are unambiguous. Moreover, there appears to me to be very little substance in this contention as the company on Oct. 12, 1917, accepted the document as having vested the debt in Mooney, and actually paid him £300 on that footing. The next point taken by the company is that the deed of July 30, 1920, did not operate to pass to the petitioner the legal right to one-half of the debt thereby assigned on the ground that an assignment of part of a debt is not within s. 25 (6) of the Supreme Court of Judicature Act, 1873 [see now Law of Property Act, 1925, s. 136]. I am not sure whether in the circumstances of this case this point really arises. I can find no evidence that any notice in writing of the assignment of October, 1917, from Pauling to Mooney was ever given to the company. It would appear, therefore, that the legal right to the debt never passed to Mooney, and that the latter was only an equitable assignee and could not confer upon the petitioner a legal right which he, Mooney, did not possess.

As, however, this point was not taken by the company, I will deal shortly with the question, which was fully argued, whether an assignment of a definite part of a debt is within sub-s. (6) of s. 25 of the Judicature Act, 1873. DARLING, J., in *Skipper and Tucker* v. *Holloway and Howard* (1), decided that such an assignment came within s. 25 (6) of the Act of 1873. BRAY, J., in *Forster* v. *Baker* (2), dissented from this decision, and held that it did not, and in the Irish case of *Conlan* v. *Carlow County Council* (3), GIBSON and BOYD, JJ., concurred in the opinion of BRAY, J. Although the point has been mentioned on at least two occasions by members of the Court of Appeal: see *Durham Bros.* v. *Robertson* (4) ([1898] 1 Q.B. at pp. 774, 775) and *Hughes* v. *Pump House Hotel Co.* (5) ([1902] 2 K.B. at p. 195); there is no decision of the Court of Appeal upon it. Having considered the arguments addressed to me in the present case, I concur in the opinions of BRAY, J., and GIBSON, J. In the result I hold that, even if Mooney did acquire the legal right to the debt, the deed of July 30, 1920, did not operate to pass the legal right to one-half of such debt to the petitioner, and that the petitioner is not a creditor of the company at law.

The next point taken by the company is that the petitioner is not even a creditor of the company in equity, and that he stands in no better position than a garnishor of a debt due from the company, and, consequently, cannot present a winding-up petition: see *Re Combined Weighing and Advertising Machine Co.* (6). In my judgment, an assignee of part of a debt stands in an entirely different position from that of a garnishor. A garnishee order does not operate to transfer the debt, and does not constitute the garnishor a creditor either at law or in equity of the garnishee. The assignment of part of a debt, however, operates in equity to transfer the part assigned, and, consequently, in my judgment, constitutes the assignee a creditor in equity of the company in respect of that part. Counsel, in opening the petitioner's case, referred to the suggestion contained in STIEBEL'S COMPANY LAW (2nd Edn.), vol. 11, p. 912, that, by reason of the omission from s. 130 of the Companies (Consolidation) Act, 1908 [Companies Act, 1948, s. 223], of the words "at law or in equity," which occurred in the corresponding s. 80 of the Companies Act, 1862, the word "creditor" in s. 137 of the Act of 1908 ought to be confined to a creditor at law. I accept counsel's submission on this point, and hold that the omission was not intended to and did not, in fact, effect any alteration in the law, but was occasioned solely because the words "at law or in equity" had become unnecessary since the passing of the Judicature Acts. I did not understand counsel for the company to dispute this proposition. I am, therefore, of opinion, that the word "creditor" in s. 137 of the Companies (Consolidation) Act, 1908, includes a creditor in equity as well as a creditor at law, and, consequently, that a creditor in equity can still petition for the winding-up of a company.

But then counsel for the company contends that, even if the petitioner be held to be a creditor of the company in equity, yet the word "creditor" in s. 137 of the Companies (Consolidation) Act, 1908, although it would include a creditor in equity entitled to the whole of a debt, ought not to be extended so as to include a creditor in equity entitled to part only of a debt. He maintains that the company are not legally bound to make any payment to such a creditor on being served with a demand by him for payment under s. 130 (1) of the Act of 1908. He points out that the petitioner could not recover payment from the company of half of the debt originally owing to Pauling, except in an action in which both Pauling and Mooney were joined as parties either as co-plaintiffs or defendants, and that consequently the company could not be guilty of any neglect within the meaning of s. 130 (1) if they were to refuse or omit to pay one-half of the debt to the petitioner on his demand, unless Pauling and Mooney were to concur in such demand, and a fortiori where, as in this case, Mooney, the owner of the other half, had given express notice to the company that they were not to make such payment. In my opinion, the contention that in an action by an assignee

A of part of a debt the court would require the persons entitled to the remainder of the debt to be parties is well founded. Although it is not necessary to decide whether in the circumstances of the present case, the court would insist upon Pauling being made a party to such action even if the assigment of October, 1917, were held not to have passed the legal right of the debt, I doubt very much whether it would be absolutely necessary to join Pauling as a party to such an action. In B my opinion, no useful object could be served by having Pauling as a party to any such action, as he would be merely a bare trustee of the debt for Mooney and his assignee, and the court could adjudicate completely and finally upon the rights of the parties in his absence: see remarks of LORD MACNAGHTEN in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (7) ([1905] A.C. at p. 462). As regards Mooney, however, I think there is no doubt that the court would require him to be a party C to any action brought by the petitioner to enforce payment of his half of the debt.

In my judgment, however, the fact that the petitioner cannot serve an effective demand for payment under s. 130 (1) does not necessarily imply that he is not a creditor entitled to present a winding-up petition under s. 137. Section 130 is devoted entirely to describing in what circumstances a company shall be deemed to be unable to pay its debts within the meaning of s. 129 (v) [Companies Act, D 1948, s. 222 (e)], and, in my opinion, the mere fact that a creditor is unable to serve an effective demand under sub-s. (1) of s. 130 does not prevent him from being a creditor within the meaning of s. 137. It only amounts to this, that the petitioner cannot rely upon non-compliance with his demand as evidence of inability on the part of the company to pay its debts. The main reason why an assignee of a part of a debt is required to join all parties interested in the debt in E an action to recover the part assigned to him is, in my opinion, because the court cannot adjudicate completely and finally without having such parties before it. The absence of such parties might result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning such debt. In my opinion, however, this reasoning does not apply to a winding-up petition. After a winding-up order has F been made the court, in all cases where it is necessary, will investigate, adjudicate upon, and settle the petitioner's debt as well as the debts of the other creditors. In the case of an assignee of part of a debt the court in adjudicating upon his claim, can and will do so in the presence of the persons entitled to the remainder of the debt, and the rights of all parties interested in the debt will be completely and finally settled once and for all.

G For the reasons I have stated I have come to the conclusion first, that an assignee of a definite part of a debt is none the less a creditor in equity in respect of that part because, according to the accepted rules of procedure, the court requires him to join the persons interested in the remainder of the debt as parties to any action he may bring to recover his part of the debt, and, secondly, that such an assignee is entitled to present a winding-up petition under s. 137, without joining the persons H interested in the remainder of the debt as co-petitioners or as respondents. In coming to these conclusion I think that I am following the view taken by BYRNE, J., in *Re Montgomery Moore Ship Collision Doors Syndicate, Ltd.* (8). Although, according to the report of that case, the company did not appear, and the learned judge did not specifically deal with the point that the petitioner was assignee of I part only of the debt, yet he had his attention called to the cases on this point, and in making the winding-up order he must have considered that an equitable assignee of part of a debt stood in the same position as regards his right to present a winding-up petition as an equitable assignee of the whole debt.

The only other point which I need deal with is that the company disputes the amount of the debt. It is of course well settled that the court will not encourage an attempt by a creditor by means of a winding-up petition to enforce payment of a debt which is bonâ fide disputed. In the present case, however, the only dispute raised by the company is as to the amount of the debt owing by the

company to Pauling at the time when he assigned it to Mooney. The company contend that the debt at that date amounted to the sum of £3,070 6s. 8d. and no more : see letter of Aug. 17, 1920; whereas the petitioner insists that it amounted to £4,632 2s. 2d., the sum stated in the assignment. I desire to say nothing on the merits of this question (which will be investigated in due course) except that, regard being had to the resolution of Oct. 12, 1917, and to the position in the company occupied by the assignor and assignee respectively, there may be some difficulty in establishing the company's present contention. On the undisputed facts of this case, therefore, the petitioner is assignee of half of a debt admittedly owing by the company, which debt amounts to upwards of £3,000, and which debt the company is unable to pay. In these circumstances it seems to me that it would be oppressive if I were to accede to the company's request, and to dismiss the petition. The result of such dismissal would be that the petitioner would be compelled to incur the useless expense and delay of bringing an action against an insolvent company, and of his again presenting a winding-up petition founded on the judgment which ex concessis he is bound to obtain in such action. In the result I hold that all the objections taken by the company to this petition fail, and I make the usual winding-up order.

Solicitors : *J. F. Spencer Cridlan ; P. R. Christie.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

BRITAIN STEAMSHIP CO., LTD. *v.* REGEM. GREEN *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. BRITISH INDIA STEAM NAVIGATION CO., LTD. *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD.

[House of Lords (Viscount Cave, Lord Atkinson, Lord Shaw, Lord Sumner and Lord Wrenbury), May 7, 10, 11, 13, 14, July 12, 1920]

[Reported [1921] 1 A.C. 99; 89 L.J.K.B. 881; 123 L.T. 721; 36 T.L.R. 791; 64 Sol. Jo. 737; 15 Asp. M.L.C. 58; 25 Com. Cas. 301]

Insurance—Marine Insurance—War risk—Warlike operation—Marine risk aggravated by war conditions—Collision while sailing without lights—Stranding while under convoy orders.

The steamship *P.*, which had been requisitioned by the Admiralty under a charter whereby the Admiralty was not liable for marine risks, but took the risk of "all consequences of hostilities or warlike operations," was being navigated at night without lights in accordance with Admiralty regulations and was sunk as the result of a collision with another steamship also being navigated without lights in accordance with the same regulations. The steamship *M.* was insured by a policy containing the usual f.c. and s. clause, and by another policy against war risks. During the currency of the policies, while she was sailing in convoy under escort and zig-zagging to avoid submarines in obedience to orders by the officer commanding, she ran upon an unlighted reef and became a total loss.

Held: if a peril be directly due to hostile action it is a war risk, but if the operation relied on as a warlike operation creates no new risk, but only aggravates or increases an existing maritime risk by removing something which, but for the war, would have been a safeguard against that risk, the risk is not a war risk; sailing without lights in war time or in convoy was not in itself a warlike operation; collision at sea was primâ facie a marine risk and in the case of the

P. that risk was aggravated by the fact that she was compelled to sail without lights; and, therefore, the loss of the *P.* was due to a marine and not to a war risk; further, in the case of the *M.* (LORD CAVE and LORD SHAW dissentiente), stranding was also primâ facie a marine risk which was aggravated by the need to sail in convoy to avoid submarine attack and to obey the orders of the naval officer in command; and, therefore, the loss of the *M.* was due to a marine and not a war risk.

Per LORD WRENBURY: The abandonment of navigation lights in the case of the *P.* by way of protection against attack by submarine and the sailing in convoy in the case of the *M.* by way of protection against the like attack are in principle similiar. They are devices to give in time of war additional protection against an existing maritime risk. Their object is to give greater security to peaceful operations.

Decisions of Court of Appeal, [1919] 2 K.B. 670, affirmed.

Notes. Considered: *Hain Steamship Co., Ltd.* v. *Board of Trade*, [1928] 2 K.B. 534; *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson*, [1929] All E.R. Rep. 17; *Forestal Land, Timber and Rails. Co., Ltd.* v. *Rickards; Middows, Ltd.* v. *Robertson; W.W. Howard Bros. & Co., Ltd.* v. *Kann*, [1940] 4 All E.R. 96; *Yorkshire Dale Steamship Co.* v. *Minister of War Transport, The Coxwold*, [1942] 2 All E.R. 6; *Clan Line Steamers, Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.*, [1942] 2 All E.R. 367; *Liverpool and London War Risks Insurance Association, Ltd.* v. *Ocean Steamship Co., Ltd., The Priam*, [1947] 2 All E.R. 586. Referred to: *Board of Trade* v. *Cayzer Irvine* (1927), 43 T.L.R. 625; *Wharton (Shipping), Ltd.* v. *Mortleman*, [1941] 1 All E.R. 175; *Athel Line, Ltd.*, v. *Liverpool and London War Risks Insurance Association, Ltd.*, [1945] 2 All E.R. 252; *Re Pitt, Mendel* v. *A.-G.* (1945), 173 L.T. 272.

As to marine insurance against war risks see 22 HALSBURY'S LAWS (3rd Edn.) 76 et seq., and for cases see 29 DIGEST 226–231.

Cases referred to:

(1) *British and Foreign Steamship Co., Ltd.* v. *R.*, [1918] 2 K.B. 879; 87 L.J.K.B. 910; 118 L.T. 640; 34 T.L.R. 546; 62 Sol. Jo. 701; 14 Asp. M.L.C. 270, C.A.; 29 Digest 228, *1849*.

(2) *Ionides* v. *Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur. N.S. 18; 11 W.R. 858; 1 Mar. L.C. 353; 143 E.R. 445 29 Digest 229, *1854*.

(3) *Andersen* v. *Marten*, [1908] A.C. 334; 77 L.J.K.B. 950; 99 L.T. 254; 24 T.L.R. 775; 52 Sol. Jo. 680; 11 Asp. M.L.C. 85; 29 Digest 216, *1725*.

(4) *Becker, Gray & Co.* v. *London Assurance Corpn.*, [1918] A.C. 101; 87 L.J.K.B. 69; 117 L.T. 609; 34 T.L.R. 36; 62 Sol. Jo. 35; 14 Asp. M.L.C. 156; 23 Com. Cas. 205, H.L.; 29 Digest 208, *1675*.

(5) *Inui Gomei Kaisha* v. *Attolico* (1918), Lloyd's List, July 20, 1918, unreported.

(6) *Ard Coasters, Ltd.* v. *R.* (1919), 35 T.L.R. 604; affirmed 36 T.L.R. 555, C.A.; 29 Digest 228, *1851*.

(7) *Richard de Larrinaga (Owners)* v. *Admiralty Comrs.*, [1920] 1 K.B. 700; 122 L.T. 551; 36 T.L.R. 147; affirmed [1920] 3 K.B. 65; 89 L.J.K.B. 842; 123 L.T. 485; 36 T.L.R. 595, C.A.; 29 Digest 228, *1851*.

(8) *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666; cited in 2 Doug. K.B. at p. 784; 98 E.R. 1297; 29 Digest 303, *2501*.

(9) *Loraine* v. *Thomlinson* (1781), 2 Doug. K.B. 585; 99 E.R. 369; 29 Digest 303, *2509*.

(10) *Stoomwaart Maatschappij Sophie H.* v. *Merchants' Marine Insurance Co., Ltd.* (1919), 89 L.J.K.B. 834; 122 L.T. 295; 36 T.L.R. 73; 64 Sol. Jo. 99; 14 Asp. M.L.C. 497, H.L.; 29 Digest 230, *1862*.

(11) *Henry and MacGregor, Ltd.* v. *Marten and North of England Protection and Indemnity Assocn.* (1918), 34 T.L.R. 504; 29 Digest 228, *1848*.

(12) *Larchgrove* (*Owners*) v. *R.* (1919), 36 T.L.R. 108; 29 Digest 229, *1853*. A

Consolidated Appeals from orders of the Court of Appeal (WARRINGTON, DUKE, and ATKIN, L.JJ.).

In the first appeal the appellants, the Britain Steamship Co., Ltd., appealed from an order of the Court of Appeal which dismissed their petition of right in respect of the loss of their steamship the *Petersham*. The court decided that the collision B which sunk the *Petersham* during the war of 1914–1918 was due solely to her being navigated at night without lights in accordance with Admiralty Regulation No. 37 made under the Defence of the Realm Regulations. She had been requisitioned by the Admiralty on the terms of a charterparty known as "T. 99," cl. 19 of which provided that the "the risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the C following or similar, but not more extensive, clause: Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

In the second case the steamship *Matiana*, belonging to the British India Steam Navigation Co., Ltd., while homeward bound on a voyage from Egypt with three D other merchant vessels which were being navigated in convoy under Admiralty control, the escort being four warships, stranded in the Mediterranean on the Keith Reef at midnight on May 1, 1918. After laying there some hours she was torpedoed by an enemy submarine, but it was found that she was lost as a consequence of the stranding and the fact of her being torpedoed was immaterial. The convoy had to traverse a part of the Mediterranean which was infested by E enemy submarines, and, with the object of avoiding an attack, the convoy steered a course more northerly than that usually adopted in time of peace. The master of the vessel was bound to obey the orders of the officer commanding the escort. Efforts were made to get the vessel off, but they failed. On May 5, there was a gale, and the vessel became a total loss. The vessel was insured under two policies—one against marine risks and the other against war risks. The material F clause of the war policy insured the vessel against

> "all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after the declaration of war."

The Court of Appeal decided in the case of the *Petersham* that navigation without lights, provided that the errand itself upon which the ship was bound was a G peaceful one—e.g., the carrying of an ordinary cargo from port to port—was a peaceful operation performed under conditions adopted by reason of the existence of a state of war, and was not of itself a warlike operation simply because of the existence of war condition, and, distinguishing the case from that of *British and Foreign Steamship Co., Ltd.* v. *R.* (1), affirmed the judgment of BAILHACHE, J., who dismissed their petition of right claiming from the Crown damages for the H loss of the ship. In the case of the *Matiana* the Court of Appeal held that sailing in convoy was only a device adopted to avoid attack or to provide means of defence or escape in case an attack should be made, being part of a series of precautionary measures taken for the safety of merchant vessels, and they held, reversing the decision of BAILHACHE, J., that the underwriters of the marine risk policy were liable. From that decision the underwriters of the policy, Green and others, I appealed, and there was a cross-appeal by the owners of the ship, the respondents to that appeal being the underwriters of the war risk policy.

In the first appeal:

MacKinnon, K.C., R. A. Wright, K.C., and *C. Robertson Dunlop, K.C.*, for the appellants.

The Attorney-General (*Sir Gordon Hewart, K.C.*) and *Norman Raeburn, K.C.*, for the Crown.

In the other appeals:

R. A. Wright, *K.C.*, and *Claughton Scott* for the marine insurers, Green and others.

MacKinnon, *K.C.*, and *Lewis Noad* for the shipowners, the British India Steam Navigation Co.

Butler Aspinall, *K.C.*, and *Norman Raeburn*, *K.C.*, for the War Risks Insurance Association.

The House took time for consideration.

July 12. The following opinions were read.

VISCOUNT CAVE.—These appeals raise the same question, namely, whether the loss of a ship, in the one case by collision, in the other by stranding, was a consequence of hostilities or warlike operations, or was the result of a marine risk not falling within that description. The facts of the two cases differ, but, as they must be decided on the same general principles, they have conveniently been heard together.

The appeal in the *British Steamship Co., Ltd.* v. *R.* arises out of the loss on May 6, 1918, of a British merchant vessel, the steamship *Petersham*. This vessel, which belonged to the appellants, the Britain Steamship Co., was at the date of her loss in charter to the Admiralty under a time charter in the form known as T. 99. The charterparty contained the following clauses:

> "(18) The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk. (19) The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive, clause: Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

On the night of May 6, the *Petersham* was on a voyage from Bilbao to Glasgow with a cargo of iron ore, and, in accordance with an Admiralty regulation made under the Defence of the Realm Regulation No. 37, was proceeding without navigation lights. At 11.20 p.m., when off Trevose Head in Cornwall, she was run into and sunk by a Spanish merchant vessel, the steamship *Serra*, which was on a voyage from Swansea to Bilbao with a cargo of patent fuel. The *Serra* was also sailing without lights, and the case has been argued upon the footing that she also was bound by the Admiralty regulation to dispense with navigation lights. The night was very dark, and it has been found that owing to the absence of lights the collision could not have been avoided by the exercise of reasonable care and skill on the part of those on board the two vessels. There is nothing to show for what purpose the iron ore was intended to be used, nor is there any evidence that any hostile vessel was, or was believed to be, in the neighbourhood at the time of the collision. A petition of right brought by the owners of the *Petersham* against the Crown for reimbursement was dismissed by BAILHACHE, J., on the ground that the loss of the vessel was not a consequence of hostilities or warlike operations within the meaning of cl. 19 of the charterparty, but fell within cl. 18, and his decision was affirmed by the Court of Appeal. The owners have appealed to this House.

The *Petersham* was lost by collision, and any liability on the part of the Admiralty is, therefore, expressly excluded by cl. 18 of the charterparty, unless the collision was a "consequence of hostilities or warlike operations" within the meaning of cl. 19 of the same document. In order to establish the latter proposition, it is necessary to show, first, that there were hostilities or warlike operations which

could have caused the collision; and, secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations. The rule, long established in cases relating to marine insurance and embodied in s. 55 (2) of the Marine Insurance Act, 1906, that an insurer is not liable for any loss which is not proximately caused by a peril insured against, applies with full force to a clause such as that which is now under consideration: see per WILLES, J., in *Ionides* v. *Universal Marine Insurance Co.* (2) (14 C.B.N.S. at p. 289); and per LORD HALSBURY in *Andersen* v. *Marten* (3) ([1908] A.C. at p. 340). It appears to me that in the case of the *Petersham* the appellants fail to show that there were in fact any hostilities or warlike operations to which the loss of the vessel can be attributed. The word "hostilities" connotes operations of war, which may be either offensive or defensive, and may be undertaken either by the vessel immediately concerned or by an enemy or friendly force. The expression "warlike operations" is said to have been added in order to cover cases where similar acts were done, but no actual outbreak of war had occurred, but, however that may be, the effect of the addition is somewhat to extend the category of acts referred to even where a war is in progress, and the appellants throughout their argument relied upon the expression "warlike operations" as the wider of the two expression. But, in order that the words may apply, there must be some act of war or of a warlike character which could have caused the loss sued upon. Here there was no such thing. So far as is known, there was no enemy ship anywhere in the neighbourhood; and the mere fact that a submarine war was being waged by Germany cannot possibly be regarded as a proximate cause of the collision of those two vessels. No friendly warship was near. Both the *Petersham* and the *Serra* were proceeding upon a peaceful mission, and their desire was not to engage in, but by all means to avoid, warlike operations. It was suggested that sailing without lights in time of war was itself a warlike operation, but that contention appears to me incapable of being sustained. The lights were extinguished in order to avoid the enemy, and there is a well-established difference between a peril insured against and an action taken for fear of such a peril: see *Becker, Gray & Co.* v. *London Assurance Corpn.* (4). Nor can the Admiralty regulation, which was of general application, be said to be an operation of any kind. No doubt the risk of collision was greater by reason of the absence of lights, but it remained a sea risk, though increased by war conditions.

British and Foreign Steamship Co. v. *R.* (1) was relied upon. But that case was clearly distinguishable, as it was there admitted on behalf of the Crown that sailing without lights at night was a warlike operation, and the decision proceeded upon that footing. No doubt the admission could readily be made in that case, as both the vessel concerned, the *St. Oswald* and the French battleship *Suffren*, were proceeding to evacuate troops from Cape Helles, and were, therefore, very plainly engaged in warlike operations. But the admission can have no effect in other cases. The decision of the Court of Appeal in *Inui Gomei Kaisha* v. *Attolico* (5) turned, not on the absence of lights, but on negligence. In the case of the *Petersham*, therefore, I am clearly of opinion that the decision appealed from is right and that the appeal should be dismissed with costs.

The second appeal, *Green* v. *British India Steam Navigation Co., Ltd.*, and the supplemental appeal arise out of the loss on May 1, 1918, of a British merchant vessel, the steamship *Matiana*, which was the property of the British India Steam Navigation Co. This vessel was insured with underwriters against the usual marine perils, including perils of the seas, the policy containing the usual f.c. and s. clause which, so far as material, was in the following terms: "Warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat, barratry, piracy, riots, and civil commotion excepted, and also from all consequences of hostilities and warlike operations, whether before or after declaration of war." She was also insured with the Liverpool and London War

Risks Insurance Association against war risks, the material clause in this policy insuring the vessel against

> "the risks of capture, seizure, and detainment by the King's enemies and the consequences thereof, or any attempt thereat, and all consequences of hostilities and warlike operations by or against the King's enemies, whether before or after declaration of war."

On April 24, 1918, the *Matiana* left Alexandria for a British port with a cargo of cotton. At that time sailing under convoy was compulsory, and the *Matiana* with three other merchant ships sailed under convoy with an escort of four of His Majesty's ships. By s. 46 of the Naval Prize Act, 1864, and s. 31 of the Naval Discipline Act, 1866, the master of a vessel sailing under convoy is bound under a penalty to obey the orders of the officer commanding the escort in all matters relating to the navigation of his ship, and those orders may be enforced (if need be) by force of arms. On May 1, the convoy was traversing a part of the Mediterranean between Sardinia and Cape Bon, which was usually infested with submarines, and was steering a course more northerly than that which is usually adopted in time of peace. Just before dark, the convoy then sailing N. 30 W., the senior naval officer in command of the escort gave orders that on a given signal the course should be changed to N. 81 W. This signal was given at 9.30 p.m., and the course was changed accordingly. At 10 p.m. the order was given to zigzag. The merchant vessels were proceeding in line abreast, the escorting ships being round about the convoy. At about 12.15 a.m. the *Matiana*, which was the second ship from the left, struck a small reef called the Keith Reef, which is unlighted. The night was calm, and no breakers were seen before she struck. Some eleven hours later she was torpedoed, but it has been found that the ship was lost as a consequence of the stranding, and that the fact of her being torpedoed made no difference in this respect. The reef is shown on the Admiralty chart with the words "generally breaks," and on the large-scale chart there is a note that "as the currents are uncertain, both in strength and direction, and the reef not always visible, care should be taken to give all these dangers a wide berth." The master of the *Matiana* gave evidence that at the time of the stranding he believed that his vessel was some nine miles to the south of the Keith Reef. The naval officer in command of the escort was not called to give evidence. An action was brought by the owners against the Liverpool and London War Risks Insurance Association, and, alternatively, against the marine risk underwriters, to recover the loss. BAILHACHE, J., found that no negligence was proved either on the part of the master of the *Matiana* or on that of the King's officer, and being of opinion that sailing under convoy was a warlike operation and that the loss was directly due to that operation, he gave judgment against the War Risks Insurance Association. On appeal, the Court of Appeal reversed this decision and gave judgment for the war risk underwriters and against the marine risk underwriters. The marine risk underwriters appealed to this House, and thereupon the owners gave a counter-notice of appeal claiming that, if the marine underwriters were not liable for the loss, the war risk underwriters were so liable, and these two appeals have been consolidated. There is no doubt that the owners are entitled to be compensated by one set of underwriters or the other, and the only question is on which side the liability falls.

In order to determine this question it is first necessary to inquire (as in the former case) whether there were any hostilities or warlike operations which could have caused the loss. I think there were. No enemy craft is known to have been in the neighbourhood at the time of the stranding, and the loss cannot be attributed to hostilities on the part of the enemy. Nor, in my opinion, is it correct to say that the *Matiana* was herself engaged in any warlike operation. It is true that she was being convoyed by warships, but that was done for her protection against

possible attack, and she herself formed no part of any attacking or defending force. In this respect I agree with ATKIN, L.J., who says:

> "It appears to be fallacious to identify the merchant vessels sailing in convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peacelike operation of conveying merchandise by sea. The sheep are not the shepherd, and are not engaged in the operation of shepherding."

But, in my opinion, the British warships which formed the escort of the convoy were engaged in a warlike operation. It has been said that almost any movement of a warship of a belligerent Power by sea in time of war is a warlike operation; and that term would certainly appear to cover an expedition undertaken by vessels of war in wartime for the protection of merchantmen against the enemy.

Assuming this to be the case, however, there remains the crucial question whether the operation of the convoying vessels was the proximate or direct cause of the loss of the *Matiana*. I think it was. The inference which I draw from the facts above stated is that the loss was the direct consequence of the orders given by the naval officer in command to take the course which he prescribed. No doubt the existence of the reef and its surrounding currents was a condition without which the vessel would not have stranded; but the true cause of the stranding was the act or event which brought the vessel within their dangerous influence. If she had been driven upon them by a storm or by hostile pursuit, or had been brought there by the negligence of those on board, the loss would have been properly described as caused, not by the reef or its currents, but by the storm, or by the enemy, or by bad seamanship, as the case might be. In fact, she was compelled to enter the area of danger by the orders of the officer commanding the escort, which she had neither the right nor the power to disobey; and I think the true conclusion is that those orders were the direct and determining cause of her loss. It is contended that, even if this be so, it does not follow that the loss was a consequence of warlike operations, as the giving of an order cannot in itself be an operation. Perhaps it cannot, if the order stands alone. But in the present case the orders were a part of the conveying operation, which included the choice of the route, the setting of the course, and the precautions taken on the voyage; and I do not think that the transaction can be split up and treated as in part an operation and in part something other than an operation. It was the duty of the commanding officer, for the protection both of the warships under his command and of the merchant vessels under his care, to direct the course of the convoy as he thought best; and in doing so he was but carrying out the operation with which he was charged. In my opinion, therefore, the loss was a consequence of warlike operations within the meaning of the war risk policy.

The Court of Appeal came to a different conclusion, and it remains to consider the reasons upon which their decision was founded. The judgment of WARRINGTON, L.J., was mainly based on the view that neither the escorting nor the escorted vessels were engaged in a warlike operation; and I have already given my reasons for holding that the escorting vessels were so engaged. But the learned lord justice added:

> "Assuming that the order of the commander was a part of the operation, I do not think it was proved in this case that the loss was directly caused by that or by the master's obedience to it. The plaintiffs in fact leave it in doubt whether the stranding was inevitable if the order was obeyed or whether there was some other cause, such as the effect of currents, which brought it about."

DUKE, L.J., did not deal expressly with this point, but ATKIN, L.J., expressed his view as follows:

> "The actual loss was caused by an ordinary sea peril, stranding. It seems to

me impossible to say that the naval officer directed her on to the reef, or that her striking was the inevitable, or even the probable, consequence of his order. That she struck the reef was a mischance. It would not be calculated. It was not proximately caused by the order. It was precisely the kind of mischance that constitutes a marine peril when voyaging an unknown or uncharted route. No doubt, by taking the course she was ordered, she was exposed to the risk of striking the reef; but in my view the true result of the order was merely to expose the ship to a greater chance of suffering a loss from marine peril."

I feel the force of this reasoning, but, with great respect to the learned lords justices, I think it gave too little weight to the special facts of this case. No doubt the loss was actually caused by stranding, but it is necessary to look beyond that fact and see what caused the vessel to strand. The position of the reef and the dangerous nature of the currents surrounding it appeared upon the chart and were known to everyone; and but for the orders of the naval officer the *Matiana* would not have found herself anywhere near them. The naval officer was not called, and we do not know why he gave the order to turn at the moment when it was given. He may have been out of his reckoning at that moment, or he may have under-estimated the effect of the tide or the currents on vessels pursuing a zigzag course. He may even (as BAILHACHE, J., suggests) have run the risk of the rocks to avoid some submarine danger known to or suspected by him. But in any case he set the course which took the *Matiana* into the area of danger. Having entered the area she could not by any exercise of seamanship on the part of her officers have avoided the rock which was submerged and invisible. Her striking was not a mischance due to the ordinary perils of the sea. It may not have been the inevitable, but it was the not improbable consequence of the order given by the naval officer, and was its actual result. If I may borrow the apt illustration used by ATKIN, L.J., in a passage which I have already cited from his judgment, I should say that, if a shepherd in order to avoid the wolf were to drive his sheep along a path leading to a precipice down which they fell, the loss of the flock would be a direct consequence of his pastoral operations. Here the escort (either by reason of some error or for some other cause) shepherded the *Matiana* into a course which led to the reef, and her stranding was the result.

The authorities, so far as they go, support the above conclusion. In *Ard Coasters, Ltd.* v. *R.* (6) a trading vessel was accidentally run down by a British destroyer engaged in patrolling for submarines, and in *Richard de Larrinaga (Owners)* v. *Admiralty Comrs.* (7), a vessel was lost by collision with a warship which was on her way to take up a convoy. In each case it was held by the Court of Appeal that the loss was the direct consequence of a warlike operation. Of course, those cases are distinguishable from the present, as in each of them the warship came into actual collision with the vessel which was lost; but they are useful as showing that a warship may be engaged in a warlike operation though no attack upon or by the enemy is impending or immediately apprehended, and also that an accident which is not the inevitable or calculable result of the course taken by a warship may yet be the direct consequence of her action. Upon the whole, I have come to the conclusion that the loss of the *Matiana* was a "consequence of hostilities or warlike operations," and, accordingly, that the war-risk underwriters are liable. I would set aside the order of the Court of Appeal in this case and restore that of BAILHACHE, J., with costs here and below.

LORD ATKINSON.—It has long been firmly established as a rigid principle of the law of marine insurance to be unfailingly applied, that in order to recover on a policy damages for the loss of a ship by one of the perils insured against that peril must be proved to have been the direct and proximate cause of the loss. The *Petersham*, a cargo-carrying ship, was lost on May 6, 1918, in consequence of a collision with another ship, the Spanish steamship *Serra*.

Collision at sea is primâ facie a sea risk. The burden on rebutting that presumption rests in this case upon the suppliant. Whatever be the true meaning of the words "hostilities" and "warlike operation," as used in cl. 19 of the charterparty known as "T. 99," under which the *Petersham* was chartered, the suppliants can, on the facts proved, only recover the damages sued for by establishing affirmatively that this collision was not a sea peril, but was the direct and proximate consequence of an act of "hostility" or of a "warlike operation," or, in other words, that an act of "hostility" or a "warlike operation" was the direct and proximate cause of the loss. I concur with ATKIN, L.J., in thinking that the word "hostilities" connotes the idea of belligerents properly so called, enemy nations at war with one another, and is used to describe the operations, offensive, defensive or possibly protective of the one against the other, in the conduct of their war. I also concur with him in thinking that the words "warlike operations" have a much wider reach, and not only include "hostilities," but cover, even where a state of war does not exist, operations of such a general kind or character as belligerents have recourse to in war, as, for instance, where combative operations are undertaken to suppress a rebellion against an allied or friendly Power, or where the territory of a nation may "before war has been declared" require, in anticipation of attack, to be protected by such defensive measures as laying down mines. The transfer of the combative forces of a Power from one area of war to another, or from one part of an area of war to another part for combative purposes would, I think, be a "warlike operation" within the meaning of this charterparty, as would also be the patrolling by the ships of war belonging to a nation of the sea coast of that nation, or an allied nation for the purpose of preventing invasion, or even for the purpose of protecting from hostile attack by enemy vessels the lives and property of the inhabitants of sea-board towns. If, in the course of this patrolling, a ship of war collided with and sank a merchant vessel, the loss would, of course, be a direct consequence of a "warlike operation." If, however, the inhabitans of such a town, in order to prevent its being made a target for the fire of an enemy's vessels of war, chose voluntarily, or upon compulsion, to screen all their lights and bury their town in almost complete darkness, this wise measure of precaution could not, I think, with reason be described as a "warlike operation," though it might incidentally vastly increase the dangers attending locomotion in the streets and thoroughfares of the town. And just as I am of opinion that patrolling such as I have mentioned would be a "warlike operation," so also am I of opinion for the reasons I shall presently give more fully, that the shepherding, directing and protecting from possible attack by ships of war of convoyed merchantmen are on the part of those ships of war, though not on the part of the merchantmen convoyed, "warlike operations." Of course, if a merchantman chose to take combative action, such as attempting to ram an enemy submarine, that action would while it lasted be a "warlike operation." The sailing over the sea by a cargo-carrying ship from port to port is in its nature a peaceful adventure, whether undertaken by day or night, in war time or in peace time. But the dangers which in war time beset such an adventure, especially the danger of attack by enemy submarine, may not only justify, but absolutely require, that certain conditions should, as precautions against possible hostile attack, be imposed upon these merchantmen as to the mode and manner in which they shall carry out their adventures. One of those conditions is, that when sailing at night they shall not exhibit their regulation lights. It is a purely negative thing, not in any way combative or aggressive in character. The non-exhibition of those lights during darkness, no doubt, necessarily increases considerably the risks of collision, since those who navigate such ships may, by reason of it, be rendered unable to see an approaching ship in time to manœuvre so as to keep clear of her, but as a recompense it is designed and presumably calculated to protect her to a considerable degree from submarine attack. The lights both of the *Petersham* and the Spanish ship were concealed when they collided. The collision, no doubt, was brought about by that

concealment; neither ship has been found guilty of negligence. I do not think, however, that a voyage such as that upon which each of these ships was engaged—a voyage which in time of peace would be treated as an ordinary maritime adventure—becomes either a "hostility" or a "warlike operation" within the meaning of this charterparty, merely because of the fact that, as a precaution against possible attack, she is compelled not to exhibit her regulation lights during the night, even though consequences indicated should follow from this concealment. Counsel for the suppliants contended (i) that the making by the Admiralty of an order that vessels should, when voyaging, not exhibit their "regulation lights" was in itself a "warlike operation," and (ii) that even if not, obedience to such an order, if rendered, was a "warlike operation." Such orders are no doubt made for the purpose mentioned during war; but neither the making of them nor the obedience to them is, in my view, a "warlike operation" within the meaning of the charterparty.

British and Foreign Steamship Co., Ltd. v. *R.* (1), referred to in argument as the *St. Oswald Case*, is in all essentials fundamentally distinguishable from the *Petersham Case*. In that case the vessel which was lost was requisitioned by the Admiralty and bound to obey the orders given through its accredited officers. She was, at the time of her loss, employed in obedience to these orders on a service which was in its very nature a "warlike operation," namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. It is true that at the time of her collision with the French battleship the *Suffren* she had not got these troops on board, but she was, under Admiralty orders, hurrying at full speed to the port at which she was to take them on board. This circumstance does not, in my view, alter the character of the operation she was at the time of collision performing. Again, the *St. Oswald* was sunk in an area of naval warfare by an Allied warship presumably engaged at the very time in carrying out "warlike operations." From whatever point of view the disaster be regarded it was, I think, the direct and proximate consequence of a "warlike operation." The decision in it has no application to the case of the *Petersham*. In the latter case the appeal, I think, fails and should be dismissed with costs.

The case of the *Matiana* is one of an entirely different character from both these cases. It presents much greater difficulties. These difficulties are somewhat increased by the fact that the senior naval officer who commanded the ships of war convoying the four merchantmen of which the *Matiana* was one, and gave the orders as to the courses the latter should follow, was not examined as a witness. The war risk policy, dated Mar. 13, 1918, effected on the *Matiana* with the Liverpool and London War Risk Association, Ltd., contained the following cl. No. 9:

> "The said ships shall be deemed to be at all times fully insured against all perils covered by an ordinary Lloyd's policy with collision clause attached and containing an f. c. and s. clause in the following terms: 'Warranted free from capture, seizure and detention and the consequences thereof, or any attempt thereat, barratry, piracy, riots and civil commotion excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war'."

Shortly after midnight on April 30, 1918, the *Matiana* ran upon the Keith Rocks, on which there were no lights, and, the night being calm, there were no breakers which might have been observed by those on board the vessel as she approached these rocks. She was next day, at about 11.30, struck by a torpedo, but BAILHACHE, J., sitting in the Commercial Court, before whom the case first came, held that the position of the *Matiana* was hopeless from the first, and that even if she had not been torpedoed she would have become a total wreck. This finding of fact has not been appealed against. He also found that the master of the *Matiana*

was in no way to blame for the position in which he found himself, and that no negligence was proved against the naval officer in charge of the convoy. A

The question for decision upon this appeal then is whether on the facts proved the loss of this vessel was due to a marine risk or to a war risk, and this, in the result, admittedly depends upon whether a "warlike operation" was or was not the direct and proximate cause of her loss. BAILHACHE, J., found that the loss was due to a war risk and gave judgment accordingly against the Liverpool and London War Risks Insurance Association, Ltd., the underwriters under the war risks policy already mentioned, and in favour of the underwriters under a marine risk policy. The case before BAILHACHE, J., is reported at [1919] 1 K.B. 632. From this report he seems to have based his decision on the view that to sail with a convoy is in itself a warlike operation, not only on the part of the ships of war which compose the convoy, but also on the part of the merchant ships convoyed, and that no negligence contributing to the disaster having been proved either against the master and crew of the *Matiana* or those of any of the ships of war, the loss of the *Matiana* was a war risk. He states his view clearly in the following passage of his judgment: B C

> "To sail in convoy is in my opinion a 'warlike operation.' The assembling of the ships to be convoyed, and of the men-of-war to convoy them, the voyage of the whole flotilla, the route chosen, and the precautionary measures taken on the voyage must all be taken together as all parts of a 'warlike operation.' In this case vessels pursued a zigzag course through a submarine infected area and some thirty miles to the northward of the ordinary peace-time course. The stranding happened in the course of this 'warlike operation,' and subject to another point made by the war risk underwriters was directly due to it." D E

With all respect, I am quite unable to concur in the learned judge's view that the merchant ship convoyed, whose task was simply to sail peacefully on the course they might be directed to follow, and to keep their proper places in the convoy, became so identified with the ships of war directing and protecting them as to be treated as members of a joint flotilla engaged in a common enterprise. I concur with ATKIN, L.J., in thinking that the learned judge treats, as he said, the sheep and the shepherd as both engaged in the operation of shepherding. The duties and proper tasks of convoying warships and the ships they convoy are respectively indicated in ss. 30 and 31 of the Naval Discipline Act, 1866. The naval officers are to diligently perform the duties of convoying and protecting the ships they are appointed to convoy according to instructions, to defend these ships and the goods they carry without deviation, to fight in their defence if they are assailed, and not to abandon them or expose them to hazard. Every master or other officer in command of any merchant or other vessel convoyed is bound to obey the commanding officer of the ships of war in all matters relating to the navigation or security of convoy, and is also bound to take such precautions for avoiding the enemy as may be directed by this commanding officer. It does not appear, however, that this latter officer has any power to require the master officers or crew of any merchant ship which is being convoyed to take combative action against a vessel of any kind, or to join in such action if taken by all or any of the ships of war. The rôles of the two classes of ships while being convoyed are entirely different in nature and character. That of the ships of war is protective and, if need be, combative, that of the merchantmen is not at all combative; and, as far as the circumstances permit, is as peaceful in nature and character as would be their enterprises in time of peace. F G H I

If this latter be the correct view, as I think it is, then, in order that the underwriters of the war risk policy may be made liable, the "warlike operation" which is the proximate cause of the loss of the *Matiana* must have been something which was done by the attendant warships or their officers. The loss of a ship by striking or grounding on rocks is, as I have said, primâ facie a marine risk. The burden

of proving that it is in this case a war risk rests upon the owners of the *Matiana*, or on the underwriters under the marine policy. The question for decision resolves itself, I think, into this: Has that burden been discharged by the evidence given in the case? WARRINGTON, L.J., sums up the evidence with accuracy and sufficient fullness to enable one to decide that question. He says ([1919] 2 K.B. at p. 680):

> "The steamship lost was bound from Egypt with cotton. The convoy had to traverse a part of the Mediterranean between Sardinia and the Gulf of Tunis which was infested by enemy submarines. With the object of avoiding an attack the convoy steered a course more northerly than that usually adopted in time of peace. At 9.30 p.m., under the orders of the senior naval officer, the course was changed from N. 30 W. to N. 51 W. The ships had been warned earlier in the evening that this change of course would be made. At about 12.15 a.m. the *Matiana* struck a small reef called the Keith Reef, which is unlighted. Her master believed that at 9.30 p.m. his position was such that a course of N. 51 W. would have taken him nine miles to the southward of Keith Reef. The naval officer in command was not called, and nothing is known as to his information at the time he gave the order to turn. The currents in that neighbourhood are very uncertain. The convoy was sailing zigzag from 10 p.m. until the accident occurred. The master says, however, that notwithstanding this he was keeping a correct mean course of N. 51 W. Either the ship must have been further to the northward at the time of the turn than was supposed or she must have drifted north during the three and a half hours from 9.30. There was no evidence given showing how it came about that she struck the rock without going south of it, neither was there any evidence to show that the naval officer's order to change the course was given in consequence of information that a submarine was in the neighbourhood. In fact, the contrary would appear to be the case, for the change had been arranged some hours before, the moment of the change only being left to be decided. The course prescribed was ordered not for the purpose of avoiding or resisting attack by a particular enemy whose presence was unknown, but as part of a series of precautionary measures taken for the safety of merchant ships in waters in which enemy craft might not improbably be encountered."

The learned lord justices (ibid., at p. 684) expresses the opinion that there was no "warlike operation" in this case of which it could be said that the loss was the consequence, but on the following page he says:

> "I think it was incumbent on these who seek to throw the loss on the war risk underwriters to prove that the loss was the direct consequence of some 'warlike operation.' Assuming that the order of the commander was a part of the operation, I do not think it was proved in this case that the loss was directly caused by that order or by the master's obedience to it. The plaintiffs, in fact, leave it doubtful whether the stranding was inevitable if the order was obeyed, or whether there was some other cause, such as the effect of currents, which brought it about."

DUKE, L.J., after assuming that the naval vessels of the convoy were engaged in a warlike operation says (ibid., at p. 690):

> "I am satisfied that in point of fact the *Matiana* was never ordered to do, never did, and never participated in any warlike operations or belligerent act. She never lost her character of a ship carrying merchandise."

ATKIN, L.J., says (ibid., at p. 698):

> "It appears to me falacious to identify the merchant ships sailing with the convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting the non-combatant vessels from the enemy. The

merchant vessels are engaged in the peaceable operation of conveying merchandise at sea. The sheep are not the shepherd, and are not engaged in the operation of shepherding. It is true that the merchant ships have to obey the instructions of the commanders of the warships."

On the next page he says:

"But the fact that the non-combatants are in particular instances, or in particular areas, made subject to the orders of combatant officers does not appear to me sufficient ground for inferring that while obeying those orders they are engaged in combative action of warlike operations. . . . I have come to the conclusion that the *Matiana* was not engaged in a 'warlike operation.' But this in itself is not sufficient to decide the case, for it was urged that at any rate the loss was the consequence of a warlike operation by the commander of the escort in controlling the course of the ship. I doubt very much whether the giving of an order can itself ever be an operation. That which is done under it is the operation. But I will assume that in giving the order, when he (the commander) did, to take a particular course he was performing a warlike operation. Was the loss the consequence of it? The actual loss was caused by an ordinary sea peril—stranding. It seems to me impossible to say that the naval officer directed her (the *Matiana*) on the reef, or that her striking was the inevitable or even probable consequence of his order. That she struck the reef was a mischance. It could not be calculated. It was not proximately caused by the order. . . . No doubt by taking the course she was ordered to take she was exposed to the risk of striking the reef; but in my view the true result of the order was to expose the ship to a great chance of suffering a loss from marine peril."

I entirely concur in the views thus expressed by ATKIN, L.J. I think the owners of the *Matiana* and the underwriters of the marine policy have failed to discharge the burden which rested upon them, that in this case, as in that of the *Petersham*, the appeal fails and should be dismissed with costs.

LORD SHAW.—I think both of these cases are accompanied with great difficulty. The refinement of distinction between them and others, and especially between these two themselves, perplex the mind.

In the result I have come to be of opinion that the loss of the *Petersham* was approximately caused by a peril of the sea. It is, no doubt, true that when she and the *Serra* on the night of the collision were sailing without lights they were doing so in conformity with a general regulation issued by the authorities in consequence of the existence of a state of war. The results of lights being exposed would have been to place valuable British assets at the mercy of the submarine or other armed naval forces of the enemy; and the saving of these assets from falling into enemy hands or from being destroyed by enemy power was an object which, in a general sense, might be subsumed under the term of defence of the realm. Accordingly, during the period of war the authorities charged with the subject, whether naval, military, or civil, were entitled to promote that defence by the issue of regulation and order. I do not see my way, however, to hold that the issue of such orders or regulations converted risk of collision, which under an ordinary policy falls within the category of a sea risk, into an exception from that category. The sailing without lights added to the quantum of that sea risk; it made the chance of collision greater, but I agree respectfully with the courts below, and especially with the view of ATKIN, L.J., upon this point in thinking that it did not convert the risk into one arising as a consequence of hostilities or warlike operations. Clauses 18 and 19 of the time charter-party T. 99 have already been cited. From cl. 18 it is seen that the loss of a steamer in collision is classed alongside any other cause arising as a sea risk; while cl. 19 enumerates the risks of war which are taken by the Admiralty. They mention

capture, seizure and detention and the consequences thereof or of any attempt thereat except piracy, and proceed: "and also from all consequences of hostilities or warlike operations whether before or after declaration of war." It appears to me that it would require (a collision of two ships at sea having occurred) something more than a regulation or order for safety on the voyage, something of the nature of an actual and accomplished change of facts of the nature of an operation conducted in the course of hostilities of war, to lift the event of collision into the category of war risks. I accept, accordingly, the result reached by the courts below.

I reach a different result in the case of the *Matiana*. I think that the putting of a vessel under convoy, with all that that involves, is an actual and accomplished change of circumstances and an operation conducted in the course of hostilities or war. The loss of the vessel, in my humble opinion, did arise out of "the consequence of hostilities or warlike operations, and that the case is, therefore, from the scope of a maritime peril and falls within the war risk insured against." It is in this view that I think it necessary to quote the terms of the Naval Discipline Act, 1866, which still bound the merchant shipping of this country during the recent war. Section 31 of that Act provides:

> "Every master or other officer in command of any merchant or other vessel under the convoy of any ship of Her Majesty shall obey the commanding officer thereof in all matters relating to the navigation or security of the convoy, and shall take such precautions for avoiding the enemy as may be directed by such commanding officer; and if he shall fail to obey such directions, such commanding officer may compel obedience by force of arms, without being liable for any loss of life or of property that may result from his using such force."

It is difficult to figure language which more emphatically puts the naval commander of the convoy in control of the movements of the merchant vessel. To all intents and purposes it is the same as if he had placed on the convoyed ship a naval officer in command, as subordinate to himself. In short, so far as the direction of the course of the vessel was concerned, the merchant captain and officers were no longer in control. The naval officers were. Not only so, but the orders of the commander of the convoy were clothed with the instant sanction of force. An order disobeyed might be followed by the guns of the convoy being levelled or fired against the offending vessel, and the officer is secured by statute against liability for any consequent loss of life or property. I do not doubt that, so far as the ships acting as convoy were concerned, they were thus conducting a warlike operation. I think the decision *Ard Coasters, Ltd.* v. *R.* (6), to the effect that a warship patrolling in the course of her duty and thereby causing a collision with a merchant vessel, was a right decision. Suppose in the present case one of the ships acting as convoy had run down one of the ships convoyed. I can hardly doubt that that event would have been similarly found.

The case, accordingly, is narrowed to the distinction between ships which are acting as convoy and the ships which are themselves under convoy. I myself see great force in the view which BAILHACHE, J., so clearly expresses to the effect that all the vessels, those acting and those under convoy, must be treated as a unity. He concludes accordingly that they were all engaged in warlike operations. I respectfully agree with that learned judge. My Lords, it is not necessary, in my opinion, and I say this having fully in view repeated expressions of opinion in this case in the courts below, to postulate that the vessel to which the accident or calamity occurred was itself actually and individually engaged in hostilities or warlike operations. The policy does not say so. What it says is that the thing which is insured against is "the consequences of hostilities or warlike operations," but it does not say "in consequence of hostilities or warlike operations in which the vessel itself is engaged." I am humbly of opinion that, so far as ships under convoy are concerned, all these ships are, along with the ships acting as convoy, under a unified command, and that command issuing from the commander of the convoy is, as part of the direction of

the convoy, a military operation. The consequence of it upon those merchant vessels to whom the command was issued was to place them compulsorily in a situation of peril in which unquestionably they would not have been placed but for the course thus forced upon them. These vessels might, of course, be said not in themselves to have been engaged in either hostilities or warlike operations, but that they suffered this peril, and in the case of the *Matiana* this loss, as a consequence of warlike operations, seems to my mind clear. The first broad fact of this case is that, if the *Matiana* had not been under convoy, she would not have been in that part of the sea, where the peril of currents driving her on the rocks occurred. The vessel was stranded on Keith Reef, N.E. of Biserta to the north of the Gulf of Tunis. There is no disputing the case that at this time the Mediterranean was the scene of very frequent submarine sinkings amounting to so many as five per day, and that there were "notorious tracts specially bad." Describing this "dangerous neighbourhood" in which was the Keith Reef, Captain Lane mentions the Riddlecombe Patch, the Hecate Patch, the Locust Patch, and Skerki Bank, and tells how in the ordinary course of navigation one would keep well clear of such a neighbourhood. In these circumstances, the naval authorities, acting no doubt to the best of their wisdom in trying circumstances, put the *Matiana* and three vessels under convoy, and the course of the convoy was steered into this unquestionably dangerous zone. A note on the chart is quoted by the witness mentioned to the following effect: "As the current are uncertain both in strength and direction, and the reef not always visible, care should be taken to give all these dangers a wide berth." The evidence is quite clear that this was the rule of navigation with regard to that locality. In the ordinary course of navigation, merchant vessels will keep well clear of it, the witness saying: "We should not go anywhere near it, not in peace time." However, the captain says: "All the courses that I took were from the senior naval officer. He was the man who gave all the orders." Being questioned: "You were then, I take it, entirely under the direction of the senior naval officer? You could not yourself fix your vessel?", he answers: "No. He told us when he blew the whistle and gave the signal to alter our course. It was too dark to take stars or anything like that." It is admitted that the vessel was exactly thus in the convoy when it—one of the four vessels convoyed—struck the reef. Be it that the ship was about nine miles to the southward of what was expected; it was in waters where the currents were so strong that a mistake of that kind was not unnatural, and against it the officers and crew of the *Matiana*, obeying naval orders, were helpless. Proper or ordinary navigation free from convoy would never have placed them or the ship within this danger zone.

I ask myself the question: What difference in principle would it have made if, instead of the senior naval officer directing the course of the *Matiana*, that commander had put the *Matiana* in tow by a hawser from the stern of the *Clematis*, and guided her not only into the dangerous reach of the current, but towed her, unknowingly and in the dark, on to the rocks? I could not have seen my way to hold that the stranding did not then occur in consequence of a warlike operation; and I think that the same reasoning must be applied to the present case. The refinement is too great for me to appreciate it which would distinguish the loss of a vessel acting as convoy from the loss of a vessel, either physically convoyed as I have suggested by hawser or convoyed in her course by compulsory compliance with orders therefrom, taking and keeping her place and distance relative to the other ships of the expedition and according to the prescribed points of the compass. On these grounds I am of opinion that the loss of the *Matiana* was an event which, in the language of the policy, arose from one of the consequences of hostilities or warlike operations. In my view the judgment of BAILHACHE, J., was correct and should be restored.

LORD SUMNER.—In the first of these two cases, that of the *Petersham*, the suppliants claim on a ship's time charter in form T. 99. In the second case, that of the *Matiana*, the action is brought on a policy of insurance against all perils excluded

A from an ordinary Lloyd's policy by the f.c. and s. clause set out. The *Matiana* was insured at Lloyd's and her owners sued alternatively on the Lloyd's policy. Thus the owners of the *Matiana* recover on one policy or the other, and the dispute is between two sets of underwriters; in the case of the *Petersham* the owners bear the burden of failure themselves. It was not disputed that the claim on the charter-party was to be treated as a claim on a policy of insurance, nor were the differences B in the wording of the clauses in the two cases alleged to establish any substantial difference between them for present purposes. In effect the claim in each case is for a loss proximately caused by consequences of warlike operations. One ship was sunk in collision; the other stranded and never got afloat again. The risks excepted by the f.c. and s. clauses employed are, among others, risk of such collisions and strandings (which in themselves are losses by perils of the seas) as may be proxi- C mately caused by hostilities or warlike operations or their consequences. In each case, therefore, two questions arise: (a) Was the collision or stranding caused by any act or consequence of hostilities or by any warlike operations or consequence thereof, and, if so what? (b) Was it proximately so caused?

I will take the *Petersham* first. She was steaming at night without showing her lights, and met the *Serra*, which was doing likewise. Each failed to make the other D out till it was to late. Each was peacefully sailing the seas on her lawful occasions, and the *Serra* was actually a neutral bound not to engage in any warlike operation. In showing no lights each was only doing what all ships did a few generations ago and what some ships did quite recently in unfrequented waters to save a little oil. Sailing the seas even under conditions of modern maritime warfare is not in itself the same thing as traversing a battlefield on land, though even that may be done on a E peaceful errand. To go ahead in the dark may be foolish or wise, but it is not warlike, nor is it made warlike because what would otherwise be blameworthy is done in obedience to lawful commands. No doubt, the object is to avoid being seen if the enemy is present, but if no enemy is present the act is a precaution only, and, fortunately, is not needed. The operation of the *Petersham* and the operation of F the *Serra* were in each case peaceable; neither was doing anything warlike separately, nor were they doing anything warlike together. Nor, again, was the operation of those who issued the order warlike, though it was performed in time of war. It did not become a warlike operation merely because its object was to baulk warlike operations on the part of the enemy. I say nothing of hostilities because of actual hostilities there was no evidence at all. Whatever may have been the case in *British and Foreign Insurance Co.* v. *R.* (1) which turned on an admission by the G Crown, I think that, in the circumstances of the *Petersham's Case*, sailing without lights was neither a warlike operation nor was it the consequence of one. The fact is that each of these ships was making a peaceable voyage under wartime conditions, and no more. Historically, it was due to the enemy's submarine campaign, but not as its proximate consequence.

H As for the *Matiana*, she was sailing with convoy. She was bound to take her course from the senior officer of the convoy and did so; and, thanks to the set of a variable current, she came unexpectedly on to the Keith Reef. Her operation also was proceeding on her trading voyage. It is true she did so by an unusual route, but the deviation was justifiable and obligatory. She found in her way a rock, submerged and unlighted, which, in itself, was a marine peril. It was a moonlight I night, and if there had been any wind she would probably have seen the break of the sea on the reef in time. As it was a still night she had no warning and she stranded. Why is such a stranding a consequence of warlike operations? The *Matiana* had to do as she was told, but she was not told to go aground either directly or indirectly. I think that the case of the *Matiana* can only be distinguished from that of the *Petersham* by dwelling on the facts, first, that she was in convoy, and, second, that, in addition to general orders as to not exhibiting lights, she was under particular orders as to the course to be shaped and the stations to be kept. In brief, sailing

with convoy is only sailing in company and is no more a warlike operation than sailing alone. If, for the sake of protection in case of danger, the *Matiana* had kept as close as she could to a King's ship casually encountered, she would still have been peacefully occupied. What difference is made by additional orders given ad hoc by the senior naval officer? It is suggested that the case is the same as if he had been on her bridge, had himself laid and directed her course and had her steered straight on to the reef. Even if it were so, I am by no means prepared to say that this would have sufficed. Not everything done by a King's ship or a King's officer, in time of war is necessarily a warlike operation or the consequences thereof. I refrain from discussing the particular cases cited of damage done directly by men-of-war lest any case decided on their authority may be under appeal to your Lordship's House, and might seem to be prejudiced by anything said now. Collision between the *Matiana* and a man-of-war would have raised considerations which, whatever their value, do not arise now, but I think the sufficient answer to the above contention is that the case is not that of a King's officer being on the *Matiana* bridge in responsible charge of the helm. It is not a case of deliberately running her aground for some purpose of war. Her course and station having been prescribed some hours before, she was in her own officers' charge, and there is no evidence to show or to suggest that the avoidance of a local obstacle in her track was not left to them, or that her orders were to keep her course let the consequence be what it might. There is nothing to suggest that, if the rock had been visible, she was not entitled and bound to manœuvre so as to avoid it. Her officers were not to blame for they could not see it, but her inability to see the rock seems to me to be indistinguishable from the *Petersham's* inability to see the *Serra*. There was nothing warlike about it—the peril of it was of the seas. For the rest, the order given by an officer in company and in authority referring to a compass course does not really differ from an order given generally in Admiralty regulations; it is a special order, but it is an order to do or to refrain, like the general order as to lights. Warlike operations and hostilities generally prevailing supplied the reason for it, but even if it was a consequence of an operation of war, the stranding was not its proximate consequence.

Ionides v. *Universal Marine Insurance Co.* (2) was relied on in this connection. It was argued, as I understood, that the illustrations given by ERLE, C.J., were in point as showing that importance attaches to the presence or absence of negligence in the navigation of the vessel lost. Collation of the different reports, especially of that of the LAW JOURNAL with that in the COMMON BENCH REPORTS, satisfies me that the allusion to negligence in the illustration of an escaping ship which takes a free channel but negligently runs aground, really meant that the channel was truly free, for escape by it was possible. This was proved by the fact that a better seaman would have made his escape by it. Hence the loss of the ship by stranding in the supposed case was not a loss by an attempt at capture, from which, try as he would, the captain had no escape. It was a loss by stranding, due to the helm action taken and the course laid, when the captain might have done otherwise, and the attempt at capture was a remote cause only. The fugitive ship, so far from being a lost ship from the beginning, as in the illustration of a ship hopelessly embayed or a ship deliberately stranded, was really a ship which could have escaped, just as in the illustration where the embayed ship escapes, thanks to a shift of the wind. To say that in ERLE, C.J.'s, illustration the captain's negligence showed that the ship was not stranded proximately by the attempted capture, is no warrant for arguing that a ship must be held to be lost proximately by warlike operations because she was put on the reef by misfortune and not by negligence. It is in this sense that I understand the observations about the trading ship's negligence in the *Larchgrove* (12) and the *Ardgantock* (6) by ROCHE, J., and BAILHACHE, J., respectively.

The remaining argument is that, at any rate, each loss is "attributable" to warlike operations, and hence fully within the clause, and the analogy of a loss by perils of the sea which is held to be irrecoverable when it is attributable to the assured's

own wilful act, was put forward. If that means that a loss not proximately caused by warlike operations but (remotely) attributable to them, is one for which the insurers are liable, in a case like the present, it is contrary to s. 55 (1) of the Marine Insurance Act, for the policy contains no special provision to this effect unless the words "consequences of warlike operations" are pressed beyond anything that they will bear. It is stated in *Ionides* v. *Universal Marine Insurance Co.* (2) that

> "consequence is a compendious description of the perils to be expected and not a description relating to the loss; instead of saying what particular results are to be expected, the word consequence is introduced to denote the class of perils which may result from hostilities."

In the clause as worded in the charter T. 99 the words "piracy excepted," formally adopted in 1898, show that consequence of capture, seizure and detention are perils insured against causing loss, as piracy is. Further, as WILLES, J., says, in the *Ionides Case* (2) "the words all consequences of hostilities, refer to the totality of causes not to their sequence." They are used to save a long enumerative description of incidents of capture, seizure or detention or of hostilities or warlike operations, as if one had said "all forms of hostilities or warlike operations of whatever kind," and some form or kind of hostility or warlike operations must have proximately caused the loss. Things of which it can be predicated that they were caused by hostilities are not themselves causes of loss additional to hostilities, or a new description of peril insured against, so that a remote consequence of hostilities would become a recoverable loss, if proximately caused by something itself describable as a consequence of hostilities. From the earliest time when this system of insuring was employed through all its forms, from the American War of Independence *Tyrie* v. *Fletcher* (8); and *Loraine* v. *Thomlinson* (9), to the present time, what is insured by the war risks cover is some peril causing loss which would have been insured against by the Lloyd's policy, if it had not been excepted out of it by some kind of f.c. and s. clause, and "consequences of capture" were never perils insured against under that policy, but they were losses by perils insured against, if proximately caused. There is, further, no analogy to the case dealt within the Act, s. 55 (2) (a). That is an express provision in the Act and the expression precludes the implication of resort to the origin, to which a loss is "attributable," in any dissimilar case not within the express words. I see no connection between expressly disabling an assured from recovering for a loss, which, though in itself the proximate consequence of perils by the seas, is really self-inflicted by his ulterior wilful misconduct, and interfering with the statutory rule prescribed in s. 55 (1) in a case where an event has happened without fault in any one, and the only question is whether or not it is within the insurance effected. I think that the judgment of the Court of Appeal was right; that the suppliant's petition fails, and that the war risks underwriters were entitled to judgment in the action.

LORD WRENBURY.—I agree in the opinions expressed by my noble and learned friends LORD ATKINSON and LORD SUMNER and shall add only a few words of my own. In the case of each of these vessels the question is whether her loss was a consequence of hostilities or warlike operations within the words "all consequences of hostilities or warlike operations whether before or after declaration of war." As regards the former of the two vessels, the *Petersham*, she was lost by collision with the *Serra*, when both vessels in obedience to Admiralty orders were navigating at night without lights. As regards the latter, the *Matiana*, she was lost by running on the Keith Rocks when sailing in convoy and zigzagging with a view to defeating the operation of possible submarines. There were, in fact, no submarines known or suspected to be in the immediate neighbourhood, but the vicinity was one notoriously dangerous in that respect.

All the decisions have, I think proceeded, and in any judgment have rightly proceeded, upon the footing that the word "hostilities" does not mean "the existence

of a state of war" but means "acts of hostility" or (to use the noun substantive which follows) "operations of hostility." The sentence may be read "all consequences of operations of hostility (of war) or operations warlike (similar to operations of war) whether before or after declaration of war." To attribute to the word the longer meaning, viz., "all consequences of the existence of a state of war" would give the expression a scope far beyond anything which one can conceive as intended. To define the meaning of "operation" in this connection is, no doubt, a matter of great difficulty, and for the purpose of these cases is not, I think, necessary. The question whether there was a warlike operation or not does not turn necessarily on the character of the vessels or vessel. Even a vessel of war is not necessarily engaged at every moment in a warlike operation. Again, the character of the cargo may be irrelevant. In the fact that the holds are filled with (say) cotton or with coal can be found no cause whatever for her (say) coming into collision. On the other hand, her cargo may be relevant. If the enemy be a civilised enemy who will do his best to sink a ship carrying troops or munitions of war but will also do his best not to injure a hospital ship, the fact that she bears the one character or the other may make all the difference in determining whether action taken against her or by her is a warlike operation. If the case be a case of collision between two vessels and one of them is engaged in a warlike operation, that may be enough. This was the case in *Ard Coasters, Ltd.* v. *R.* (6), where a vessel was lost by collision in the dark with a destroyer which was on patrol duty for the purpose of intercepting hostile submarines, and in the course of that duty was turning across the route which vessels in that part of the ocean would normally and properly follow, with the result that she fouled the route of the *Ard Coaster*, which was close to her. If the *British and Foreign Steamship Co.* v. *R.* (1) is right (upon which I feel grave doubt) it must be on a similar ground. I feel great difficulty however in saying that from the mere fact that a vessel is a vessel of war and is steaming in her duty as such, it results that, if she collides with another vessel and sinks her, the loss is in consequence of a warlike operation. If there be only one vessel and she be not engaged in a warlike operation at all the words may still be satisfied. Thus, if the enemy has sunk a vessel in a fairway with a view to causing injury to any vessel which enters in ignorance of the fact, or if the enemy has placed false lights with a view to inducing a vessel to think she is on a course which she is not and a peaceful merchantman is consequently lost, the loss is a consequence of a warlike operation of blocking the fairway or deceiving the vessel. So if a vessel is lost by coming in contact with drifting mines, her loss is a consequence of the warlike operation of laying mines: *Stoomvaart Maatschappij Sophie H.* v. *Merchants' Marine Insurance Co., Ltd.* (10). Again, a vessel not equipped for war at all may be engaged in a warlike operation if, as in *Henry and MacGregor, Ltd.* v. *Marten and North of England Protection and Indemnity Assocn.* (11), she takes the offensive and attempts to ram what she supposes to be a submarine, and in so doing is injured.

But the leading case of *Ionides* v. *Universal Marine Insurance Co.* (2) draws a line, on one side of which lie cases such as those I have mentioned, and on the other lie cases such as those which are before your Lordships. For the present purpose the distinction may, I think, be stated as follows: If the operation relied upon as a warlike operation is one which creates no new risk, but only aggravates or increases an existing maritime risk by removing something which, but for the war, would have been a safeguard against the risk, then the risk is not a war risk. But if the peril be directly due to hostile action, it is a war risk. Of the former of these, *Ionides* is an illustration. By reason of the war and for warlike purposes a light had been removed. Had it still been burning the master of the *Linwood* would have had the necessary warning to escape the danger into which he ran. The war did not create the risk but increased it. The cause of the loss was in going ashore. The loss was not a war risk. But, on the other hand, the vessel which tries to ram that which she believes to be an enemy vessel; the vessel which is rammed by a destroyer which is steaming in the dark without lights for a warlike purpose,

A and which necessarily, for the due performance of that duty, turns across the route which a vessel would normally and properly take in that neighbourhood; and the vessel which is lost by striking a mine; are lost by a new risk originating in and operative by reason of war.

To apply these principles to the two cases before the House: The *Petersham* was lost by collision by reason of navigation in the dark without lights. The risk of B collision at night is an ordinary maritime risk. It was aggravated by the removal of the protection of the usual lights of navigation. This is governed by the principle of *Ionides*, which I think, was right, and which in fact counsel have not attacked. The *Matiana* was lost by going on a reef when sailing in convoy. To sail in convoy is to increase the everyday maritime risk of collision whether with a fixed object or with another vessel, for vessels in a convoy are necessarily not far apart. But there C was no new risk. The abandonment of navigation lights in the case of the *Petersham* by way of protection against attack by submarine and the sailing in convoy in the case of the *Matiana* by way of protection against the like attack are in principle similar. They are devices to give in time of war additional protection against an existing maritime risk. Their object is to give greater security to peaceful operations. It has been argued that to sail in convoy is a warlike operation. It is an D operation adopted in time of war, but this does not, I think, make it a warlike operation. Not offence only, but defence also, may, no doubt, be a warlike operation, but a precautionary measure is not in itself a measure of defence. If it becomes necessary to use the weapon of precaution, no doubt a defence may commence. Thus, if here submarines had been sighted, and the escorting vessel had ordered a notoriously dangerous course in order to avoid a peril of war, namely, submarine E attack, and in consequence a vessel had gone on the rocks the case would, I think, have been different. But there was no such case. Further, even if sailing in convoy were a warlike operation, the loss no doubt occurred in the course of, but how did it result in consequence of, that operation? The ship went on the reef, not because she was in convoy—surrounded, that is, by other ships—and bound to act under the order of the escorting ship, and so on, but because she did not know where F she was and did not know of the danger. There stated, quite shortly, are the reasons which lead me to the conclusion that in neither case was the loss a consequence of hostilities or warlike operations. In my judgment, both the appeals should be dismissed with costs.

Solicitors: *Holman, Fenwick & Willan; Treasury Solicitor; William Crump & Son, Waltons & Co.; Rawle, Johnson & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

SIR W. G. ARMSTRONG, WHITWORTH & CO., LTD. *v.* REDFORD

HOUSE OF LORDS (Viscount Finlay, Lord Dunedin, Lord Sumner, Lord Parmoor and Lord Wrenbury), February 23, 24, March 26, 1920]

[Reported [1920] A.C. 757; 89 L.J.K.B. 495; 123 L.T. 114; 36 T.L.R. 451; 64 Sol. Jo. 388; 13 B.W.C.C. 68]

Workmen's Compensation—"In course of employment"—Workman engaged on matter ancillary or incidental to his work—Accident in place provided by employer—Canteen provided for workpeople—Optional use—Injury to workman while returning to work after dinner in canteen—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The respondent was employed by the appellants at their works. It was a rule that all employees should leave the works at 1 p.m. for an hour, being free to go where they liked to obtain their dinner. The appellants provided for the workpeople a canteen which was a few yards from the works, but was within the curtilage, and formed part, of the appellants' premises. To reach it a workman had to go out in the street and walk a few paces to a door which gave on stairs leading to the canteen. The use of the canteen was purely optional on the part of the employees; they might either buy their food there or eat what they had brought to the works. Just before 2 p.m. a hooter sounded and the employees had to be back at the works to "clock on" at that hour. If late they lost half an hour's pay. On Oct. 2, 1918, the respondent had her dinner at the canteen, and when returning to the works after the hooter had sounded she slipped on the stairs leading to the street, fell, and broke her ankle.

Held (VISCOUNT FINLAY and LORD DUNEDIN dissenting): if a workman, during the hours of labour and while engaged on a matter ancillary or incidental to the work on which he was employed, met with an accident in a place provided by his employer, where he had no right to be except by virtue of his employment, such accident, in the absence of special circumstances, was incurred in the course of his employment; the facts of the present case fell within that principle; and, therefore, the respondent was entitled to compensation.

Decision of the Court of Appeal (1919), 121 L.T. 293, affirmed.

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, which itself was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the last-named Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the language of s. 1 (1) of the Act of 1906. See also s. 7 (1).

Considered: *Hannifin* v. *Fitzmaurice* (1920), 14 B.W.C.C. 320; *Upton* v. *Great Central Rail. Co.*, [1923] All E.R. Rep. 286; *Moule* v. *Marmite Food Extract Co.* (1927), 20 B.W.C.C. 446. Referred to: *St. Helens Colliery Co., Ltd.* v. *Hewitson*, [1923] All E.R. Rep. 249; *Gorman* v. *Barclay Curle & Co., Ltd.* (1925), 19 B.W.C.C. 564; *Pruce* v. *Davey* (1926), 136 L.T. 601; *Brentnall* v. *London and North Eastern Rail. Co.* (1925), 25 B.W.C.C. 265; *Gaskell* v. *St. Helens Colliery Co.*, [1934] All E.R. Rep. 633; *Knight* v. *Howard Wall, Ltd.*, [1938] 4 All E.R. 667; *Weaver* v. *Tredegar Iron and Coal Co.*, [1940] 3 All E.R. 157.

As to "accidents" within the Workmen's Compensation Acts see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq.; as to industrial accidents see ibid. (3rd Edn.) vol. 27, p. 802 et seq. For cases see 34 DIGEST 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

A Cases referred to:

(1) *Charles R. Davidson & Co.* v. *McRobb or Officer*, [1918] A.C. 304; 87 L.J.P.C. 58; 118 L.T. 451; 34 T.L.R. 213; 62 Sol. Jo. 347; 10 B.W.C.C. 673, H.L.; 34 Digest 276, *2339*.

(2) *Blovelt* v. *Sawyer*, [1904] 1 K.B. 271; 73 L.J.K.B. 155; 89 L.T. 658; 68 J.P. 110; 52 W.R. 503; 20 T.L.R. 105; 48 Sol. Jo. 115; 6 W.C.C. 16, C.A.; B 34 Digest 284, *2381*.

(3) *Gilbert* v. *Nizam (Owners)*, [1910] 2 K.B. 555; 79 L.J.K.B. 1172; 103 L.T. 163; 26 T.L.R. 604; 3 B.W.C.C. 455, C.A.; 34 Digest 295, *2454*.

(4) *Dennis* v. *A. J. White & Co.*, [1917] A.C. 479; 86 L.J.K.B. 1074; 116 L.T. 774; 33 T.L.R. 434; 61 Sol. Jo. 558; 10 B.W.C.C. 280, H.L.; 34 Digest 321, *2627*.

C (5) *Bell* v. *Armstrong, Whitworth & Co.* (1919), 88 L.J.K.B. 844; 121 L.T. 258; 35 T.L.R. 479; 63 Sol. Jo. 533; 12 B.W.C.C. 138, C.A.; 34 Digest 314, *2578*.

(6) *Parker* v. *Black Rock (Owners)*, [1915] A.C. 725; 83 L.J.K.B. 1373; 113 L.T. 515; 31 T.L.R. 432; 59 Sol. Jo. 475; 8 B.W.C. 327; 13 Asp. M.L.C. 137, H.L.; 34 Digest 295, *2456*.

D (7) *Philbin* v. *Hayes* (1918), 87 L.J.K.B. 779; 119 L.T. 133; 34 T.L.R. 403; 62 Sol. Jo. 519; 11 B.W.C.C. 85, C.A.; 34 Digest 284, *2380*.

(8) *Rowland* v. *Wright*, [1909] 1 K.B. 963; 77 L.J.K.B. 1071; 99 L.T. 758; 24 T.L.R. 852; 1 B.W.C.C. 192, C.A.; 34 Digest 316, *2596*.

(9) *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K.B. 539; 78 L.J.K.B. 921; 100 L.T. 979; 25 T.L.R. 640; 2 B.W.C.C. 42, C.A.; 34 Digest 311, *2559*.

E (10) *John Stewart & Son (1912), Ltd.* v. *Longhurst*, [1917] A.C. 249; 86 L.J.K.B. 729; 116 L.T. 763; 33 T.L.R. 285; 61 Sol. Jo. 414; 10 B.W.C.C. 266, H.L.; 34 Digest 279, *2357*.

Appeal by the employers from an order of the court of appeal dismissing their appeal from an award of His Honour JUDGE MELLOR sitting as arbitrator under F the Workmen's Compensation Act at Manchester County Court.

Rigby Swift, K.C., and *Edgar Meynell* for the appellants.

Holman Gregory, K.C., and *T. Eastham* for the respondent workman.

The House took time for consideration.

Mar. 26. The following opinions were read.

G **VISCOUNT FINLAY.**—This is a claim for compensation under the Workmen's Compensation Act, 1906. It came before the judge of the county court at Manchester. He found that the accident arose out of and in the course of the employment, and his decision was affirmed in the Court of Appeal by SWINFEN EADY, M.R., and WARRINGTON and DUKE, L.JJ. The employers, Armstrong, Whitworth & Co., have appealed to your Lordships' House.

H The respondent is a machinist and was in the employ of the appellants at their works in North Street, Manchester. As stated by the arbitrator in the course of his judgment:

> "It is a rule at the works that all employees should leave the premises at 1 p.m. for an hour. They leave by the exit from the works in North-street. The employees then are free to go where they like, either to obtain dinner I or for any other purpose. They all have to return and 'clock on' at 2 p.m., just before which time the hooter sounds. It sounds for some few minutes, and anyone who is late loses half an hour's pay."

On Oct. 2, 1918, the respondent was at the appellants' works in the course of her employment. At 1 p.m. she left the premises by the entrance to the works in North Street. She then walked a few yards along the pavement till she came to the outer door leading upstairs to the canteen, into which she went. This canteen is situate over the office of the appellants, and is provided by them for

their workpeople. The building in which are the office and canteen is situate a little distance from the works, but within the same outer wall. There is a doorway giving access to the passage at the foot of the canteen stairs from another passage by which the workpeople obtain access to the street from the works and vice versa, but this door is open only at night for the use of the employees on the night shifts. The building in which is the canteen belongs to the employers and the canteen is kept up by them for the benefit of their workpeople and is under the control of the employers. The employees are entitled to use the canteen, and they may either bring their food and eat it there, or obtain food in the canteen. If there is any surplus from the takings at the canteen after paying expenses, it is devoted to charitable purposes, and the employers derive no profit from it. No persons other than employees of the appellants are permitted to use the canteen. The respondent on the day of the accident took her mid-day meal at the canteen, and when the hooter sounded for return to work at 2 p.m., in going down the stairs leading from the canteen itself to the exit into North Street she slipped and broke her ankle.

The question is whether the personal injury was "by accident arising out of and in the course of the employment." The meaning of these words was very fully considered by your Lordships' House in *Charles R. Davidson & Co.* v. *M'Robb or Officer* (1). The conclusion arrived at in that case is thus stated in the headnote in the LAW REPORTS:

> " 'In the course of the employment' does not mean during the currency of the engagement, but means 'in the course of the work which the workman is employed to do and what is incident to it,' and absence on leave for the workman's own purposes is an interruption of the employment."

This expresses the considered opinion of four out of the five peers present at the hearing (the LORD CHANCELLOR, and LORDS HALDANE, DUNEDIN and ATKINSON), and the fifth (LORD PARMOOR, while confining his judgment to the question whether the accident arose out of the employment in no way dissented from the views of his colleagues as to the meaning of the words "in the course of the employment." The views expressed on this point form an integral part of the reasoning on which the judgments of three of their Lordships rested. By some inadvertence the word "semble" has been prefixed to this paragraph in the headnote in the LAW REPORTS. It is, therefore, now settled that for the purposes of Act the accident must be in the course of the work or what is incident to it.

Before *Davidson* v. *McRobb* (1) there was an impression that the words "course of the employment" denoted merely the currency of the engagement and on this reading they added practically nothing to the requirement that the accident must arise "out of" the employment. In one case to which I shall refer later on—*Blovelt* v. *Sawyer* (2)—it was held that the accident arose out of the employment where it was caused by the fall of a wall on the employer's premises on which the workman was permitted to remain during the dinner hour to eat his dinner. This decision was explained by FARWELL, L.J., in *Gilbert* v. *Nizam (Owners)* (3) as proceeding on the principle that the workman was permitted to be there by virtue of his contract of employment. In a sense such a case is one of accident arising out of the employment because it is as an employee that the man was allowed to remain there. It certainly is not "in the course of the employment" as all work was stopped during the dinner hour, but it would have been so, if "the course of employment" meant merely the currency of the engagement as was formerly supposed.

In my view, the present case is determined by the interpretation of the Act adopted in *McRobb's Case* (1). The accident did not take place in the course of the work or what is incident to it. The accident happened between one and two in the afternoon. All the employees must leave the works at 1 p.m., returning at two. This interval is for all purposes on the same footing as the interval between

A the cessation of work in the afternoon and the resumption of work next morning. It is shorter, but so long as it lasts the service is entirely suspended. There is no work during that hour. The respondent was bound to leave, and did leave, the work premises; she came out into the street and she ceased to be engaged on her master's business when she came into the street, just as much as she would when leaving at the end of the working day. Till two o'clock she was absolutely B her own mistress, and there was no obligation upon her to go to the canteen for her dinner—she might have gone to any restaurant or to her own home. The question may be illustrated by considering what would have been the result if the accident had happened in the street, during her short passage from the exit to the canteen by coming into collision with a passing vehicle, or by slipping on the pavement. Could she, in such a case, have claimed under the Workmen's C Compensation Act? I think it is clear that she could not, but this would result not from the fact that the accident would have been due to dangers incident to traffic in the street, but from the fact that her work had for the time ceased when she passed out into the street from the works. If she had been still "in the course of her employment" she could have recovered under the Act in respect of a street accident. This was settled by the decision of your Lordships' House in D *Dennis* v. *A. J. White & Co.* (4). To say that the employer would not be liable for dangers of the street encountered by the workman if he was still in the course of his employment would be to relapse into the fallacy which influenced a series of decisions in the Court of Appeal (differing on this point from the Scottish courts) that a workman cannot recover under the Act in respect of a danger of the street which is shared by all members of the public using the streets under the E like conditions. If the workman was in the street in the course of his employment he can recover in respect of injury from such ordinary street risks. The only question is whether he was there in the course of his employment. This is well illustrated by the decison of the Court of Appeal in *Bell* v. *Armstrong, Whitworth & Co.* (5). In that case a woman munition worker upon a night shift, having been released for an hour's interval for supper at 10 p.m., was "clocked out" of the F works, and, while crossing a public road outside in order to reach a canteen provided by the employers in their own premises a short distance away for the exclusive use of their staff of workers, was knocked down in the dark by a motor lorry and killed. She was under no obligation to go to the canteen, but might have stayed in the works if she had brought her own food with her and consumed it there, as many others did. It was held that, as the deceased had left the works and gone G into the streets for her own purposes and not in pursuance of any duty which she owed to her employers, the accident did not arise out of or in the course of the employment. That case was decided on May 7, 1919, by SWINFEN EADY, M.R., and WARRINGTON and DUKE, L.JJ., a few days before the case now under appeal. The distance in that case between the works and the canteen was 120 yds. The Master of the Rolls rested his decision entirely on the ground that the employee H was not in the street on her master's business, and said:

> "If, . . . the servant is in the street either for his own pleasure or for some necessary purpose of his own, some purpose of business, even the business of obtaining food, then the servant is there on his own business, and is not there in respect of any duty which he owes to the master."

I The Master of the Rolls went on to quote the decision of the House of Lords in *Parker* v. *Blackrock (Owners)* (6). The other members of the court concurred, and a passage from LORD ATKINSON's judgment in *Davidson* v. *M'Robb* (1) ([1918] A.C. at p. 327) was quoted as an accurate statement of the law:

> "The words 'in the course of the employment' mean, I think, 'while the workman is doing something which he is employed to do'."

Everything that was said in the Court of Appeal in *Bell* v. *Armstrong, Whitworth & Co.* (5) would be directly applicable to the present case if the accident had

happened in the street between the exit from the works and the entrance to the canteen. There, as here, the canteen was the property of the employer, and was kept up for the benefit of the workmen. The fact that the distance was there 120 yds. from the works, while here it was 3 yds. or so, cannot make any difference in the legal principle applicable. The course of the employment had ceased when the respondent got into the street. Did it begin again when she entered the canteen? Such a conclusion seems to me impossible if cases under the Workmen's Compensation Act are to be governed by any legal principle. It was not in pursuance of any duty to her employers that she went into the canteen and the accident did not result from any obligation which had to be satisfied in order to perform the duties of her employment.

It is necessary to consider carefully the precise grounds on which the Court of Appeal held that this accident happened in the course of the employment and distinguished the present case from *Bell's Case* (5), in which the same judges had decided that the accident did not happen in the course of the employment. The Master of the Rolls said that the employees of the class of the respondent were entitled as a term of their employment, either expressed, or implied, to use the canteen. He went on to point out that this is a case in which the accident happened upon the employers' premises and upon the part of the premises which was set apart for the use of the employees during their meals, a part of the premises, therefore, upon which the employees were entitled to be at the time when the accident happened. He distinguished *Bell's Case* (5) by saying:

> "In my judgment this case is wholly different from that case. In *Bell's Case* (5) the accident occurred in the public street. It was an ordinary street accident. This was an accident that occurred within the employers' works, within the employers' premises, though not upon the part of the premises where the machinery shop in which the applicant was usually engaged was situate, but still upon a part of the premises and works where the employee was entitled to be as a term of the contract with her employer. Now, in the ordinary way for a street accident the employer is not liable unless it can be shown that the employee was in the street on the business of, or as a duty that she owed to, the employer. The present case is one of a different character. It is where the accident happened while the workman is actually on the employers' premises and during the course of the employment because the course of the employment is not interrupted by the workman having to take adequate food."

The decision of the county court judge, which was affirmed in the Court of Appeal, proceeded mainly on the ground that the works and canteen were part of the premises of the appellants, but he added another ground:

> "I am also of opinion that in hurrying down the stairs in order to get into the works, while the hooter was sounding, the applicant was doing something equally for her own benefit and for that of the employers. It was for her own interest to 'clock in' while the hooter was still sounding, and it was in the interest of the employers that their workpeople should be punctual. Even if there had been a break in the employment, the employment had re-started as she was in the act of 'clocking on'."

I shall say nothing about this second ground, except that if it were valid it would apply just as much to the case of an accident to the employee while hurrying down the steps of her own house on her way to work in the morning. The decision of the Court of Appeal rests entirely on the fact that the accident took place upon the employers' premises. This is quite true, but it was not on any part of the premises in which work was carried on, and the respondent was not in the canteen in pursuance of any duty to her employer. On what legal principle can it be held that the fact that the canteen is within the same outer wall as the workshop shows that she was there in the course of her employment?

Counsel for the respondent did not rest his argument upon the fact that the canteen was within the enclosure in which the works were. He contended that the same result would have followed if the canteen provided by the employers had been at some distance from the works. In my opinion, it is, indeed, impossible to distinguish between the two cases, and if the respondent is in the right here it would follow that the employer, by providing a canteen where his employees may have their meals comfortably, extends the operation of the Workmen's Compensation Act to any premises on which the employer has made provision for the comfort of his employees at any distance from the works. Such a principle could not be confined to the case of a canteen. It would be just as applicable to any provision made by the employer for the recreation of his workpeople. It would apply to a bathing place in the river, to a football or cricket field, and to a library. It is very common, I believe, in large towns, to have bedroom accommodation over the shops and other business premises for the use of the employees. Would the employer be liable for an accident which occurred to an employee by a fall while going upstairs or in his bedroom? Surely not. Such an accident would not be in the course of the employment and does not arise out of it. It arises out of the provisions made for the welfare of the servant when off duty, which had nothing to do with the service itself.

The question may be illustrated by reference to *Parker* v. *Black Rock* (*Owners*) (6). A fireman had contracted by articles which provided that the crew were to find their own provisions. He went ashore with leave to buy provisions, and when returning fell from the pier and was drowned. The House of Lords held that as the deceased was on shore for his own purposes, and not in fulfilment of any obligation imposed on him by the contract of service, the accident did not arise out of his employment. LORD PARKER OF WADDINGTON said ([1915] A.C. at p. 729), that the struggle had been to show that the absence from the ship was in pursuance of a duty owed to the employer, but that this contention failed. So here, it was not in pursuance of a duty to the employer that the respondent went to the canteen. We are always driven back to the point upon which the Court of Appeal's judgment rested, that the accident happened in the course of the employment because the canteen was on the employers' premises. What bearing can this have on the course "of the employment," particularly when the canteen was in a building separate from that in which the work was carried on, and specially appropriated to the taking of meals? If there is anything in the contention it must equally apply, as, indeed, was argued by the respondent's counsel, to canteens provided by the employer for his workpeople at a distance from the works, and, if so, it would seem to follow that the workman would be in the course of the employment while going to this canteen through the streets and that the employer would be liable for any street accident that befell him during the transit to or from the canteen.

Philbin v. *Hayes* (7) brings out very clearly the irrelevancy for this purpose of the employer's ownership of the premises where the accident happened. In that case huts were erected by a contractor on the premises, and the workmen were allowed to live in these huts at a small charge. An accident happened to a workman by the fall of the roof while he was sleeping in one of the huts on the premises. It was held by the Court of Appeal that the employer was not liable. The huts there were used for residence and repose; the canteen here is used for taking meals. It appears to me that no distinction can be drawn between *Philbin* v. *Hayes* (7) and the present case. As was said by FARWELL, L.J.: "The necessity for food no more arises out of his employment than the necessity for sleep"; *Gilbert* v. *Nizam* (*Owners*) (3). Anything which is incident to the work is covered by the course of employment, but to say that taking meals or taking sleep is incident to the work is surely a most unjustifiable extension of the scope of "incident." In the case of a night watchman who has to be on premises all night, both meals and sleep are in the course of his employment. He is discharging his duty by being on the premises and guarding them, and while doing this he is entitled to

take some repose and some refreshment. The same thing applies to domestic servants. But a job of that sort differs for the present purpose absolutely from the case of a workman who takes his food and sleep when off work. The night watchman is at work while he is taking food or sleeping; the workman who takes his food during the dinner hour is off work. The two decisions of the Court of Appeal in the present case and in *Philbin* v. *Hayes* (7) cannot stand together. They are mutually destructive unless all attempt to decide cases of this kind on principle is to be abandoned as hopeless. In my opinion, *Philbin* v. *Hayes* (7) was rightly decided and the decision in the present case was wrong.

Some other cases have been referred to. In *Rowland* v. *Wright* (8) a teamster was in the stable in the course of his duty with his horses. While there he ate his dinner, and was bitten by the stable cat. It was naturally held that eating his dinner did not put an end to the course of his employment. In such a case the workman recovers compensation, not because he is eating his dinner, but because he was on the spot in the course of his employment. In *Blovelt* v. *Sawyer* (2), to which I have already referred, the accident to the workman was during the dinner hour, while he was eating his dinner on the premises. There was no rule as to the workman going or straying during the dinner hour, and he was at liberty to do either. While he was eating a wall fell upon him. It was held that during the dinner hour there had been no break in the employment of the workman, and that he was entitled to compensation under the Act. With reference to this case FARWELL, L.J., said, in *Gilbert* v. *Nizam* (*Owners*) (3):

> "The workman has to prove that the accident arose out of, as well as in the course of, his employment. The necessity for food no more arises out of his employment than the necessity for sleep. The man who is crushed by a falling wall of his employers' premises recovers compensation because he is entitled to be on the spot by virtue of his contract of employment (as I have explained in *Gane* v. *Norton Hill Colliery Co.* (9)), notwithstanding that, and not because, he was eating his dinner. But it is no part of his contract of employment that he should go home or eat or drink or sleep at home or anywhere else."

In *Blovelt's Case* (2) the workman was upon the working premises, while in the present case the respondent was in the canteen which was devoted to the taking of meals. But I cannot think that *Blovelt's Case* (2) would have been so decided if it had been subsequent to *M'Robb's Case* (1) in this House. If a workman, when eating his dinner, is not doing anything for his master, how can it be that the mere permission to remain on the premises while he takes his meals renders the master liable? The permission to be there during an hour when work is entirely suspended does not constitute a continuance of the course of employment. It would be another case if there were no dinner hour with its suspension of all work and the workman merely snatched a hasty meal at the place of his work. There might be said in such a case to be uninterrupted continuance of the employment. There is a short suspension of actual work during a short absence for any necessary purpose, going to a lavatory for instance, but there is no suspension of the course of employment. But as soon as you have an hour during which work necessarily ceases the workman, whether he is permitted to remain on the premises or not, cannot by remaining there be said to be continuing the course of his employment. The test is not whether the workman was on the employer's premises by his permission, but whether he was there on his employer's business. If he is there merely because the employer permits him to remain there, whether such permission is an implied term of the employment or not, he is not during the dinner hour engaged on his master's business any more than if he went out for his dinner. FARWELL, L.J., was right in saying that the taking of meals is rather against its being in the course of employment, but I think he was not right in saying that the right to be at the place decides that it is. The question must remain whether what he was doing can be considered as part of the service. In the present case

the taking of the meal was not part of the service, as FARWELL, L.J., pointed out in emphatic terms in the passage which I have just quoted.

It is not necessary in this case to consider what the result would have been if it had been a term of the engagement that the workman should take his meals at the canteen. It might be made a term of the employment that the workman should join the Cadet Corps of the factory and should attend the drills. The employer might build a chapel on his premises and make it a term of engaging a workman that he should attend the services there. It might be a term of the employment that the workman should sleep in the building. Some such case may come before your Lordships on some other occasion. Much might depend on the question whether such a term were in its nature purely collateral or might be considered as relating to the "employment" itself. In my opinion, the decision in this case was erroneous and should be reversed with costs here and below.

LORD DUNEDIN.—If the respondent here was in the course of her employment, then I do not think it could be said that there was no evidence on which the county court judge as arbitrator could find that the accident arose out of her employment. The slippery steps were a danger of the employment. The more difficult question is: Was she in the course of her employment? I said what I had to say in that matter in *Davidson* v. *McRobb* (1), and I do not propose to repeat myself, but I will venture to quote one sentence:

> "The words 'course of employment' connote the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work or the natural incidents connected with work, e.g., in the workman's case the taking of meals during the hours of labour."

Had the respondent been allowed an interval for her meals in the works, then, although the accident happened during her meal time, according to what I said there, she would have been in the course of her employment, for she might be held to be during her hours of labour. The judgment in this case proceeds on the view that that was the case here. I cannot reconcile that with the distinct finding on the part of the arbitrator as to what happened at one o'clock. He says:

> "It is a rule at the works that all employees should leave the premises at 1 p.m. for an hour. They leave by the exit from the works in North-street. The employees then are free to go where they like, either to obtain dinner or for any other purpose. They have all to return and 'clock on' at 2 p.m., when the hooter sounds."

That finding seems to me to make it impossible to say that she was in the works during that hour, or occupied at a meal during her hours of labour. Why "clock on" if labour was not interrupted? The mere fact that the canteen is on the same plot of ground as the works does not, so far as I can see, alter the position. The ownership of premises, as I said in *John Stewart & Son, Ltd.* v. *Longhurst* (10), per se settles nothing. The canteen here might just as well have been in another place altogether, separate from the plot on which the works stood. If so, it would have been, I think, quite impossible to say that a girl going there instead of going to her own home was doing something so connected with her employer's work as to be in the course of her employment. The test seems to me to be, not the situation of the premises, but whether resort to the premises is a part of the duty owed to the employer. The finding I have quoted seem to me to negative that, nor can I myself take the view of the situation which is taken by others that the canteen is practically in the premises, with access to the works, and that the accident, therefore, is really an accident within the works happening to a workman hurrying to his work. I am, therefore, of opinion that the appeal should be allowed.

LORD SUMNER.—The controversy in this case turns on the words "in the course of." As the respondent was hurt by slipping on her employers' slippery

stairs, the accident arose "out of" her employment, if she was then "in the course of" it at all. These words have been discussed in many cases. In *McRobb's Case* (1) a decision was given upon them, which is, I hope, final, and it only remains to apply it. There is some difference in the exact language used by the different noble Lords, who took part in that case, in paraphrasing or explaining the words of the statute, but for the present purpose it is not necessary to enquire what difference in meaning, if any, there may be between these varying expressions.

It is clear now that the question is not merely one of the determination or discontinuity of the relation of employer and employee. The currency of the engagement is not the test. There cannot be employment where one party no longer employs and the other is no longer employed, but there may be a break in "the course of the employment" in the sense of the statute, though the currency of the contract is unbroken and the legal nexus is subsisting. At the appellants' works, the respondent's contract of employment seems to have been by the week. It did not break off at one o'clock and begin at two, but, apart from the fact that the respondent had to come back to her work, she had nothing to do for her employer that she was employed to do after she reached the canteen. This case is one of the very large class in which the "dinner hour" is emphatically the employee's own time. It is not one where the employee is bound to stand by during meal times, being liable to be called on and to have the continuity of his meal broken by the intervention of some immediate summons or duty. Here the works stopped and were cleared for an hour.

This, however, is not conclusive. I cannot accept the argument that a workman gets his dinner "in the course of" his employment merely because he must get his dinner some time or other, because we must all eat to live. Dining is "ancillary," an "incidental," to his continued utility no doubt, but that in itself does not make him dine in the course of his service, nor is dining for that reason part of his service. This, however, is not all, nor is it conclusive to say that all work was suspended for an hour. The "dinner hour" is not a mere question of sixty minutes by the clock, nor does a cessation of work at the machine from one o'clock to two preclude the possibility that, during those sixty minutes and while doing something else than work at the machine, the respondent was "in the course of" her employment for the purposes of the Act. The pinch of this case arises from the fact that she had finished her dinner and had left the canteen and was coming down the stairs, which were the provided means of access from part of her employer's premises to the particular part where the machines were, when she slipped and fell. I think there was evidence, on which the arbitrator might find, as he did, that the stairs were part of the premises, where the respondent was employed. Accordingly, this case need not be decided one way or the other on the ground that the canteen was part of a "welfare" undertaking, to which under the terms of their employment the workpeople had a right, but no duty, to resort, or on the ground that the canteen, though premises of the appellants, was not part of the premises where the workpeople were employed on the machinery. I by no means wish to decide that when the respondent availed herself of the option of using the canteen, which her contract of employment gave her, it might not be said of her, to quote *McRobb's Case* (1) ([1918] A.C. at p. 314), that

> "a workman who by the terms of his employment, takes his meals on his employer's premises is in the course of his service in being there at meal times."

Be that as it may, I do not see how the case can be any worse for the respondent, because, in the exercise of a contractual right, she resorted to the canteen instead of availing herself of the cessation of regular work to go somewhere else. Equally in either case she has to come back, and, in the dinner hour, just as at the beginning and end of the day, the course of the employment may extend to traversing the

means of egress or regress provided by the employer for that purpose. Had the accident happened in the street the case might well have been different.

The respondent was returning from the place where she had dined, down the stairs provided for her return, the use of which exposed her to risk to which members of the public were not exposed because they had no right to be there not being the appellants' employees, for the purpose of regaining the place where she worked, viâ the place, where she "clocked on." It is a question of fact for the arbitrator to determine where the area begins over which it is an incident of her employment to go, an "incident naturally connected with the class of work she had to do," and which in fact she was just going to do. This was said to be so with regard to the dock in *Davidson* v. *McRobb* (1). It is no less so in the present. The steps were close to the place for "clocking on" and were part of the same structure, nor were they separated from the workshop, so far as appears except by an inconsiderable intervening space. As a question of fact the arbitrator decided this in the respondent's favour, finding that the canteen and the rest of the works formed one entire premises and there was evidence, on which he could do so. That it is a question of law seems to me to be suggested only on the ground that the stairs were not part of the works, but of the canteen. They were in fact the means of communication between the two. While an internal door at the bottom of the stairs was kept locked, as it was, a few steps down the street from one door to the next had to be interposed, but I do not see that this constitutes a legal chasm or insulation between one part of the same building and another. At night the internal door is open and access to the works from the canteen viâ the stairs is all within the curtilage of the appellants' establishment. Surely we cannot hold as a matter of law that returning to work by the stairs is in the course of the employment by night but not by day.

I cannot agree with the proposition that "she came out into the street and she ceased to be engaged on her masters' business when she came into the street," if this is a proposition of law. If it is one partly of law and partly of fact, I think that, unless based on a finding by the arbitrator, it is inapplicable where the street is the passage between door and door close together. There is no such magic about a highway in such a connection. Again, in a sense the employers carried on two businesses, one of catering and the other of manufacturing, but the whole object of the first was the welfare of those employed in the second, and no principle of law is involved in the distinction. After all, welfare work in a mill is, let us hope, for the benefit of all parties in the long run and, if an employer does extend the area of his liability under the Act by providing for the comfort of his workpeople, that cannot affect the construction of the section. If the canteen had been at a distance, or if it had been carried on for profit, the case might be different, but no opinion need be expressed about it now.

It seems to me that the arbitrator was entitled to put to himself the question whether the respondent might not be regarded as "in the course of" her employment while passing down the stairs to the spot where her actual work lay, and whether such passage was not within "the contemplation of both parties to the contract as necessarily incidental to it," whenever she availed herself of the canteen as she was invited and entitled to do. If he did so, there was evidence on which he could find in her favour. The arbitrator did not actually put this question to himself, nor are his findings of fact in terms an answer to it. I think they are such in substance, but I have been obliged to consider carefully, whether he ever directed his mind as it was his duty to do. He begins his judgment by remarking that

> "it must be remembered that this Act was passed for the purpose of enabling injured workpeople to obtain compensation and not for the benefit of insurance companies and I do not think that it is any part of the duty of county court

judges at any rate to exercise their brains in trying to draw fine distinctions to prevent the attainment of that object."

I refrain from saying all that might justly be said of this regrettable and unfounded observation. It reduces the value of any conclusions arrived at in accordance with it almost to a negligible quantity. Still we have the evidence and in any case the respondent at least ought not to be deprived of the benefit of the findings, so far as they rest on the evidence and not merely on the arbitrator's own conclusions. I think that on the evidence she proved such a case of an accident arising "in the course of" her employment, as cannot now be disturbed on grounds of law, and that the appeal fails.

LORD PARMOOR.—In my opinion this appeal should be dismissed. It is not clear on what exact terms the respondent was employed, but it is clear that the employment did not terminate at the dinner hour to start afresh in the afternoon. The meaning of the words "in the course of employment" has been determined in this House in *Davidson* v. *McRobb* (1).

"In the course of employment does not mean during the currency of the engagement, but means in the course of work which the workman is employed to do and what is incident to it."

I think that a midday meal is incidental to an employment such as that of the respondent, which commenced at six in the morning, and that the taking of such a meal does not in itself, and apart from special circumstances, create an interruption in the course of her employment. There are no special circumstances in the present case such as for instance arise when an employee is away from his work not in the course of employment, but for his own pleasure or business. In *Davidson* v. *McRobb* (1) Lord Dunedin said, referring to course of employment:

"It connotes to my mind that the workman or servant is doing something which is part of his employment for his employer or master. No doubt it need not be work, but it must, I think, be work or the natural incidents connected with the class of work, e.g., in the workman's case, the taking of meals during the hours of labour."

This passage supports the view that it cannot be said, as a matter of law, that the taking of meals within the dinner hour cannot come within the course of employment of a workman. The respondent took her midday meal in a room provided by the employers, to which she only had the right of access as an employee under the contract of employment. It was further established, in my opinion, that the room was within the curtilage of and formed part of the premises on which the respondent was employed. These facts are in no sense conclusive in favour of the respondent, but they tend to show that the accident did arise both in the course of the employment and out of the employment, and they are relevant to the consideration whether there was any evidence on which the county court judge could come to the conclusion which he formed. In the same way it is a relevant factor that the respondent, when the accident occurred, was using the stairs, as she was entitled to use them, for the purpose of returning to her work.

This case, in my opinion, comes within the category of cases which determine that if a workman, during the hours of labour and while engaged on a matter ancillary or incidental to the work on which he is employed, meets with an accident in a place provided by his employer, where he has no right to be except by virtue of his employment, such accident, in the absence of special circumstances, is incurred in the course of his employment. I agree with the finding of fact in the present case that the accident did arise out of the respondent's employment, so as to make the employer liable to pay compensation. In some cases, if an accident is incurred in the course of employment, the only possible inference is that it arises out of the employment, but this is not necessarily the case, and to entitle a claimant to compensation the two conditions must be established by the applicant

A in any particular case. It is in this connection that the dock cases and street accident cases are of importance. In the dock cases the general test is whether in going from or returning to his ship the claimant was using an access provided for his use by the employer. In the present case the respondent in returning to her work was using an access provided for her use by the appellants. In the street accident cases it has been held that a street accident of an ordinary character, B such as all persons using the street might be liable to, does not arise out of employment, or, in other words, that there is no causal relationship between the accident and the employment, which would support a claim for compensation. If, however, as in the bicycle case, the workman is engaged at the time of the accident in the actual work for which he is employed, it will not defeat his claim that the accident was in its character an ordinary street accident. In the present case there is C causal relationship between the employment and the accident and the claim is not defeated because any person using the stairs in the ordinary way might have met with the same consequential injury. The county court judge has found in the present case that the respondent has discharged the burden of proof which rests upon her. I think that there was evidence before him on which such a conclusion could within reason be found, and that he has not, in so finding, made an error in D law. The appeal should be dismissed with costs.

LORD WRENBURY.—The language of the Act of Parliament and the decisions upon it are such as that I have long since abandoned the hope of deciding any case upon the words "out of and in the course of" upon grounds satisfactory to myself or convincing to others. In the present case I say no more than that I E think that the girl was in course of her employment when in hurrying down the stairs to achieve punctuality in "clocking on." She was endeavouring to comply with the duty of punctuality which she owed to the employer, and, the stairs being very "slippery," she was exposed to the danger which resulted in the accident by the fact that it was incidental to her employment that she was allowed to be and was in that place. On these grounds, I think the appeal should be dismissed.

Solicitors: *Collyer, Bristow, Curtis, Booth, Birks & Langley*, for *R. Sheriton Holmes*, Newcastle-upon-Tyne; *A. E. Pratt*, for *Brooks, Marshall & Moon*, Manchester.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

HARTLEY *v.* HYMANS

[King's Bench Division (McCardie, J.), June 9, 10, 30, 1920]

[Reported [1920] 3 K.B. 475; 90 L.J.K.B. 14; 124 L.T. 31; 36 T.L.R. 805; 25 Com. Cas. 365]

Sale of Goods—Delivery—Time—Essence of contract—Waiver—Acceptance of deliveries after final delivery date—Implication of new contract—Termination by reasonable notice.

By a contract in writing dated July 29, 1918, the defendant agreed to purchase from the plaintiff 11,000 lb. of cotton yarn, delivery to begin in September, 1918, to be at the rate of 1,100 lb. per week and to be completed by Nov. 15, 1918, failure to deliver within the stipulated time to render the order liable to be cancelled by the defendant. The plaintiff delayed making any delivery until Oct. 26, 1918, and thereafter deliveries were always late and not of the contract quality. The defendant continually wrote letters to the plaintiff complaining of the delay and asking for better deliveries, and eventually, by a letter dated Mar. 13, 1919, he purported forthwith to cancel the order and refused to take any further deliveries. In an action by the plaintiff for damages for breach of contract,

Held: in an ordinary commercial contract for the sale of goods time was primâ facie of the essence of the contract with respect to delivery, but that condition could be waived; in the present case, after the final delivery date the defendant had demanded and received deliveries under the contract and so had waived his right to assert, and was estopped from asserting, that the term of the contract as to the date for the final delivery was still binding on the plaintiff; on the construction of the correspondence passing between the parties there must be implied a new agreement that the contract period should be extended beyond Nov. 15, 1918; that agreement could not be terminated by the defendant except by a reasonable notice requiring the plaintiff to deliver the undelivered balance of the goods; and, therefore, the plaintiff was entitled to succeed.

Notes. Considered: *Levey* v. *Goldberg*, [1922] 1 K.B. 688; *Charles Rickards, Ltd.* v. *Oppenheim*, [1950] 1 All E.R. 420. Referred to: *Hindley & Co.* v. *General Fibre Co.*, [1940] 2 K.B. 517; *Pavia & Co., S.P.A.* v. *Thurmann-Neilsen*, [1951] 2 All E.R. 866; *MacPherson Train & Co., Ltd.* v. *Howard Ross & Co., Ltd.*, [1955] 2 All E.R. 445.

As to conditions in a contract for the sale of goods see 29 Halsbury's Laws (2nd Edn.) 52 et seq., and as to estoppel by representation and conduct see ibid. (3rd Edn.), vol. 15, 223–232, 235–243. For cases see 21 Digest 290–310, 328 et seq., 39 Digest 414 et seq.

Cases referred to:

(1) *Bowes* v. *Shand* (1877), 2 App. Cas. 455; 46 L.J.Q.B. 561; 36 L.T. 857; 25 W.R. 730; 5 Asp. M.L.C. 461, H.L.; 39 Digest 425, *564*.

(2) *Reuter* v. *Sala* (1879), 4 C.P.D. 239; 48 L.J.Q.B. 492; 40 L.T. 476; 27 W.R. 631; 4 Asp. M.L.C. 121, C.A.; 39 Digest 426, *566*.

(3) *Sharp* v. *Christmas* (1892), 8 T.L.R. 687, C.A.; 39 Digest 429, *590*.

(4) *Paton & Sons* v. *Payne & Co.* (1897), 35 Sc.L.R. 112, H.L.; 39 Digest 428, *578*.

(5) *Plevins* v. *Downing* (1876), 1 C.P.D. 220; 45 L.J.Q.B. 695; 35 L.T. 263; 40 J.P. 791; 39 Digest 549, *1581*.

(6) *Coddington* v. *Paleologo* (1867), L.R. 2 Exch. 193; 36 L.J.Ex. 73; 15 L.T. 581; 15 W.R. 961; 39 Digest 536, *1467*.

(7) *Pearl Mill Co.* v. *Ivy Tannery Co.*, [1919] 1 K.B. 78; 88 L.J.K.B. 134; 120 L.T. 28; 24 Com. Cas. 169, D.C.; 39 Digest 665, *2547*.

(8) *Alexander* v. *Gardner* (1835), 1 Bing. N.C. 671; 1 Hodg. 147; 1 Scott, 630; 4 L.J.C.P. 223; 131 E.R. 1276; 39 Digest 426, *567.*

(9) *Corn Products Co., Ltd.* v. *Fry & Sons*, [1917] W.N. 224; 39 Digest 411, *452.*

(10) *Dudley Clarke and Hall* v. *Cooper, Ewing & Co.* (July 10, 11, 14, 1919), unreported.

(11) *Cuff* v. *Penn* (1813), 1 M. & S. 21; 105 E.R. 8; 39 Digest 653, *2466.*

(12) *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; 2 Nev. & M.K.B. 28; 2 L.J.K.B. 127; 110 E.R. 713; 12 Digest (Repl.) 398, *3082.*

(13) *Reuss* v. *Picksley* (1866), L.R. 1 Exch. 342; 4 H. & C. 588; 35 L.J.Ex. 218; 15 L.T. 25; 12 Jur. N.S. 628; 14 W.R. 924, Ex.Ch.; 39 Digest 393, *295.*

(14) *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1875), L.R. 10 Exch. 195; 44 L.J.Ex. 130; 33 L.T. 56; 23 W.R. 871, Ex.Ch.; 39 Digest 571, *1762.*

(15) *Bentsen* v. *Taylor, Sons & Co. (2)*, [1893] 2 Q.B. 274; 63 L.J.Q.B. 15; 69 L.T. 487; 42 W.R. 8; 9 T.L.R. 552; 4 R. 510, C.A.; 12 Digest (Repl.) 391, *3032.*

(16) *Panoutsos* v. *Raymond Hadley Corpn. of New York*, [1917] 2 K.B. 473; 86 L.J.K.B. 1325; 117 L.T. 330; 33 T.L.R. 436; 61 Sol. Jo. 590; 22 Com. Cas. 308, C.A.; 39 Digest 467, *924.*

(17) *Hughes* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 42 J.P. 421; 25 W.R. 680, H.L.; 21 Digest 310, *1137.*

(18) *Bruner* v. *Moore*, [1904] 1 Ch. 305; 73 L.J.Ch. 377; 89 L.T. 738; 52 W.R. 295; 20 T.L.R. 125; 48 Sol. Jo. 131; 21 Digest 371, *1464.*

(19) *Morrell* v. *Studd and Millington*, [1913] 2 Ch. 648; 83 L.J.Ch. 114; 109 L.T. 628; 58 Sol. Jo. 12; 12 Digest (Repl.) 402, *3116.*

(20) *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598; 44 L.J.C.P. 358; 32 L.T. 873; 23 W.R. 872; 39 Digest 659, *2512.*

(21) *Leather Cloth Co.* v. *Hieronimus* (1875), L.R. 10 Q.B. 140; 44 L.J.Q.B. 140; 44 L.J.Q.B. 54; 32 L.T. 307; 23 W.R. 593; 39 Digest 386, *231.*

(22) *Morris* v. *Bacon & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 39 Digest 398, *341.*

(23) *Ogle* v. *Lord Vane* (1868), L.R. 3 Q.B. 272; 9 B. & S. 182; 37 L.J.Q.B. 77; 16 W.R. 463, Ex.Ch.; 39 Digest 676, *2624.*

(24) *Jones* v. *Gibbons* (1853), 8 Exch. 920; 1 C.L.R. 461; 22 L.J.Ex. 347; 1 W.R. 438; 155 E.R. 1626; 39 Digest 554, *1618.*

Action tried by McCardie, J., without a jury.

By a contract in writing, dated July 29, 1918, the defendant agreed to buy from the plaintiff 11,000 lb. of cotton yarn, delivery to begin in September, 1918, and to be at the rate of 1,100 lb. per week, failure to deliver within the stipulated time, i.e., by Nov. 15, 1918, to render the order liable to cancellation by the defendant. Considerable delays occurred in the deliveries, and in March, 1919, the defendant refused to accept the balance of the goods under the contract. The plaintiff then began this action in which he claimed damages for breach of contract.

Cyril T. Atkinson, K.C., and *H. Derbyshire* for the plaintiff.

A. M. Langdon, K.C., and *A. Cairns* for the defendant.

Cur. adv. vult.

June 30. **McCARDIE, J.,** read the following judgment. This action raises a point of much importance, and constant recurrence, with respect to contracts for the sale of goods. The plaintiff claims damages for the defendant's refusal to accept delivery of a large quantity of cotton yarn. The contract is contained in a written memorandum, No. M. 1113, signed by the defendant and dated July 29, 1918, whereby he agreed to purchase from the plaintiff 11,000 lb. of cotton yarn of two sizes, 2/82 and 2/88. It was a term of the bargain that delivery should be at the rate of 1,100 lb. per week, starting in September. Among the conditions of the memorandum were the following :

"1. The goods are to be delivered free to our works or depots as specified, in good order and condition, and exactly in accordance with our specifications (if any). Quantities must not exceed those specified. 8. Failure to deliver the goods within the stipulated time and in compliance with the above conditions renders this order liable to cancellation by us, and you will be held responsible for any loss of profit incurred by us through your default. 9. Incomplete deliveries not taken to account." A B

Those are the only terms I need mention. It is agreed between the parties that the date at which the plaintiff should have completed his deliveries under the contract is Nov. 15, 1918. No delivery at all was made by the plaintiff until Oct. 26, 1918, when 550 lb. were delivered. Meanwhile the defendant had made vigorous protests against the plaintiff's delay. From Oct. 26, the defendant again urged delivery, and on Nov. 19, 1918, the plaintiff supplied and the defendant C accepted another 550 lb. Further deliveries were made by the plaintiff and accepted by the defendant under the contract in November, December and February as follows: Nov. 29, 1918, 550 lb.; Dec. 9, 1918, 550 lb.; Dec. 12, 1918, 550 lb.; Dec. 16, 1918, 363 lb.; Feb. 5, 1919, 550 lb.; Feb. 7, 1919, 484 lb.; and Feb. 27, 1919, 660 lb. Over the whole of this period the defendant, by his letters, constantly urged the plaintiff to deliver; he complained of the delay, and he referred to the D absolute necessity of having better deliveries. That he treated the contract as being alive seems to be absolutely clear. Thus on Dec. 3, 1918, his letter to the plaintiff refers to the cotton yarn "which you have on order for me." So also on Jan. 20, 1919, he wrote:

"My clients are extremely annoyed at this dilatoriness on your part, and are E threatening to cancel unless I complete the order within the next two or three weeks. You have had ample warning, and the fault will be entirely yours if my clients cancel. I should think that in your interest, seeing that the market has dropped so considerably, you would have made a special effort to get in high-priced orders. I have warned you before of the risk you are taking, and the entire responsibility will be yours if I have to cancel." F

This letter, be it observed, was written more than two months after the expiration of the contract period for delivery. The defendant, I may say, had re-sold to one of his customers the yarn purchased by him from the plaintiff. On Feb. 1, 1919, he wrote:

"I thank you for your invoice for 500 lb. (2/82), and shall be glad if you will push on a further 1,500 lb. with all possible speed, and also 1,100 lb. of G the 2/88. My customer is desperately in need of the delivery at once."

On Feb. 7, the plaintiff delivered a further 484 lb. On Feb. 21, the defendant wrote:

"Regarding my order for 2/82 and 2/88, I regret that I have not been favoured with your report on this contract as promised by your representative on H Tuesday last. As I then informed him, I cannot see my way to accept responsibility now, owing to the dilatory methods which you have adopted in executing this contract, should my customer cancel the same."

On Feb. 27, the plaintiff delivered a further 600 lb. On Mar. 1 the defendant wrote a letter in which he said:

"With reference to my order for 2/82 and 2/88, I shall be glad if you will I kindly observe the following instructions which have just been posted to-day by my client."

He then gave precise instructions as to the marking of the goods to be delivered by the plaintiff under the contract of July 29, 1918, and added:

"I trust that you will pay particular attention to these instructions. As I before stated, I shall not under any circumstances now accept any responsibility as to what course of action my customer takes with regard to this contract."

On Mar. 4, he wrote:

"If, owing to your late delivery my client cancels on me, I shall have no option but to cancel on you."

On Mar. 8, he wrote:

"I shall be glad if you will kindly let me have a delivery as soon as possible against contract."

On Mar. 10, he wrote:

"Further to my letter of Mar. 8, please mark outside the packages (bundles) the following quality mark 'J. C.,' and oblige."

To this letter the plaintiff replied on Mar. 11:

"Your letters of the 8th and 10th inst. duly to hand, and I note that you require the mark 'J. C.' put outside the package, and I have given instructions for this to be done. I am glad to be able to send you herewith invoice for 660 lb. of 2/82, and I am pushing the mill as much as I possibly can for further deliveries."

The defendant's answer was as follows, dated Mar. 13, 1919:

"With reference to my order, M. 1113, this was given you for delivery 1,100 bundles per week, starting the first week in September. You did not start delivery until October, and you have been consistently late in delivering ever since, as per the various letters I have written you. Owing to your late deliveries, I much regret to state that I must cancel this order, and I cannot take to account the 660 lb. that Messrs. Delaney & Co. advise me this morning you have delivered to them. I regret that it should be necessary for me to cancel this order, but the fault has been entirely your own."

This letter constitutes the repudiation relied on by the plaintiff. In the letter of Mar. 14, 1919, the plaintiff replied:

"I am in receipt of your favour of the 13th inst. The yarn is all in work and cannot be stopped. The order will be completed now in a very short time. I cannot agree to accept your attempt of cancellation. The yarn is ready, and it will be invoiced to me and delivered to Delany. I trust that you will take such deliveries duly to account in order to avoid the necessity of any unpleasantness."

This ends the material correspondence. The defendant wholly refused to accept the 660 lb. mentioned in the preceding letter, or to take any further deliveries from the plaintiff.

I need only add a few further facts. The defendant has duly paid the contract prices for the deliveries accepted by him from Oct. 26, 1918, to Feb. 27, 1919. The present action is brought to recover damages for the non-acceptance of the balance of the contract quantity. I am satisfied that the failure of the plaintiff to deliver was not due to any neglect on his part. It arose through the difficulties of the times, which affected both his sub-contractors and himself, and it was due to no small extent to the existence and operation of the Cotton Control Board. The yarn in question was being spun for the plaintiff by one firm, and it was being "doubled" for him by another firm. It was of a special description, and was suitable for the continental market only as distinguished from the English market. At the date of the defendant's cancellation on Mar. 13, 1919, the whole of the yarn required for the contract had been spun, and practically the whole of it had been "doubled." These are the substantial processes, and the remaining work to make the goods ready for delivery could have been promptly carried out. The plaintiff could within a reasonable time from Mar. 13, 1919, have supplied to the defendant the whole of the undelivered balance. He was ready and willing to do so. The defendant's customer never did cancel his contract with the defendant. At the time of the defendant's cancellation of the contract the market

had fallen heavily, and the defendant's repudiation had caused substantial loss to the plaintiff. The damages are agreed at £563.

Upon the above facts and letters (which are characteristic of many sale of goods cases) there arise the important questions of law which were argued before me with great ability. The plaintiff submits (in substance) that the defendant treated the contract as subsisting after the expiration of the stipulated period of delivery, and that he was, therefore, bound to give a reasonable notice before terminating the bargain. The defendant submits (in substance) that after the expiration of the contract period he was completely justified in law in terminating the contract at any time, and without the slightest notice to the plainiff. It is common ground, and indeed it is obvious, that the defendant here terminated the contract in the most abrupt manner and without any notice at all, save the letter of Mar. 13, 1919. That letter fixed no time within which the plaintiff was required to deliver. On the contrary, it decidedly refused to take delivery of the goods, which were almost ready for delivery, and upon the manufacture of which the plaintiff had taken special steps, involving heavy expense, at the defendant's request, long after the expiration of the contract period.

It might well be thought that the law on the matter has long been ascertained and clearly settled, inasmuch as the point is vital and of unceasing recurrence. But counsel could not cite, nor have I been able to find, a single direct reported authority on the question, and two days of acute argument occurred before me in discussing several lines of ambiguous and complex decisions, and in seeking to formulate some guiding and definite principle. Questions of waiver were argued in conjunction with s. 4 of the Sale of Goods Act, 1893, and questions as to a new agreement were analysed in conjunction with the conduct of the defendant and his alleged obligation to give a reasonable notice ere cancelling. Here, of course, the contract fell within s. 4 of the Sale of Goods Act, 1893. The whole legal position is, in my view, most unsatisfactory and confusing. I have felt the greatest difficulty in arriving at any opinion, and I give this judgment with the utmost diffidence and doubt.

It seems well to deal at once with one or two points on which the law here applicable seems to be settled. In the first place, I think that time was here of the essence of the contract. This, indeed, was not really disputed by the plaintiff. It is curious that s. 10 (1) of the Sale of Goods Act, 1893, deals so ambiguously with the point. That subsection provides:

> "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

This section gives a very slender notion of the existing law, and it is well to remember s. 61 (2) which provides:

> "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provision of this Act . . . shall continue to apply to contracts for the sale of goods."

Now the common law and the law merchant did not make the question whether time was of the essence depend on the terms of the contract, unless, indeed, those terms were express on the point. It looked rather to the nature of the contract and the character of the goods dealt with. In ordinary commercial contracts for the sale of goods, the rule clearly is, that time is primâ facie of the essence with respect to delivery: see in reference to this Lord Cairns in *Bowes* v. *Shand* (1) (2 App. Cas. at p. 463); per Cotton, L.J., in *Reuter* v. *Sala* (2) (4 C.P.D. at p. 249); and Lord Esher, M.R., in *Sharp* v. *Christmas* (3) (8 T.L.R. at p. 688). In *Paton & Sons* v. *Payne & Co.* (4), however, it was held by the House of Lords that in a contract for the sale and delivery of a printing machine time was not of the

essence. This point is not fully dealt with in Benjamin on Sale (5th Edn.), at p. 588, and no general rule appears to be stated in that treatise. But in Blackburn on Sale (3rd Edn.), p. 244, the matter is more clearly and fully treated, and it is laid down that in mercantile contracts stipulations as to time (except as regards time of payment) are usually of the essence of the contract. I may add that the relevant decisions on the point are excellently summarised in Halsbury's Laws of England (1st Edn.), vol. 25, p. 152, in the section on Sale of Goods, written by Sir Mackenzie Chalmers and Mr. W. C. A. Ker. With the above text-books may be contrasted the passage in Addison on Contracts (11th Edn.), at p. 543.

Now, if time for the delivery be of the essence of the contract, as in the present case, it follows that the vendor who has failed to deliver within the stipulated period cannot primâ facie call upon the buyer to accept delivery after that period has expired. He has himself failed to fulfil the bargain, and the buyer can plead the seller's default and assert that he was not ready and willing to carry out his contract. That this is so seems clear. It is, I take it, the essential juristic result when time is of the essence of the contract. This is cogently shown by the judgment in *Plevins* v. *Downing* (5), where the plaintiff vendors agreed to deliver iron in the month of July. As Brett, J., put it when delivering the opinion of the court (1 C.P.D. at p. 226):

> "The day after the end of July they could not have insisted on an acceptance of iron then offered to defendant":

see also Martin, B., in *Coddington* v. *Paleologo* (6) (L.R. 2 Exch. at p. 196, 197); and upon an analogous point see *Pearl Mill Co.* v. *Ivy Tannery Co.* (7) ([1919] 1 K.B. at p. 83). Hence counsel for the defendant contends in the present case that upon the expiry of the contract period on Nov. 15, 1918, the plaintiff ceased to possess a right to tender under the contract; that the defendant then ceased to be under any duty to take delivery; and that the subsequent letters of the defendant and his acceptance of post-period deliveries did not place him under any contractual obligation to the plaintiff. He submits that, whatever the defendant's conduct, and in spite of his letters, he could at any time reject deliveries, even though tendered at his express demand. Counsel for the plaintiff argued, on the other hand, that the defendant, by reason of the above matters, must be taken to have waived the right to insist that time was of the essence of the contract, and he alternatively submits that, upon the correspondence, I should find that a new agreement was made between the parties. He further submits that, upon the proper effect of such new agreement, the defendant could only terminate his obligations to take the undelivered balance by giving a notice to the plaintiff fixing a reasonable time for the completion of the bargain. Discussion on the above points involved a citation of many decisions bearing more or less directly on waiver, extension of time, new agreement, forbearance, and the like, and those decisions certainly illustrate the difficulties of the position. I cannot help feeling that much of the difficulty has arisen by the omission to keep clear the distinction between cases which are within the Statute of Frauds, or s. 4 of the Sale of Goods Act, 1893 [which provided that a contract for the sale of goods of the value of £10 or upwards should not be enforceable unless it was in writing or had been partly performed; the section was repealed by s. 2 of the Law Reform (Enforcement of Contracts) Act, 1954: 34 Halsbury's Statutes (2nd Edn.) 757], and cases which are not within those statutory provisions. If this distinction be borne in mind, then the cases when the waiver or extension of time is evidenced by writing may fall into one class, and the cases where the waiver or extension of time is not so evidenced fall into another class. In the present case, it is to be noted, the plaintiff relies on the defendant's letters, and he pleads those letters in the statement of claim as evidence of, and as constituting an agreement for, an extension of time for delivery, or of a waiver of the contract time.

In considering the present case, it is well to bear in mind s. 11 (1) (a) of the Sale of Goods Act, 1893, which provides:

> "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated."

This subsection seems to apply as much to conditions as to time as to other conditions. Here see *Alexander* v. *Gardner* (8) and HALSBURY'S LAWS OF ENGLAND (1st Edn.), vol. 25, at p. 153. In *Alexander* v. *Gardner* (8), the plaintiff agreed to sell to the defendant butter to be shipped in October. The butter was not in fact shipped till November, but the defendant waived the objection and accepted the invoice and bill of lading. It was held that he was liable for the price, although the butter was lost by shipwreck. TINDAL, C.J., said:

> "If the defendant waives the condition, he is in the same situation as if it had never existed."

It is to be noted that, although in that case the waiver was not by writing, but by conduct only, yet it was held effective. The rule as to waiver is stated broadly in BLACKBURN ON SALE (3rd Edn.), at pp. 212 and 213, as follows:

> "Where there is a condition precedent to the duty of either party to do some act, it is a good defence to an action for not doing that act to say that the condition precedent has not happened or been performed. But that defence is no longer available if the party wishing to set it up has waived his right to insist upon the performance of it, as, for example, where, after the time when the condition ought to have been performed, he accepts any benefit under the contract."

See also p. 523 of the same treatise. With equal breadth is the matter stated in BENJAMIN ON SALE (5th Edn.), at p. 563:

> "The necessity for performing the condition precedent may be waived by the party in whose favour is stipulated, either expressly or tacitly, by inference from his act or conduct, as, for example, where he leads the other party to suppose that the contract is still binding, and that the breach of the condition will be treated only as a breach of warranty."

It might well be presumed from the above passages that waiver can be effected in contracts for the sale of goods either by writing, or by word of mouth, or by conduct, and equally whether contracts be within or without s. 4 of the Sale of Goods Act, 1893, or the Statute of Frauds. But the extent to which the rule has been cut down will appear later in this judgment.

If the present be a case of waiver, I should hold that the defendant had undoubtedly waived the condition that the goods should be delivered by Nov. 15, 1918, inasmuch as, long after that date, he demanded and received deliveries under the contract. But his counsel argued that a distinction existed between cases where a contract period was continuing and cases where the contract period had wholly expired. In the former case, he submitted, the waiver could take place provided that s. 4 of the Sale of Goods Act, 1893, was complied with, but in the latter it could not take place at all unless the defendant had actually received the goods, and even though the waiver was evidenced by writing. I confess that I cannot myself understand why a man may not waive a condition after the expiry of a contract period. But a view favourable to this contention seems to have been taken by BRAY, J., in *Corn Products Co., Ltd.* v. *Fry & Sons* (9), where, although the parties seem to have treated the contract as subsisting after the contract period, yet BRAY, J., said:

> "In the absence of a new binding agreement, no arrangement made after the time for performance by the defendants had expired would be binding."

A The learned judge cited *Plevins* v. *Downing* (5) in support of his proposition. With the view of Bray, J., in that case I compare the words of Bailhache, J., in *Dudley Clarke and Hall* v. *Cooper, Ewing & Co.* (10), of which a shorthand note has been supplied to me. He says:

> "Where there is a contract for the delivery of goods in a specified time, if the goods are not delivered within that time, there is a breach of contract by the seller who contracts to deliver within the specified time, unless he has some exception in his contract which excuses him. But it is commonly the case that parties do not hold each other strictly to contractual times, and when it is found that both parties are not holding each other strictly to contractual times, but are extending the times and treating the contract as still on foot, it remains on foot, so far as time is concerned, notwithstanding that the contractual time has expired."

Both *Corn Products Co., Ltd.* v. *Fry & Sons* (9) and *Dudley Clarke and Hall* v. *Cooper, Ewing & Co.* (10) were, of course, cases within s. 4 of the Sale of Goods Act, 1893. In the passage cited from Bailhache, J., in the latter case, that learned judge did not refer to any need for a new agreement, or to s. 4 of the Act of 1893, nor did he point to any possible distinction between an extension of time prior to the expiration of a contract period and an extension of time after the expiration of such period.

Before I venture to state my view of the decisions, I may usefully quote the following passage from Addison on Contracts (11th Edn.), p. 544:

> "In the case of contracts required by s. 4 of the Sale of Goods Act, 1893, to be in writing, it often appears that the time specified for delivery or acceptance of the goods, or payment of the price, is enlarged by one party at the verbal request of the other. The promise to deliver, or pay, at the substituted time, cannot be sued on, and it appears that the original agreement is no longer the agreement between the parties. The difficulty on this point, which has been the subject of consideration in many cases, has now been set at rest, and the plaintiff must rely on the original agreement or nothing. If he can aver and prove that he was ready and willing to perform his part of it, and that the defendant made default on his part, the plaintiff proves a cause of action. Thus where the time for delivery is extended at the request of the defendant, the plaintiff can prove that he was ready and willing to deliver at the time mentioned in the written agreement. But if the time was extended at the plaintiff's own request, he cannot sue on the original contract, since he was not ready and willing to perform his part, nor can he sue on the substituted agreement, because the term on which he insists is not in writing."

In connection with this passage a number of decisions are cited ranging from *Cuff* v. *Penn* (11) to *Plevins* v. *Downing* (5). I do not pause to analyse this passage, or to point out the difficulties it suggests, particularly by the words "it appears that the original agreement is no longer the agreement of the parties." I myself conceive that upon the expiration of a contract period the contract does not ipso facto become void. On the contrary, it clearly remains alive, for example, for the purpose of an action by the party not in default. I imagine that all that is meant by Addison is that the party in default cannot sue on the original contract which he was not ready and willing to perform, unless he can prove either a waiver by the other side, or an agreement that the original contract should continue to subsist, in spite of the expiration of the contract period.

Plevins v. *Downing* (5) seems to be the root decision on the matter, and I desire to state my view as to the effect of that decision. There the basic facts were that the plaintiffs sold iron for delivery in July, 1874, under a written contract. The value of the iron was over £10, and the contract, therefore, was required to be evidenced in writing. The plaintiffs failed to deliver the iron in July, and were, therefore, in default. In October, 1874, the defendant met the plaintiffs' manager and said: "You

have not sent any pigs lately." To which the plaintiffs' manager replied: "I will send you a boat this week." Thereupon the plaintiffs forwarded twenty-five tons addressed to the defendant, and the defendant refused to accept the goods. There the arrangements made after the contract period were purely verbal. The plaintiffs sued the defendant for damages for non-acceptance. They failed in the action (as I read the decision of BRETT, GROVE and DENMAN, JJ.) for two reasons—namely (i) because they were not able to show that they were ready and willing to fulfil the original contract, and (ii) because the incident of October consisted of a verbal conversation only. In the judgment of the court there is this passage:

> "Inasmuch as they [the plaintiffs] cannot rely upon their readiness and willingness to deliver according to the terms of the original contract, because they were not so ready and willing, they are logically driven to rely upon the subsequent request of the defendant, either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept. But, as the request was merely verbal, the undertaking sought to be founded on it cannot be enforced."

It will be observed that the court did not hold that the request could not (apart from the Statute of Frauds) be a proposed alteration of a term of the original contract, or that it could not be a footing on which to hang a new contract to accept. The decision on this point rested on the ground that the request was verbal. Hence I do not, with respect, follow wholly the observations of BRAY, J., already cited, in *Corn Products Co.* v. *Fry & Sons* (9) as to the effect of *Plevins* v. *Downing* (5). If the request in *Plevins* v. *Downing* (5) had been in writing, then I conceive that, upon the circumstances of that case, a verdict for the plaintiff could have been supported, and the more so if the written request had referred to the original written contract.

The effect of *Plevins* v. *Downing* (5) is stated in BENJAMIN ON SALE (5th Edn.), at p. 689, as follows:

> "Held, that the plaintiffs could not sue on the original contract, as they were unable to prove that they were ready and willing to deliver the twenty-five tons at the end of July, and had only withheld delivery at the defendant's request, neither could they rely upon the request to deliver made to them by the defendant in October, as that would have constituted a new contract which was by parole only."

Plevins v. *Downing* (5), however, seems to decide that a new and binding arrangement as to time of delivery cannot, where the State of Frauds applies, be made by mere conduct or by word of mouth either before or after the contract period has expired. *Plevins* v. *Downing* (5) seems also to decide that a waiver of rights as to time of delivery cannot (where the contract is within the Statute of Frauds) be made by mere conduct or spoken words. The defendant in *Plevins* v. *Downing* (5) had, in my view, clearly waived, by his words, his right to insist on the plaintiff's non-observance of the contract time, and I confess that, apart from the Statute of Frauds, I do not see why he should not have been held to that waiver having regard to the facts of the case. This, I imagine, is consonant with the decision in *Goss* v. *Lord Nugent* (12), a case with respect to land, and, therefore, within s. 4 of the Statute of Frauds [repealed by s. 1 of the Law Reform (Enforcement of Contracts) Act, 1954: 34 HALSBURY'S STATUTES (2nd Edn.) 97]. There the defendant verbally stated that he would accept the title of the plaintiff to certain land, notwithstanding a defect therein. It was held that he was not bound by such statement, inasmuch as it was not in writing. Thus a waiver, whether by word of mouth, or by conduct, cannot appparently be binding if the original contract be within the statute. It is worth while to recall, when considering such decisions, that it suffices to satisfy the Statute of Frauds if the party charged has signed a proposal for an agreement which the other party has accepted, verbally or by conduct: see *Reuss* v. *Picksley* (13).

In *Tyers* v. *Rosedale and Ferryhill Iron Co.* (14) the variation of the contract took

A place during, and not after, the contract period. There was no express contract for such variation, but the letters between the parties showed that as acquiescence, when evidenced by writing, is effectual during the contract period, I am unable to see why it should not be effective after the expiration of the contract period, and I conceive that this was the substance of the opinon of Bailhache, J., in *Dudley Clarke* v. *Cooper Ewing & Co.* (10), which has been already cited. This view seems B to accord with the decision in *Bentson* v. *Taylor, Sons & Co.* (15) (which was a charterparty case), in which the ship sailed a month later than the contract date. The defendants (the charterers), therefore, had the right to repudiate, but instead of doing so they wrote certain letters and did certain things which I need not specify. Lord Esher said ([1893] 2 Q.B. at p. 279):

C "The ship did not sail till nearly a month afterwards, and there was a breach of the condition. The defendants had then a right to treat the contract as at an end, or they could, if they chose, treat it as still subsisting. But if they intended to treat the contract as at an end, it was their duty so to exercise their right as not to lead the plaintiff to believe that he was still bound by the contract."

The test put by Lord Bowen in the same case was this:

D "Did the defendants, by their acts or conduct, lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end on account of the failure to perform the condition precedent, but that they only intended to rely on the misdescription as a breach of warranty, treating the contract as still open for further performance."

E This test seems to apply exactly to the present case apart from the question of s. 4 of the Sale of Goods Act, 1893. It may be said, however, that *Bentsen* v. *Taylor, Sons & Co.* (15) was a case of a charterparty, and not of sale of goods. The answer to that criticism is that exactly the same principle was applied by the Court of Appeal in *Panoutsos* v. *Raymond Hadley Corpn. of New York* (16), which was, in fact, a sale of goods case. I do not state the facts in that well-known decision by F the Court of Appeal, consisting of Lord Reading, C.J., Lord Cozens-Hardy, M.R., and Scrutton, L.J., Lord Reading cited with approval, the dictum of Bowen, L.J., in *Bentsen* v. *Taylor, Sons & Co.* (15), and added ([1917] 2 K.B. at p. 478):

"I cannot find any authority to support the proposition that when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-mentioned party can cancel G the contract without giving any notice to the other, so as to enable the latter to comply with the requirements of the contract. It seems to me to follow from the observations of Bowen, L.J., in *Bentsen* v. *Taylor, Sons & Co.* (15) that there must be reasonable notice given to the buyer before the seller can take advantage of the failure to provide a confirmed banker's credit. That is the decision of Bailhache, J."

H It is curious to observe that the waiver by the seller in *Panoutsos* v. *Raymond Hadley Corpn. of New York* (16) (where, as I have said, the contract was within s. 4 of the Sale of Goods Act, 1893) was not in writing, but by conduct only, and there seems to have been a binding variation of the contract obligation in favour of the buyers, in spite of the absence of writing. The decision in that case may well be contrasted with the decisions already cited in this judgment. I desire to add that I the principle stated in *Panoutsos* v. *Raymond Hadley Corpn. of New York* (16) seems to be fully agreeable to the broad rule of justice stated by Lord Cairns and Lord O'Hagan in *Hughes* v. *Metropolitan Rail. Co.* (17) (2 App. Cas. at pp. 448–9), and by Farwell, J., in *Bruner* v. *Moore* (18) ([1904] 1 Ch. at pp. 312–13).

In the first of these cases, speaking of forfeiture in the equity court, Lord Cairns said:

"It is the first principle upon which all courts of equity proceed that if a contract is entered into under distinct terms involving legal results, certain

penalties, or legal forfeiture, and the parties by their own act, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that certain rights under the contract will not be enforced, or will be held in abeyance, the person who might otherwise enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties."

A similar principle was thus stated by FARWELL, J., in *Bruner* v. *Moore* (18). It is true, however, that in these two latter cases the Statute of Frauds did not arise, and hereon I cite *Morrell* v. *Studd and Millington* (19), where s. 4 of that statute was in question, and where ASTBURY, J., after referring to *Hickman* v. *Haynes* (20), and *Goss* v. *Lord Nugent* (12) said:

"Those cases merely decide that when a contract falling within the Statute of Frauds is once made, no conduct or verbal waiver can be relied on to substitute a different term from one appearing in the contract itself."

How several of the cases and dicta I have cited are to be reconciled with *Leather Cloth Co.* v. *Hieronimus* (21) I know not. There the written contract for the sale of goods provided that the goods were to be sent by the plaintiffs, the sellers, to Ostend. They then changed the place of destination to Rotterdam. It was left by ARCHIBALD, J., to the jury to say, from the silence and subsequent conduct of the defendant, whether or not there had been an assent by him to the change of route from Ostend to Rotterdam. The jury found that there was such assent, and a verdict passed for the plaintiffs. The Court of Queen's Bench, consisting of COCKBURN, C.J., and BLACKBURN and MELLOR, JJ., upheld the verdict. BLACKBURN, J., said:

"I cannot see why the assent to a substituted mode of performing one of the terms of the contract need be in writing, and may not be by parole, though the original contract must have been in writing."

This was a clear case of waiver by conduct. I see that *Leather Cloth Co.* v. *Hieronimus* (21) was not discussed by the House of Lords in their decision in *Morris* v. *Baron & Co.* (22).

I have, I fear, already cited a somewhat large number of decisions with respect to the operation of the Statute of Frauds and of s. 4 of Sale of Goods Act, 1893. In considering certain decisions, it is desirable to separate clearly the points which arose therein with respect to the principle of *Ogle* v. *Lord Vane* (23). The principle was closely interwoven with the observations of the court in *Hickman* v. *Haynes* (20) and *Plevins* v. *Downing* (5). It will suffice to say that that principle has no bearing on the present case, and to discuss it would only involve a further confusion. The Statute of Frauds has already introduced sufficient difficulties into the application of the ordinary principles of contract law.

On this unhappy confusion of authority, and this embarrassing ambiguity of principle, what are the conclusions at which I should arrive, in the present case, where the contract was one within s. 4 of the Sale of Goods Act, 1893? In my view, the facts and documents here clearly call for one or more juristic bases on which to support the plaintiff's claim. First, I hold that here the defendant waived his right to insist that the contract period terminated on Nov. 15, 1918. The waiver is evidenced by writing, and I rule that it binds the defendant, even though it took place after Nov. 15, 1918. Waiver is not a cause of action, but a man may be debarred by the doctrine of waiver from asserting that an original condition precedent is still operative and binding. In view, moreover, of the fact that the plaintiff acted (at great expense to himself) upon the footing that the waiver had taken place, it would, I conceive, be wrong to allow the defendant to insist on the terms of the original contract as to time. Secondly, I hold that (in so far as estoppel differs from waiver), the defendant is estopped from saying that the period for delivery expired on Nov. 15, 1918, or from asserting that the contract ceased to be valid on that date. Inasmuch as the defendant led the plaintiff to believe, by

letters, as well as conduct, that the contract was still subsisting, and inasmuch as the plaintiff acted on that belief, at serious expense to himself, it would be unjust to allow the defendant to assert that the delivery period ended on Nov. 15, 1918. I shall apply to this case the principle asserted by the Court of Appeal in *Bentsen* v. *Taylor, Sons & Co.* (15) and approved by the Court of Appeal in *Panoutsos* v. *Raymond Hadley Corpn. of New York* (16). Thirdly, I hold that upon the letters passing between the parties, I can, and ought, to imply a new agreement that the contract period should be extended beyond Nov. 15, 1918, that is, until the defendant had given a notice to the plaintiff requiring delivery within a reasonable period. I imply such an agreement. In so holding, I consider that I am acting not only in consonance with *Plevins* v. *Downing* (5), but also in accord with the already cited words of Bailhache, J., in *Dudley Clarke and Hall* v. *Cooper, Ewing & Co.* (10) and with the principle of *Panoutsos* v. *Raymond Hadley Corpn. of New York* (16). I do not doubt that the defendant would have been entitled in March, 1919, to give a notice fixing a reasonable time in which the plaintiff was required to supply the undelivered balance of the contract goods. This point was also dealt with by Bailhache, J., in *Dudley Clarke* v. *Cooper, Ewing & Co.* (10) where he said:

> "It is quite open to a buyer to say, where deliveries are late and he has been extending the time, that he will not take further deliveries unless they are made within some reasonable time which he is entitled to designate."

The principle is one which is further illustrated by the cases cited in Leake on Contracts (6th Edn.), at p. 617; and it accords with the ratio of the decision in *Jones* v. *Gibbons* (24). The defendant here gave no such notice. He cancelled peremptorily and abruptly. But for the fact that the defendant's repudiation was absolute as to all undelivered goods a difficult question would have arisen as to the proper period or periods for delivery which could have been fixed by the defendant in March, 1919. But inasmuch as he absolutely refused on that day to take any further goods at any time, the point is covered by the decision of the Exchequer Chamber in *Tyers* v. *Rosedale and Ferryhill Iron Co.* (14). Hence it is right to assess the damages as at March, 1919. Those damages are agreed at £563. I, therefore, give judgment for that amount with costs.

Judgment for plaintiff.

Solicitors: *Tatham & Lousada*, for *Farrar & Co.*, Manchester; *Speechly, Mumford & Craig*, for *Mumford, Johnson & Co.*, Bradford.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

ADAMS *v.* LONDON IMPROVED MOTOR COACH BUILDERS, LTD.

[COURT OF APPEAL (Bankes, Atkin and Younger, L.JJ.), December 3, 6, 1920]

[Reported [1921] 1 K.B. 495; 90 L.J.K.B. 685; 124 L.T. 587; 37 T.L.R. 229; 65 Sol. Jo. 154]

Solicitor—Retainer—Retainer by agent—Retainer by trade union on behalf of member—Liability of member for costs—Right to order for costs against unsuccessful defendants to action.

By the rules of a trade union a member in benefit was entitled to legal assistance in any matter concerning his employment, and under that provision the union instructed their solicitors to act on behalf of the plaintiff in an action by him against the defendants for wrongful dismissal. The solicitors issued a writ in the plaintiff's name with the name of their firm on it as acting as the plaintiff's solicitors. There was no agreement that in no circumstances—e.g., in the event of the union not having sufficient funds—would the plaintiff be liable for the costs. The plaintiff obtained judgment in the action, but the defendants contended that he was not entitled to costs as the union had instructed solicitors to act for him and was liable to them for the costs.

Held: the union acted as the plaintiff's agent in retaining the solicitors, who accepted the retainer on the plaintiff's behalf, and, therefore, the solicitors were the plaintiff's solicitors, and, in the absence of any agreement that in no circumstances was the plaintiff to be liable for costs, he became liable to the solicitors for costs, and was entitled to an order for costs against the defendants.

Decision of SANKEY, J., [1920] 3 K.B. 82, affirmed.

Notes. As to the retainer of a solicitor by a client see 31 HALSBURY'S LAWS (2nd Edn.) 81 et seq., and for cases see 42 DIGEST 47 et seq.

Cases referred to:

(1) *Gundry* v. *Sainsbury*, [1910] 1 K.B. 645; 79 L.J.K.B. 713; 102 L.T. 440; 26 T.L.R. 321; 54 Sol. Jo. 327, C.A.; 42 Digest 126, *1207*.

(2) *R.* v. *Archbishop of Canterbury*, [1903] 1 K.B. 289; 72 L.J.K.B. 188; 88 L.T. 150; 51 W.R. 277; 19 T.L.R. 92; C.A.; 11 Digest (Repl.) 609, *406*.

(3) *Geilinger* v. *Gibbs*, [1897] 1 Ch. 479; 66 L.J.Ch. 230; 76 L.T. 111; 45 W.R. 315; 41 Sol. Jo. 243; 42 Digest 338, *3820*.

(4) *Cape Breton Co.* v. *Fenn* (1881), 17 Ch.D. 198; 50 L.J.Ch. 321; 44 L.T. 445; 29 W.R. 386, C.A.; 42 Digest 341, *3851*.

(5) *Henderson* v. *Merthyr Tydfil Urban Council*, [1900] 1 Q.B. 434; 69 L.J.Q.B. 335; 48 W.R. 332, D.C.; 42 Digest 130, *1243*.

Also referred to in argument:

Porter v. *Fraser* (1912), 29 T.L.R. 91; 42 Digest 342, *3855*.

Newbiggin Gas Co. v. *Armstrong* (1879). 13 Ch.D. 310; 49 L.J.Ch. 231; 41 L.T. 637; 28 W.R. 217, C.A.; 42 Digest 354, *4030*.

Yonge v. *Toynbee*, [1910] 1 K.B. 215; 79 L.J.K.B. 208; 102 L.T. 57; 26 T.L.R. 211, C.A.; 42 Digest 53, *438*.

Fernée v. *Gorlitz*, [1915] 1 Ch. 177; 84 L.J.Ch. 404; 112 L.T. 283; 42 Digest 350, *3970*.

Harold v. *Smith* (1860), 5 H. & N. 381; 29 L.J.Ex. 141; 1 L.T. 556; 6 Jur. N.S. 254; 8 W.R. 447.

Hockley v. *Bantock* (1833), 2 My. & K. 437; 3 L.J.Ch. 93.

Appeal by the defendants from an order of SANKEY, J., in an action tried by him without a jury.

The plaintiff sued the defendants to recover arrears of salary, and judgment was entered for him for £94 10s. It was contended on behalf of the defendants that the

plaintiff was not entitled to the costs of the action since he was not under any liability for costs to the solicitors who acted for him in the action, and, therefore, the defendants were not liable for the plaintiff's costs on the authority of *Gundry* v. *Sainsbury* (1). The plaintiff was a member of the National Union of Clerks, and was entitled to benefits under the rules of the union, including legal aid. By r. 117 it was provided:

> "Any member not disqualified for benefit . . . may claim legal assistance through the union in any matter concerning his employment. Such claim, accompanied by a full and true statement of the facts of the case, shall be addressed to the branch secretary, who shall at once forward it, with a statement of any further facts he may deem necessary to the general secretary. The general secretary shall present the claim as soon as possible to the executive council, which shall take such steps to deal therewith as may be deemed advisable."

The plaintiff appealed to the union for legal aid, and the executive council instructed the solicitors for the union to act as solicitors for the plaintiff in the action. Thus the union became liable for the costs, payable out of the union funds. SANKEY, J., held that the union had acted as the plaintiff's agents in retaining and instructing the solicitors, who were entitled to be paid their costs out of funds contributed to by the plaintiff, and that the plaintiff was entitled to judgment with costs against the defendants. The defendants appealed.

Barrington-Ward, *K.C.*, and *David White* for the defendants.
Cyril Atkinson, *K.C.*, and *Kyffin* for the plaintiff.

BANKES, L.J.—The defendants appeal from a judgment of SANKEY, J. The plaintiff succeeded in an action for wrongful dismissal, and the learned judge gave judgment for £94, with costs. The defendants complain that the learned judge ought not to have given the plaintiff his costs, and they put it upon the ground that the plaintiff was under no liability to the solicitor for his costs, and that, in those circumstances, he was not entitled to award any costs.

The facts, so far as there was any dispute about them were these: The plaintiff was a clerk, and a member of the National Union of Clerks, who, among other benefits, provide legal aid for their members. Rule 89 of their rules provides:

> "Any member to be eligible for benefit, including legal aid and trade benefit, must have been clear on the books on the Saturday prior to the date of his claim and have paid, at least, six consecutive months' contributions."

The plaintiff complied with those condition, and was, therefore, under the rules, entitled to benefit, which included legal aid. By r. 117:

> "Any member, not disqualified for benefit under rr. 21 and 89, may claim legal asistance through the union in any matter concerning his employment. Such claim, accompanied by a full and true statement of the facts of the case, shall be addressed to the branch secretary, who shall at once forward it, with a statement of any further facts he may deem necessary, to the general secretary. The general secretary shall present the claim as soon as possible to the executive council, which shall take such steps to deal therewith as may be deemed advisable."

The plaintiff's claim came before the council, and they decided that he was entitled to legal aid, and thereupon they gave the necessary instructions to their solicitor, Mr. Evershed, who is a member of the firm of Helliwell, Harby and Evershed, who act as solicitors for the National Union of Clerks. The practice of the union with reference to such matters is stated by the learned judge, I think, quite correctly, in his judgment. He says ([1920] 3 K.B. at p. 85):

> "The usual practice was that when a dispute likely to lead to legal action occurred, the proposed plaintiff wrote to the general secretary of the union, and

he, in turn, engaged a solicitor or (as in the present case) a firm of solicitors, on behalf of the plaintiff. The solicitors' costs were payable out of the union's funds. Although the plaintiff gave no written retainer to them, the solicitors issued a writ on his behalf, took all the necessary steps to bring the action to trial, and instructed counsel during the preliminary stages and at the hearing of the action. The union acted as the plaintiff's agent in retaining and instructing the solicitors, who accepted the retainer on the plaintiff's behalf, and were entitled to be paid their costs out of funds contributed to by him."

A writ was issued, and the endorsement of that writ states that it was issued by Helliwell, Harby and Evershed, whose address for service was Stanley House, Strand, solicitors for the plaintiff.

The theory upon which costs as between party and party are allowed is that the costs are awarded to the persons claiming them as an indemnity. That being the theory upon which the rule proceeds, it follows that anyone who is not in a position to claim to be indemnified would not be entitled to an order for party and party costs. It is said here that the plaintiff was not in that position, for two reasons, as I understand—one, that the firm who purported to act as his solicitors were not his solicitors at all, they were the solicitors for the union, and their only instruction had been to act as solicitors for the union. Another ground on which I understand, the case is put, is that, even assuming the union instructed the firm of solicitors to act as solicitors for the plaintiff, yet it was upon the term that the solicitors should look to the union, and the union only, for payment of their costs. SANKEY, J., has held that neither contention is well founded upon the facts. He has come to the conclusion that the solicitors were engaged to act as solicitors for the plaintiff by the union, and that in so engaging the solicitors, the union were acting as the agents of the plaintiff. In my opinion, that view is quite correct. The learned judge, as I understand it, also found that upon the facts there had been no arrangement either by the union or by the solicitors or by the plaintiff, that the solicitor should not, in any circumstances, look to the plaintiff for payment of his costs, and with that conclusion upon the facts I also agree. I arrive at my opinion by these steps. First, Who was it who engaged the solicitors to act for them? The answer, it appears to me, is quite plain: It was the union. For whom did they engage the solicitors to act? Was it to act as solicitors for the union, or as solicitors for the plaintiff? It seems to me impossible, on those facts, to come to any other conclusion except that the union employed the solicitors to act in the matter as solicitor for the plaintiff, and I arrive at that conclusion for this reason. The plaintiff's solicitors issued the writ, and they made the statement on the endorsement of the writ that they did so as solicitors for the plaintiff. Mr. Evershed was called. The defendants, who were challenging the position and asserting that that was a mis-statement, and that he never was acting as solicitor for the plaintiff, but was acting as solicitor for the union, never asked him a single question on the subject. Again, take the case of the plaintiff. The plaintiff had certain questions put to him. He was never asked whether the gentleman was his solicitor or not, and it seems to me, upon those facts, clearly impossible to come to any other conclusion except that the solicitors were engaged to act as solicitors for the plaintiff.

The next question is: Upon what terms were they employed? Here again the plaintiff and the solicitor were asked some questions about that. But if, as I take it, it is essential for the defendant's case here that they should establish that the terms upon which the solicitors were engaged included the term that in no circumstances should they look to the plaintiff, it seems to me that the evidence falls entirely short of what was necessary to establish the defendant's case. The plaintiff himself, in his cross-examination, was asked how it came about that he made a claim right up to June, 1919, and he said that he was an official of the Clerks' Union, and that he had made up his mind to make that claim long before he went

A to Helliwell, Harby and Evershed. The question arose in connection with this incident: He was asked in cross-examination, "Are you an official of the Clerks' Union?" and the answer was, "That is so. (Q.) Are their solicitors Helliwell, Harby, and Evershed?—(A.) That is so. (Q.) Was it before you went to them that you informed them of your opinion that you had a right to this money?—(A.) That is right." Down to that time no suggestion of this present contention B had been made. The plaintiff was re-examined. Then his leading counsel interposed and asked leave to put this further question: "I am instructed to put this: You said those gentlemen were the solicitors for the union?—(A.) Yes. (Q.) Have you given them any retainer yourself?—(A.) Nothing whatever." I should assume that the plaintiff understood that question referred to a written retainer; however, be that as it may, he had never given it in the nature of a formal request. Then C SANKEY, J., said: "Is this *Gundry* v. *Sainsbury* (1)? (Leading counsel) Yes. (To the witness): You have given them no retainer at all?—(A.) No. (Q.) If you lose this action you will not have to pay them any costs?—(A.) I take it not." Of course, assuming the union were in funds and were going to keep faith with him, he would not have to pay the costs. The answer is quite consistent with his view that as a matter of fact he would not have to pay, but the answer does not D necessarily, nor, as it seems to me, does it, touch the question of his liability to pay in the event of the union not paying the solicitors. Then the solicitor is called expressly for the purpose of clearing up the position, and he is asked: "Is what I said right, that you are acquainted with the rules which deal with the right to legal aid for the members?—(A.) Yes. (Q.) Is it the practice that they send their members to you in trade disputes?—(A.) Yes." That seems to me to suggest E that the practice is that the union send the members to the solicitors, and in that way the solicitor gets into touch with the person from whom he gets instructions from the union to act as solicitor. Then he is asked: "Is it the practice to get the retainer?" and he says: "No, not from people who get a benefit, because in those cases the union are, by their rules, under an obligation to find the necessary money for the legal aid that is required by the plaintiff." "Is anybody responsible F to you for the costs?" (A.) "The National Union of Clerks." That answer does not exclude the liability of the plaintiff. The National Union of Clerks may be liable to the solicitor, and so may be the plaintiff. Then he is asked: "There is no sort of arrangement between you and Mr. Adams?—(A.) None whatever." Whether that question was intended to be a question: "Is there any sort of arrangement between you and Mr. Adams excluding your liability for costs?" or G whether it means: "Is there any sort of arrangement between you and Mr. Adams about costs?" seems to me to be immaterial, because when once it is set up that the solicitor was acting for the plaintiff by his knowledge and with his assent, it seems to me that he became liable to the solicitor for costs, and that liability would not be excluded merely because the union also undertook to pay the costs.

H It is necessary to go a step further and prove that there was a bargain, either between the union and the solicitor, or between the plaintiff and the solicitor, that in no circumstances is the plaintiff to be liable for costs. In my opinion, the evidence falls short of establishing that material and necessary point, without which, in my opinion, the defendants are not entitled to succeed. On those grounds I think the learned judge gave a right decision, and I think the appeal should be dismissed.

I I only want to say one word about the learned judge's view. A passage has been referred to in his judgment in which it would appear that possibly he might be influenced in his judgment by the fact that the plaintiff contributed to the funds of the society from which the remuneration of the solicitor would be found. I cannot think that the learned judge really intended that passage to bear that meaning, but, be that as it may, it does not seem to me to make any difference in this case that the plaintiff may have contributed in an infinitesimal amount to the fund out of which the solicitors would be paid. The only other matter which I wish to

refer to is *R.* v. *Archbishop of Canterbury* (2), to which our attention has been called. It seems to me that that case proceeded on the assumption on all sides that the archbishop was under a liability to the solicitor, even though he never might be called upon to make that liability good. For these reasons, in my opinion, the appeal fails and must be dismissed with costs. A

ATKIN, L.J.—I agree. It appears to me that the learned judge was correct in finding that the solicitor in the action acted as a solicitor of the plaintiff, and that the plaintiff was employing the solicitor. A retainer in the sense of an express agreement with a solicitor to employ him whether in writing or not, need not be established. In all such cases what has to be shown is that the agent was in fact employed by the principal, whether he is a professional man, or whatever his employment may be. In this case it appears to me from the admitted facts that there is only one inference possible, namely, that the plaintiff did, in fact, employ the solicitor as his solicitor in the action. He was sent along to him, the writ was issued in the plaintiff's name, with the solicitor's name upon it as acting as solicitor for the plaintiff. He knew, right through the proceedings, that they were purporting to act as solicitors. He was made acquainted with the proceedings, as I can see, at every stage. The solicitors communicated with him and sent him an affidavit to be sworn, and he appeared, gave evidence in the action, and was examined by counsel instructed by the solicitors on the record. If there had been no antecedent communication with the solicitors at all, it appears to me that the only inference that one could draw from those facts could be that the plaintiff had ratified the act of the solicitor in acting as his agent as solicitor. It appears to me, therefore, that the learned judge was perfectly correct in saying that here was a case where the solicitors were acting as solicitors for the plaintiff. If they were acting as solicitors for the plaintiff, they were acting under the ordinary terms under which any professional man acts who is employed to do professional work, namely, on the terms that he should be remunerated. That is the primâ facie obligation that at once emerges when you have once proved the employment. It is perfectly possible for the agreement of employment to contain terms by which the agent agrees that he will not claim remuneration from his employer, but will either do the work for nothing or will claim remuneration from some third party. But in the absence of such an agreement, which will have to be proved by the party alleging it, the ordinary deduction from the employment of a professional man accepted in this way is that the person accepting the advice is bound to remunerate the agent. B C D E F G

The question arises whether or not such an express agreement was made. Before proceeding to deal with that, I should like to point out that it seems to follow that if the defendants had been successful in their contention that here there was no employment by the plaintiff of the solicitors, the result would be that the action would be a nullity; it would be brought in the name of a plaintiff who had given no authority to bring an action for him; and it seems to me that the defendants would have the right to have the proceedings stayed and, I presume, have the usual order that the solicitor pay the costs of both parties. That is an application that can be made equally by the defendant and by the plaintiff, and it was so decided in at least two cases: *Geilinger* v. *Gibbs* (3) and *Cape Breton Co.* v. *Fenn* (4). I do not stop to discuss those cases, but it seems to me to follow as a matter of course from the fact of the action being brought without the authority of the plaintiff, that it is, so far as the defendant is concerned, a nullity. H I

The next question that arises is whether or not there was any agreement proved by the defendants that the solicitors were not entitled to receive remuneration from the plaintiff. To my mind, no such agreement was proved. It is a case where the plaintiff was, under the rules of his trade union, entitled to indemnity as to legal costs from the union, and the union chose, for their member, the actual solicitor. In these circumstances I think that it is highly probable, though the

A matter has not been discussed, that the solicitor had a personal right against the trade union to receive a proper remuneration for his services. I say it has not been discussed, and we do not know the precise terms of the relation between the trade union and the solicitor, but I will assume that there exists such an obligation; nevertheless there is nothing inconsistent with that obligation co-existing with an obligation on the part of the real person, the actor, the plaintiff in the B case, to remunerate the solicitor. Naturally as a matter of business, when one came to consider to whom the solicitor would apply, the solicitor would apply, I have no doubt, in the first instance, to the trade union, as being the person ultimately liable to pay the costs as between all parties. But that does not exclude the liability of the member, and it seems to me not in the least to affect the position that he may be liable, although there may be a third person to indemnify C him. I feel satisfied that, on the evidence in the case, it would be quite wrong to draw the conclusion that here there was an express bargain that the plaintiff was not to be liable to the solicitor for the costs incurred; and quite apart from the express evidence that no such arrangement had been made, it appears to me that there was no evidence on behalf of the defendant from which it could be implied that such an arrangement had been made.

D For these reasons it appears to me that the appeal should be dismissed. Like my Lord, I think there is only one passage in the judgment of the learned judge which was at all exposed to comment, namely, where he says:

> "No such agreement was come to in the present case, the facts of which were that the solicitors were entitled to be paid their costs out of the fund contributed E to by the plaintiff, and there was no arrangement to the contrary."

I think the probability is that that sentence would fall into its proper perspective if the learned judge had inserted it where it is to be found in the statement of facts, that he found that the union acted as the plaintiff's agent in retaining and instructing the solicitors, that the solicitors accepted the retainer and instructions on the plaintiff's behalf, and were entitled to be paid out of funds contributed F to by the plaintiff. I think it is probably true that the solicitors were entitled to be paid their costs by the union, and in that sense to be paid out of funds contributed to by the plaintiff, but it does not appear to me that that fact had any bearing on the actual reason for deciding the case. I think this appeal should be dismissed with costs.

G **YOUNGER, L.J.**—I am not sorry that in the result this appeal will be dismissed, because I feel that these costs were properly incurred in reference to the plaintiff in the prosecution of this action, and it would be, I think, unfortunate if, for any technical reason, the defendants were relieved from the proper burden imposed upon them of discharging these costs. On the other hand, I feel a little more difficulty in relation to the facts of the case than is shared by my learned brothers, H although it appears to me that there is authority binding upon this court which leads to the result which, on the facts as they see them, necessarily follows. So far as the facts are concerned, I am rather struck with this. First, of course it will be agreed that the plaintiff, obtaining here an order for party and party costs, is only entitled to recover under such an order the costs which he is himself immediately liable to pay to the solicitors. The plaintiff's solicitors' position in I relation to the plaintiff appears to me to be this. The solicitors were not solicitors pro hac vice of the union, but they were the regular solicitors of the union, and their intervention in this litigation was due exclusively to that fact. Under the rules of the union the plaintiff, by r. 117, is entitled to legal aid, certain conditions being complied with which were complied with in this case; and although not expressly stated, it is a necessary implication of that rule, as I read it, that he is entitled to such legal aid, the conditions being complied with, without further payment by himself. It is one of the many benefits he receives in respect of his

contributions to the union. The solicitors were the general solicitors of the union, A
and the evidence is that when a question arose between a member of the union
and his employer, and the matter was taken up by the governing body through
the general secretary, they took up the matter; and I should feel inclined to infer
very strongly from that at least, and I think it is supported also by the evidence
given by the solicitors, that any society taking up a matter on behalf of a member
referred to them by the general secretary, did so with full knowledge of the rules, B
and of the benefits thereunder to which the member was entitled, and, therefore,
presumably took it up upon the terms that for their work they would be paid
under the general employment by the union; but that so far as the member was
individually concerned, he was, as between him and them, as free from personal
liability for these costs as was any other member of the union. That would appear
to be primarily what I should suppose to be the position while the solicitors were C
acting as the general solicitors of the union in relation to a dispute between a
member and his employer, brought to them by the general secretary. What
was the position of the plaintiff when he went to the general secretary? There
again I think I should be inclined to conclude that he went to the general secretary
under the privilege reserved to him by r. 117, and he must be taken to have given
the general secretary full authority to use his name in connection with the vindica- D
tion of his rights in relation to that dispute. He, again, under the rules, obtained
without further payment to the solicitors, the benefit to which, under the rules,
he was entitled. I am not satisfied that in point of fact the learned judge has
found anything more than what I said. I doubt whether one must trust too much
to the statement that he makes, that the general secretary engaged a solicitor, or,
as in the present case, a firm of solicitors, on behalf of the plaintiff. If that passage E
has to be pressed too far, it would appear that the learned judge had in his mind
the fact that for this purpose only, and pro hac vice, the general secretary employed
this firm of solicitors, not having any other connection with the union, to act for
the plaintiff in connection with this dispute. I do not think the learned judge
could have intended so to find, because it was not through any such separate or F
special selection that the solicitors came to act in this matter. I am, therefore,
rather inclined to attach more importance than my learned brothers do to the
statement in the learned judge's judgment in which he seems to arrive at the
conclusion that the defendants here are liable for costs, because these costs under
the arrangement will come out of a fund, that is to say, the trade union fund, to
which the plaintiff, as a member entitled to benefits, has himself contributed. G
But I think it must be agreed that if the principle be the principle of indemnity,
and that be the only ground upon which the plaintiff's claim can be established,
then he certainly on that ground would be liable to no further costs than those
represented by the amount of his contributions to the fund out of which the total
costs were to come. But I am not satisfied that the learned judge had that distinc-
tion clearly in his mind, because it does seem that he may have been influenced, in H
stating that conclusion, by *Henderson* v. *Merthyr Tydfil Urban Council* (5) which
was cited to him, and with which he was perfectly familiar, having been counsel
in the case. But although the learned judge may not, in fact, have found that
this work was undertaken on the instructions of the plaintiff, so that the plaintiff
became liable as between himself and the solicitors to pay the costs irrespective of
his rights under the rule, although I myself am bound to say, for the reasons I I
have given, that I would have great difficulty in arriving at the conclusion that
that was the true relation either between the solicitor and the plaintiff, on the
one hand, or between the plaintiff and the solicitor, on the other hand, nevertheless
I can see no distinction, even on the view that I take of the facts, between this
case and *R.* v. *Archbishop of Canterbury* (2), and if it was possible for the Court
of Appeal in that case to come to the conclusion that in some event it was arranged
between these parties that the archbishop should be liable to the Treasury Solicitor
for costs, then it appears to me it is not difficult to conclude that in this case

A there must have been some way in which the plaintiff was to be liable to the solicitors of the union for his costs. I think, with my lord, that the view of the Court of Appeal in *R.* v. *Archbishop of Canterbury* (2) was that it must have been assumed on all sides that there was some remote liability on the part of the archbishop which remained; and if that was a proper assumption in that case, it is undoubtedly a proper assumption in this. The more so because there are the facts B to which my lord and ATKIN, L.J., have alluded, which make the case stronger. In fact, they do make it stronger here than they did in the case mentioned. Therefore, I concur in the opinion which has been expressed by my lord and ATKIN, L.J.

Before parting with the case, I desire to say one thing. I think it would be unfortunate if, as the result of the decision in this case, members of trade unions, who contribute generously to the funds of their union, should be left with the idea C that, notwithstanding their contributions to the funds of the union and the legal aid which is promised them in consideration of that contribution, they nevertheless remain liable for the costs of litigation incurred on their own behalf. That, I understand, is not really the true effect of this decision. It is only that that may be the effect if the trade union itself is not able to provide the funds, and I understand that fortunately, in nearly all cases, there is no danger of that happening. D

Appeal dismissed.

Solicitors: *White & Co.; Helliwell, Harby & Evershed.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

E

F

DI FERDINANDO *v.* SIMON, SMITS & CO., LTD.

[COURT OF APPEAL (Bankes and Scrutton, L.JJ. and Eve, J.), July 12, 1920]

[Reported [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 36 T.L.R. 797; 25 Com. Cas. 37]

G *Money—Foreign currency—Rate of exchange—Damages—Breach of contract—Conversion of foreign currency—Rate prevailing at date of breach.*

Where the amount of an award of damages for breach of contract has to be stated in a foreign currency and then converted into sterling the conversion must be at the rate of exchange prevailing on the date of the breach and not on that of the judgment. Changes in rates of exchange are too remote a con- H sequence of a breach of contract to be taken into consideration by the court.

Notes. Considered: *The Volturno*, [1920] P. 447. Applied: *Re Rickett, Ex p. Insecticide Activated Products* v. *Official Receiver*, [1949] 1 All E.R. 737. Referred to: *Barry* v. *van den Hurk*, [1920] 2 K.B. 709; *Celia (Owners)* v. *Volturno (Owners)*, [1921] All E.R. Rep. 110; *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (1921), 126 L.T. 513; *Re British American Continental Bank, Credit General Liegeois' Claim*, [1922] All E.R. Rep. 219; *Re British American Continental Bank, Goldzieher and Penso's Claim*, [1922] 2 Ch. 575; *Re British American Continental Bank, Lisser and Rosenkranz's Claim*, [1923] 1 Ch. 276; *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] All E.R. Rep. 705; *Ellis' Trustee* v. *Dixon-Johnson*, [1924] 2 Ch. 451; *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1931), 100 L.J.K.B. 465; *Madelein Vionnet et Cie* v. *Wills*, [1939] 4 All E.R. 136; *Graumann* v. *Treitel*, [1940] 2 All E.R. 188; *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*, [1943] A.C. 507; *Cummings* v. *London*

Bullion Co. (1951), 95 Sol. Jo. 157; *Mehmet Dogan Bey* v. *Abdeni & Co.*, [1951] 2 All E.R. 162; *East India Trading Co., Inc.* v. *Carmel Exporters and Importers, Ltd.*, [1952] 1 All E.R. 1053; *Philips* v *Ward*, [1956] 1 All E.R. 874.

As to the conversion of damages in a foreign currency for breach of contract, see 11 HALSBURY'S LAWS (3rd Edn.) 306, 307; and for cases see 17 DIGEST 173–175.

Cases referred to:

(1) *Scott* v. *Bevan* (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, *44*.

(2) *Lebeaupin* v. *Richard Crispin & Co.*, post p. 353; [1920] 2 K.B. 714; 89 L.J.K.B. 1024; 124 L.T. 124; 36 T.L.R. 739; 64 Sol. Jo. 652; 25 Com. Cas. 335; 17 Digest (Repl.) 174, *687*.

(3) *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 46 W.R. 498; 14 T.L.R. 312; 42 Sol. Jo. 413, C.A.; 35 Digest 176, *57*.

(4) *Barry* v. *Van Den Hurk*, [1920] 2 K.B. 709; 89 L.J.K.B. 899; 123 L.T. 719; 36 T.L.R. 663; 64 Sol. Jo. 602; 17 Digest (Repl.) 174, *688*.

(5) *Cook* v. *Fowler* (1874), L.R. 7 H.L. 27; 43 L.J.Ch. 855, H.L.; 35 Digest 177, *67*.

(6) *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120; 61 L.J.Ch. 294; 65 L.T. 722; 40 W.R. 194; 8 T.L.R. 82; 36 Sol. Jo. 77, C.A.; 20 Digest 249, *133*.

Also referred to in argument:

Kirsch & Co. v. *Allen, Harding & Co., Ltd.* (1919), 89 L.J.K.B. 265; 122 L.T. 159; 36 T.L.R. 59; 25 Com. Cas. 63; reversed, 89 L.J.K.B. 265; 123 L.T. 105; 36 T.L.R. 245; 25 Com. Cas. 174, C.A.; 17 Digest (Repl.) 173, *682*.

Rodocanachi v. *Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp. M.L.C. 100, C.A.; 39 Digest 669, *2570*.

Williams Bros. v. *Ed. T. Agius, Ltd.*, [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 30 T.L.R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200, H.L.; 39 Digest 670, *2571*.

Slater v. *Hoyle and Smith*, [1920] 2 K.B. 11; 89 L.J.K.B. 401; 122 L.T. 611; 36 T.L.R. 132; 25 Com. Cas. 140, C.A.; 39 Digest 481, *1026*.

Jamal v. *Moolla Dawood, Sons & Co.*, [1916] 1 A.C. 175; 85 L.J.P.C. 29; 114 L.T. 1; 32 T.L.R. 79; 60 Sol. Jo. 139, P.C.; 17 Digest (Repl.) 109, *227*.

Marburg v. *Marburg* (1866), 26 Maryland Rep. 8.

Cash v. *Kennion* (1805), 11 Ves. 314; 32 E.R. 1109, L.C.; 35 Digest 173, *35*.

Cockerell v. *Barker* (1810), 16 Ves. 461; 33 E.R. 1059, L.C.; 35 Digest 172, *33*.

Lee v. *Willcocks* (1819), 5 Serg. & Raw. 48.

Appeal from an order of ROCHE, J., in the Commercial List.

The plaintiff was an Italian merchant, and the defendants were shipping agents and shippers carrying on business in England. The plaintiff's claim was for damages for breach of contract of carriage and for conversion of the goods. In or about May, 1918, the plaintiff bought from Messrs. Poliakoff, of London, about 25 tons of sodium sulphide c.i.f. from London to Milan at the price of £58 a ton. Messrs. Poliakoff arranged with the defendants to carry the goods from London to Milan by sea from London to Havre and by rail from Havre to Milan. In September, 1918, the goods were handed by Messrs. Poliakoff to the defendants. The defendants gave to Messrs. Poliakoff a document reciting that they received for shipment on board the steamship or vessel called the *Verde*, or other vessel now lying in the port, and bound for Le Havre, the parcels of sodium sulphide in question. The defendants did not ship the goods either by the *Verde* or by any other vessel then lying in port, or at all. ROCHE, J., found that they had committed a breach of the contract to carry the plaintiff's goods from London to Milan, and had converted the goods. He further held that the proper measure of damages was the value of the goods in Italy on the date when they would have arrived in Italy, had

A they been forwarded, namely, on Feb. 10, 1919, and that the rate of exchange to be applied for the conversion of that sum into English currency was that prevailing on that date, the date of the breach by the defendants of the contract between the parties. The defendants appealed.

Neilson, K.C. (*G. P. Langton* with him), for the defendants.

Schiller, K.C. and *St. John Micklethwait* were not called on to argue.

B

BANKES, L.J.—This is an appeal from a judgment of ROCHE, J., in a matter which has become of very considerable importance owing to the variation in the rates of exchange since the war [of 1914–1918].

The plaintiff brought an action against the defendants for failure to deliver certain goods which they contracted to deliver to him in Milan, the plaintiff being C a merchant carrying on business in Milan and the defendants being carriers carrying on business in England. The plaintiff brought his action against the defendants in England and the learned judge has held that the defendants committed a breach of their contract in not delivering the goods to the plaintiff, and he also held that they had been guilty of a conversion of the goods. He held that the date of breach was Feb. 10, 1919, and he proceeded to assess the damages as on that date by D inquiring what the value of the goods to the plaintiff in Milan would have been on that date. The only materials which were presented to him on which to arrive at that value were the value of the goods in Italian money, and, after consideration, he arrived at the conclusion that that value on Feb. 10, 1919, was the sum of 48,000 odd lire. At that date the rate of exchange was such that the equivalent of that number of lire in English money was £1,555. The action was tried on E Mar. 30, 1920, and the rate of exchange had so altered that on that date the equivalent in English money of 48,000 lire was only £780. The defendants contended that they would discharge their obligation to the plaintiff if the learned judge gave judgment in the plaintiff's favour for the sum of £780, representing the 48,000 lire at the rate of exchange prevailing at that date. The defendants, on the other hand, contended that they were entitled to £1,500 odd, the dispute between them F being as to the date at which the rate of exchange should be taken. ROCHE, J., decided that the right date was the date of breach, and he gave judgment for the £1,555. From that judgment the defendants appeal. Their counsel has contended that, having regard to the alteration in the rate of exchange, the plaintiff would be in the same position if he was paid £780 at the date of the judgment as if he had been paid £1,555 at the date of the breach.

G It seems to me that the apparent difficulty of the position to a large extent disappears if one concentrates one's attention on the rule of law which one has to apply. That rule is this. The plaintiff is entitled to have his damages assessed as at the date of breach and the court has no jurisdiction to award damages except in English money. I think if that rule is kept clearly before one's mind a great deal of the difficulty which counsel suggested disappears. The plaintiff is entitled H to his damages as at the date of the breach, and it seems to me the judge must express those damages in English money, and in order to do that he must take the rate of exchange prevailing at the date of breach.

We have been referred to a considerable number of authorities and all, with the exception of one English authority and one American authority seem to me to be in favour of the view taken by ROCHE, J. The one English authority is a decision I of ROCHE, J.'s, own with regard to which he says he is not satisfied whether it is in conflict with his present decision, but, if it is, he prefers the decision he gave in this case. The American authority I need not refer to, there being, as it seems to me, such a weight of English authority in favour of the view taken by ROCHE, J. The first case I should like to refer to is *Scott* v. *Bevan* (1) which I think, understood as I understand it, does not deserve the comments on it made by MCCARDIE, J., in *Lebeaupin* v. *Richard Crispin & Co.* (2) (post 359), and is, I think, an authority in favour of ROCHE, J.'s, view. There the plaintiff had recovered

judgment in Jamaica, and he sued the defendant in England upon that judgment. The judgment was expressed in current money of the island of Jamaica, and the defendant contended that the amount to be paid into court at the rate of exchange prevailing at the date of the judgment in Jamaica was sufficient to satisfy the plaintiff's claim. His calculation was based upon the rate of exchange actually existing at the date of the Jamaican judgment. The plaintiff contended that he was entitled to something more than the amount paid into court, because he said that he was entitled to have the rate of exchange calculated according to a conventional rate of seventy-five and not upon the actual rate prevailing. The court decided that the defendant's view was right and that the actual rate and not the conventional rate was the material one. The decision also proceeded upon the footing that the material date to consider was the date when the judgment was delivered in England.

Another case which I think is of great importance is *Manners* v. *Pearson & Son* (3) because, although the facts are not the same as in the present case, LORD LINDLEY, M.R., and VAUGHAN WILLIAMS, L.J., as it seems to me, in their judgments made statements as to the law which are directly in point and which really govern this case, VAUGHAN WILLIAMS, L.J., does so more directly, perhaps, than the Master of the Rolls, but the Master of the Rolls says ([1898] 1 Ch. at p. 587):

> "The necessity of considering what amount the defendants ought to pay in English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and, speaking generally, the courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writ of execution."

Applying that to this case it seems to me that ROCHE, J., was bound to express in English money the amount of damages to which the plaintiff was entitled at the date of breach. VAUGHAN WILLIAMS, L.J., more pointedly says (ibid. at p. 592) after referring to *Scott* v. *Bevan* (1):

> "It seems plain that this mode of computing the value of foreign currency in English sterling and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment."

Nothing could be more in point than that statement of the law by the lord justice which seems to be entirely in accordance with *Scott* v. *Bevan* (1) and entirely in accordance with what I conceive must be the rule on the subject.

That view was followed by MCCARDIE, J., in *Lebeaupin* v. *Richard Crispin & Co.* (2), and by BAILHACHE, J., in *Barry* v. *Van Den Hurk* (4). In those last two cases the learned judges express their views in different language, but they both came to the same conclusion, which was that, to use BAILHACHE, J.'s, language, damages must be crystallised at that moment. Personally I would rather put it that the judge is under an obligation to express the amount of damages as at that date in English money, but, from whatever point of view you regard it, or in whatever language you choose to express it, I am satisfied that the principle laid down by VAUGHAN WILLIAMS, L.J., is right, and this appeal must be dismissed with costs.

SCRUTTON, L.J.—On this question, which is becoming of great importance owing to the great variety of exchange rates and their rapid fluctuation between countries of the world, I agree with the views of BAILHACHE, J., and MCCARDIE, J., and the second judgment of ROCHE, J. I regret that as an intellectual effect I

have not had the pleasure of hearing leading counsel for the plaintiff explain that the first judgment of ROCHE, J., and the second judgment of ROCHE, J., really mean the same thing. I have not had the pleasure of hearing that reconciliation, I cannot express any opinion about it, but it looks to me as if the first judgment of ROCHE, J., was erroneous, and his second thoughts the better.

As a matter of principle the matter appears to stand in this way. When one is claiming damages for the delivery of goods in a foreign country at a fixed date the clear measure of damages is, if there is a market, the market value of those goods at the place where they should have been delivered, and on the day when they should have been delivered and in arriving at the amount of damages on that principle it is quite immaterial to prove that at the date of the judgment for damages the goods were either worth more or worth less than they were on that day. It would be no use if the goods were worth £50 a ton on the day of delivery proving that they would have been worth £100 a ton on the day of the judgment, or proving that they would only have been worth £25 a ton on the day of judgment. The reason for excluding that evidence is that subsequent fluctuations in the value of the goods which ought to have been delivered are too remote as a consequence of the original breach to be taken into account by the court, and, therefore, shutting out the change in the value of the goods after the day of breach you have, if the matter is in a foreign country, usually to do a calculation in foreign currency and one arrives at a figure in foreign currency. The English courts cannot give judgment in foreign currency, they would have no power to enforce it; therefore, they must translate into English currency the figure they have arrived at which is the figure of damages in foreign currency on the day of the breach. Just as, in my view, they have to exclude from their calculation the subsequent change in the value of the goods after the date of breach, so they also have to exclude the subsequent changes in the value of the currency after the date of the breach; they exclude it for the same reason that they have excluded the change in the value of the goods and the changes in the value of the currency are too remote a consequence of the breach to be taken into consideration by the courts. That view of the principle appears to me to be in accordance with all the authorities to which we have been referred except the first judgment of ROCHE, J. I, like my Lord, do not understand MCCARDIE, J.'s, comment on *Scott* v. *Bevan* (1) or, rather, I think I understand why it was made, but it proceeds on a misapprehension, because the report is expressed in somewhat ambiguous terms, of the value of that judgment. In *Scott* v. *Bevan* (1) an action was brought on a Jamaican judgment for money, and the defendants paid into court a sum based on the rate of exchange at the day of the Jamaican judgment. The plaintiff said: "I do not care about the actual exchange, there is a conventional method of turning Jamaica money into English money by a ratio of seventy-five, irrespective of the actual exchange on any particular date." The defendants said that was wrong, and they proved that on Oct. 1, 1827, when the judgment was obtained, a certain rate prevailed. LORD TENTERDEN at the trial thought the plaintiff's view of the conventional exchange was the right one. When the matter came before the full court, LORD TENTERDEN, delivering the judgment of the full court, though saying that he himself was still not quite sure that his original view was not right, said that the defendants' view was correct, taking the rate of exchange at the commencement of the action or sometime before or after. What had been proved was the rate of exchange at the date of the judgment, and I think that MCCARDIE, J.'s, comment proceeds on the misapprehension that the date of the judgment means the date of the English judgment, and not as appears to be clear on the authority the date of the Jamaican judgment.

There is one thing more I wish to say. It has occurred to me, possibly it may be a way of dealing with the matter, that in some cases of non-payment of money one recovers interest on non-payment by agreement; in other cases where there is no agreement for the payment of interest and one cannot bring the non-payment within

any statute that gives one interest, one may yet recover damages for the failure to pay on the agreed day under the head of interest by way of damages. The matter is explained, and the reason why one can do it, by the House of Lords in *Cook* v. *Fowler* (5). As explained by BOWEN, L.J., in *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.* (6) one can add to one's damages at the time of the breach in some circumstances a sum for interest for not paying on the amount due on the agreed date, but postponing its payment until judgment is obtained in an English court. It occurred to me it might possibly be the case that differences of exchange have been included in such damages. I have been unable to find, in the time I have had to look into the matter, that interest by way of damages has ever been allowed to cover alteration of the sum due through appreciation or depreciation in the exchange, and the learned counsel who obviously has shown great industry in going to the courts of Maryland, and many other courts in the many cases he has given us, had equally not found any case in which damages have been allowed to cover variation in the exchange. I think the reason is the reason I have already given—that they are too remote from the actual breach complained of. Variation of rates of exchange is connected with the contract to be in contemplation of the parties. That seems to me, in principle, the way the matter should be dealt with, and without going through the authorities, that is the rule that should be followed—a rule laid down by three judges of great experience in the King's Bench Division.

EVE, J.—I think the principles applicable in this case are those to be found in *Scott* v. *Bevan* (1) and explained in language more lucid and more apposite than any I can employ by VAUGHAN WILLIAMS, L.J., in *Manners* v. *Pearsan & Son* (3). In particular, I think the sentence which my lord has read, and which I will not read again, seems to dispose of the argument that the date on which the value of the foreign currency in English sterling is to be ascertained is the date of the judgment and not of the breach. I think it is quite clear that the learned lord justice took the view that *Scott* v. *Bevan* (1) had determined that the real date was the date of the breach, and I agree in thinking this appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *William A. Crump & Son; Crossley & Burn.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

LEBEAUPIN *v.* RICHARD CRISPIN & CO.

[KING'S BENCH DIVISION (McCardie, J.), June 18, 1920]

[Reported [1920] 2 K.B. 714; 89 L.J.K.B. 1024; 124 L.T. 124; 36 T.L.R. 739; 64 Sol. Jo. 652; 25 Com. Cas. 335]

Sale of Goods—Non-delivery—Defence—Failure of subject-matter of contract—Sale of tinned fish to be prepared by third party—Breach by third party of contract to supply seller—Failure to deliver due to "force majeure"—Construction of those words—Occurrence beyond control of seller.

Money—Foreign currency—Rate of Exchange—Damages—Breach of contract—Conversion of foreign currency—Rate obtaining at date of breach.

By two contracts dated May 16, 1917, the sellers agreed to supply to the buyer, under each contract, 2,500 cases of British Columbia Fraser River salmon. By the first contract: "The salmon to be the first 2,500 cases of ½ lb. flat pinks packed by the St. Mungo Cannery, Fraser River, during the season of 1917." By the second contract: "The salmon to be the first 2,500 cases of ½ lb. flat pinks packed by the Acme Cannery, Fraser River, during the season of 1917." An exception clause in each contract provided: "In the event of the destruction, or partial destruction, of the cannery plant or material, or falling short through short run of fish . . . or from any cause not under the control of the canners or shippers . . . causing non-arrival at destination . . . the contract to be cancelled in respect of such non-delivery or part non-delivery as the case may be," and each contract contained the words "subject to force majeure." There was an excellent run of fish on the Fraser River during the season of 1917. After the St. Mungo company had began to pack the salmon into ½ lb. tins they discovered that the tins, which had been supplied to them by another company, were defective; they stopped packing, but before a new supply of tins could be obtained the run of salmon had practically ceased. With regard to the Acme company, the supply of fish was ample to enable the company to pack 2,500 cases in accordance with the contract, and they were in possession of more than sufficient ½ lb. tins for the purpose, but when the run of fish began, the company had a large stock of 1 lb. tins which were getting rusty and to avoid loss they began by filling the 1 lb. tins, but before they could proceed with the filling of the ½ lb. tins the run of salmon ceased, and no ½ lb. tins were filled. As a result the cannery companies were unable to deliver the fish to the sellers who, in turn, could not deliver to the buyer.

Held: (i) the case was not one of the sale of specific goods to be prepared by a third person so as to absolve the sellers from liability if the goods did not come into existence, but the sellers must be treated as occupying the same position as the cannery companies and could not rely on any failure of subject-matter which those companies, if defendants, would have been disabled from relying on: *Howell* v. *Coupland* (1) (1876), 1 Q.B.D. 258, distinguished; the exception clause did not apply; the words "force majeure" must be construed in each case with a close attention to the words which preceded or followed them and with a due regard to the nature and general terms of the contract, and in the present case there was no failure of fish or other matter beyond the control of the sellers which would excuse them for their failure to perform the contract; and, therefore, the buyer was entitled to the damages, amounting to $12,500, for breach of the contracts awarded by an umpire in an arbitration between the parties, the date of the breach, and not the date of the present judgment, to be taken as the time for the ascertainment of the rate of exchange for the conversion of the Canadian currency into sterling.

Notes. Approved: *Di Ferdinando* v. *Simon, Smits & Co., Ltd.*, ante p. 347. Considered: *The Volturno*, [1920] P. 477; *Podar Trading Co., Bombay* v. *Francois Tagher, Barcelona*, [1949] 2 All E.R. 62; *Brauer & Co. (Great Britain), Ltd.* v.

James Clark (Brush Materials), Ltd., [1952] 1 All E.R. 981. *British Electrical and Associated Industries (Cardiff), Ltd.* v. *Patley Pressings, Ltd.*, [1953] 1 All E.R. 94. Referred to: *Celia (Owners)* v. *Volturno (Owners)*, [1921] All E.R. Rep. 110; *Re British American Continental Bank, Goldzieher and Penso's Claim*, [1922] 2 Ch. 575; *East India Trading Co. Inc.* v. *Carmel Exporters and Importers, Ltd.*, [1952] 1 All E.R. 1053.

As to impossibility of the performance of a contract see 8 HALSBURY'S LAWS (3rd Edn.) 178 et seq., and ibid., 2nd Edn., vol. 29, pp. 48, 49. As to conversion of damages in foreign currency, see ibid., 3rd Edn., vol. 11, pp. 306, 307. For cases see 12 DIGEST (Repl.) 414 et seq., 39 DIGEST 404–406, 17 DIGEST (Repl.) 173–175.

Cases referred to:

(1) *Howell* v. *Coupland* (1874), L.R. 9 Q.B. 462; 30 L.T. 677; 22 W.R. 691; affirmed (1876), 1 Q.B.D. 258; 46 L.J.Q.B. 147; 33 L.T. 832; 40 J.P. 276; 24 W.R. 470, C.A.; 12 Digest (Repl.) 429, *3304*.

(2) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

(3) *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex.Ch.; 12 Digest (Repl.) 696, *5334*.

(4) *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 8 Digest (Repl.) 46, *277*.

(5) *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.*, [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 24 T.L.R. 114; 52 Sol. Jo. 170; 10 Asp. M.L.C. 581; 13 Com. Cas. 104, H.L.; 41 Digest 474, *3056*.

(6) *Elderslie Steamship Co.* v. *Borwick*, [1905] A.C. 93; 74 L.J.K.B. 338; 92 L.T. 274; 53 W.R. 401; 21 T.L.R. 277; 10 Asp. M.L.C. 24; 10 Com. Cas. 109, H.L.; 41 Digest 477, *3107*.

(7) *Zinc Corpn., Ltd.* v. *Hirsch*, [1916] 1 K.B. 541; 85 L.J.K.B. 565; 114 L.T. 222; 32 T.L.R. 232; 21 Com. Cas. 273, C.A.; 12 Digest (Repl.) 446, *3377*.

(8) *Matsoukis* v. *Priestman & Co.*, [1915] 1 K.B. 681; 84 L.J.K.B. 967; 113 L.T. 48; 13 Asp. M.L.C. 68; 20 Com. Cas. 252; 39 Digest 429, *584*.

(9) *Yrazu* v. *Astral Shipping Co.* (1904), 20 T.L.R. 153; 9 Com. Cas. 100; 41 Digest 477, *3099*.

(10) *Peter Dixon & Sons, Ltd.* v. *Henderson, Craig & Co., Ltd.*, [1919] 2 K.B. 778; 87 L.J.K.B. 683; 118 L.T. 328, C.A.; 12 Digest (Repl.) 449, *3388*.

(11) *The Concadora*, [1916] 2 A.C. 199; 85 L.J.P.C. 156; 114 L.T. 692; 32 T.L.R. 465; 13 Asp. M.L.C. 355, P.C.; 37 Digest 643, *954*.

(12) *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France*, [1919] A.C. 1; 87 L.J.K.B. 746; 118 L.T. 731; 34 T.L.R. 400; 62 Sol. Jo. 519; 14 Asp. M.L.C. 291, H.L.; 39 Digest 667, *2560*.

(13) *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (1919), 89 L.J.K.B. 265; 122 L.T. 159; 36 T.L.R. 59; 25 Com. Cas. 63; reversed (1920), 123 L.T. 105; 36 T.L.R. 245; 25 Com. Cas. 174, C.A.; 17 Digest (Repl.) 173, *682*.

(14) *Di Ferdinando* v. *Simon, Smits & Co.*, [1920] 2 K.B. 704; affirmed [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 36 T.L.R. 797; 25 Com. Cas. 37, C.A.; 17 Digest (Repl.) 173, *686*.

(15) *Barry* v. *Van Den Hurk*, [1920] 2 K.B. 709; 89 L.J.K.B. 899; 123 L.T. 719; 36 T.L.R. 663; 64 Sol. Jo. 602; 17 Digest (Repl.) 174, *688*.

(16) *Rodocanachi, Sons & Co.* v. *Milburn Bros.* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp. M.L.C. 100, C.A.; 39 Digest 669, *2570*.

(17) *Williams Bros.* v. *Ed. T. Agius, Ltd.*, [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 30 T.L.R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200, H.L.; 39 Digest 670, *2571*.

(18) *Slater* v. *Hoyle and Smith*, [1920] 2 K.B. 11; 89 L.J.K.B. 401; 122 L.T. 611; 36 T.L.R. 132; 25 Com. Cas. 140, C.A.; 39 Digest 481, *1026*.

(19) *Jamal* v. *Moolla Dawood, Sons & Co.*, [1916] 1 A.C. 175; 85 L.J.P.C. 29; 114 L.T. 1; 32 T.L.R. 79; 60 Sol. Jo. 139, P.C.; 17 Digest (Repl.) 109, *227*.

(20) *Marburg* v. *Marburg* (1866), 26 Maryland Rep. 8.

(21) *Scott* v. *Bevan* (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, *44*.

(22) *Cash* v. *Kennion* (1805), 11 Ves. 314; 32 E.R. 1109, L.C.; 35 Digest 173, *35*.

(23) *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 46 W.R. 498; 14 T.L.R. 312; 42 Sol. Jo. 413, C.A.; 35 Digest 176, *57*.

(24) *Hayward Bros., Ltd.* v. *James Daniel & Son* (1904), 91 L.T. 319; 12 Digest (Repl.) 429, *3305*.

Award by an umpire in the form of a Special Case in an arbitration between buyers and sellers.

The facts appear in his Lordship's judgment.

Le Quesne for the sellers.

Raeburn, K.C., as amicus curiae referred the court to *Hayward Bros., Ltd.* v. *James Daniel & Son* (24), where it was held that the principle of *Howell* v. *Coupland* (1) did not apply. As to the rate of exchange, he referred to *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (13), *Di Ferdinando* v. *Simon Smits & Co.* (14), and *Barry* v. *Van den Hurk* (15).

Neilson, K.C. and *H. T. P. Hallett* for the buyers.

McCARDIE, J.—This award raises several points of law of novelty and importance. The buyer (M. Lebeaupin) claims damages against the sellers (Richard Crispin & Co.) for breach of contract to deliver a large quantity of tinned salmon.

There were two contracts, each dated May 16, 1917, and each for the supply of 2,500 cases of "British Columbia Fraser River salmon." The first contract had the following words:

"The salmon to be the first 2,500 cases of ½ lb. flat pinks packed by the St. Mungo Cannery, Fraser River, during the season of 1917."

The second contract has these words:

"The salmon to be the first 2,500 cases of ½ lb. flat pinks packed by the Acme Cannery, Fraser River, during the season of 1917."

Each contract contained the following exception clause:

"In the event of the destruction, or partial destruction, of the cannery plant or material, or the packing being interfered with, or stopped, or falling short through short run of fish or through strikes or lock-outs of fishermen or workmen, or from any cause nor under the control of the canners or shippers . . . causing non-arrival at destination . . . the contract to be cancelled in respect of such non-delivery or part non-delivery as the case may be."

Then appeared in large letters the words "subject to force majeure." The sellers failed to deliver any part of the goods to the buyer. They asserted that they were saved from liability for several reasons. The umpire negatived their contentions and awarded substantial damages to the buyer.

The sellers are merchants in London. To cover themselves upon the present contracts they made contracts with a firm of Evans, Coleman, and Evans, Ltd., also of London, and the latter firm made contracts with the St. Mungo Cannery and the Acme Cannery of British Columbia. The terms of the latter contracts were not in evidence before the umpire. The St. Mungo Cannery belongs to the St. Mungo Canning Co., Ltd. In the season of 1917 there was an excellent run of fish on the Fraser River. The St. Mungo company began to pack the salmon into the ½ lb. tins. They then proceeded to prepare the tins as usual by a cooking process, but found that the tins were defective and useless for the desired purpose. Hence they

ceased to pack into the ½ lb tins and destroyed the cooking already made. Before they could get a new lot of ½ lb. tins the run of salmon had practically ceased. If they had possessed a sufficient supply of good tins they could have secured fish for 2,500 cases of ½ lb. flat pinks. The St. Mungo company gave evidence before the umpire to the effect that it was not possible to discover that the tins were defective until pressure was put on them in the process of cooking. Upon this point the umpire says:

> "I accept this in the sense that the defects could not be found until the tins were used, and that they had no reason to suspect them until they did use them, but I find that they might have been used and so tested at an earlier date—for example, when they were packing the Toba Inlet fish. There was no evidence of the date or term of their contract with the American Canning Co., or of the date of the delivery of the tins which proved defective . . ."

Apparently the defective tins had been supplied by the American Canning Co. The Acme Cannery belongs to the British Columbia Packers' Association. Ample fish existed in the season of 1917 to enable them to pack 2,500 cases of ½ lb. flat pinks. They had a full supply of ½ lb. tins. What happened, however, was this. They had a large number of 1 lb. tins. These were getting rusty when the fish began to run. They therefore filled the 1 lb. tins first to the extent of over 3,700 cases to avoid the loss of those 1 lb. tins. Then, ere they could proceed to fill the ½ lb. tins, the run of the fish ceased and they were unable to prepare ½ lb. tins at all. The cessation of the run was in no way abnormal.

Such are the main facts as to the two contracts. The first contention of the sellers was that the words, "the salmon to be the first 2,500 cases of ½ lb. flat pinks packed by the St. Mungo Cannery, Fraser River, during the season of 1917," and the like words (mutatis mutandis) in the second contract, were a sale of a specific class of goods actually to be prepared and made by a third person, and that, unless that specified class of goods came into existence, the sellers were free from liability. They relied on *Howell* v. *Coupland* (1). There the defendant Coupland agreed to sell "200 tons of Regent potatoes grown on land belonging" to Coupland in Whaplode "at the rate of £3 10s. per ton." Owing to the potato blight the crop failed and the defendant was only able to deliver 80 tons. It was held that he was not liable for the non-delivery of the remaining 120 tons. The ground of the decision was given by BLACKBURN, J., who said:

> "The principle of *Taylor* v. *Caldwell* (2), which was followed in *Appleby* v. *Myers* (3) in the Exchequer Chamber, at all events, decides that where there is a contract with respect to a particular thing and that thing cannot be delivered owing to it perishing without any default in the seller, the delivery is excused. Of course, if the perishing were due to any default of the seller, that would be quite another thing. But here the crop failed entirely owing to the blight which no skill, care or diligence of the defendant could prevent."

In my opinion, the decision in *Howell* v. *Coupland* (1) does not cover the present case. The sellers here must, I think, be treated for the purposes of the present contracts as occupying the position of the St. Mungo Cannery Co. and the Acme Cannery Co. They cannot rely on any defence of failure of subject-matter which those companies (if they were defendants to the present proceedings) would be disabled from relying upon. This being so, I point out that it is clear that there was no failure of the fish crop at all. It was, indeed, larger than usual. The reason for the default was in the one case the omission of the St. Mungo Cannery Co. to provide good tins, and was in the other case the deliberate choice of the Acme Co. to pack 1 lb. tins in priority to ½ lb. tins in the hope that an exceptional run of fish would occur. There is no scope here for an application of the *Howell* v. *Coupland* (1) principle. If it were to be applied to such a case as the present, the result would be greatly to impair the obligations of sellers.

A The next contention of the sellers was that they were saved from liability by the words of the exception clause, i.e., apart from the special words, "subject to force majeure." As to this contention, I need not say that if a seller desires to escape from liability in such a case as the present, he must take care to use words of adequate clearness and width. The principle of *Price & Co.* v. *Union Lighterage Co.* (4) and *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.* (5) applies as much to
B the documents before me as to shipping documents. This point was cogently put by Lord Macnaghten in *Elderslie Steamship Co.* v. *Borthwick* (6), when he said: "An ambiguous document is no protection." In the present case I think that the exception clause does not, upon any fair interpretation of it, cover the facts here. Indeed, I go further and say that upon the facts here found by the umpire the non-
C delivery of the goods in question did in substance arise from causes under the control of the canners or shippers.

The next point turned on the words "subject to force majeure." The phrase "force majeure" has been introduced into many English commercial contracts within recent years. It is employed not only with increasing frequency, but without any attempt to define its meaning or any effort to co-ordinate the phrase to the other provisions of documents. It is a phase employed in the Code de Commerce of
D France. Thus, for example, art. 230 of that code provides:

> "La responsabilité du capitaine ne cesse que par la preuve d'obstacles de force majeure."

The meaning of the phrase as used on the continent of Europe is discussed in Calvo's Dictionnaire de Droit International, title "Force Majeure" and by
E Dalloz, Jurisprudence Générale, tome 24, p. 755, article "Force Majeure." A broad statement on the matter appears in Goirand's French Commercial Law (2nd Edn.) p. 854, who says:

> "'Force Majeure.' This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and
F such force majeure is sufficient to justify the non-execution of a contract. Thus war, inundation, and epidemics are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure."

This is a wide definition, but I think that it usefully, though loosely, suggests not only the meaning of the phrase as used on the continent, but also the meaning of the phrase as often employed in English contracts. That "war" comes within the
G meaning of force majeure would seem to be the opinion of Swinfen Eady, L.J., in *Zinc. Corpn., Ltd.* v. *Hirsch* (7). That a strike of workmen comes within the phrase was the opinion of Bailhache, J., in *Matsoukis* v. *Priestman & Co.* (8). That learned judge was, if I may respectfully say so, clearly right when he said that the phrase force majeure was not interchangeable with vis major or "the act of God." It goes
H beyond the latter phrases. Any direct legislative or administrative interference would of course come within the term, for example, an embargo. But even such a thing as a breakdown of machinery through accident was deemed by Bailhache, J., to come within the words force majeure: see *Matsoukis* v. *Priestman & Co.* (8). This opinion is agreeable to the view of Walton, J., in *Yrazu* v. *Astral Shipping Co.* (9), where he ruled that, although a miscalculation of the master and engineer of a ship
I causing a ship to leave with insufficient coals whereby she was compelled to call at another port and thereby suffered delay and depreciation of cargo, was not a case of force majeure, yet that it would have been a case of force majeure if the deficiency of coal had arisen from some accident or casualty. In *Matsoukis* v. *Priestman & Co.* (8) Bailhache, J., seems to have ruled that delay caused by bad weather was not within the force majeure clause. But he was there dealing with the particular facts, and I conceive that normal bad weather is one thing, whereas abnormal tempest, storm, or the like, may be another thing, and might well fall within the force majeure clause. *Peter Dixon & Sons, Ltd.* v. *Henderson, Craig & Co., Ltd.*

(10) throws but little light on the matter, inasmuch as the force majeure clause there dealt with by the Court of Appeal was defined by the words following the heading of force majeure. But in *The Concadoro* (11) an interesting question arose as to the meaning of force majeure in art. 2 of the Hague Convention, No. 6 of 1907. LORD PARMOOR in reading the advice of the Privy Council said:

> "The force majeure contemplated in the article is one which renders the vessel unable to leave the port, and cannot be construed to include the circumstance that the matter has not been provided by the owners with sufficient financial resources to continue his voyage."

I take it that a force majeure clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument. Applying the above observation to the present case. I point out again that there was no failure of fish on the Fraser River in 1917. There was no legislative or administrative interference with the canners or shippers; there was nothing in the nature of vis major or actus Dei, and nothing in the nature of a strike, or an accident, or a casualty. All that happened as to the St. Mungo company was that they were in default with their tins, and if their contractors (the American Canning Co.) had committed a breach of contract in supplying defective tins, they could presumably have secured damages against them. The Acme company's default arose either through their deliberate choice or their error of judgment. A man cannot rely on his own act, or negligence, or omission, or default as force majeure: see the principle stated by LORD FINLAY in *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France* (12) [1919] A.C. at p. 6. However broadly the force majeure clause may be interpreted, it could not exonerate the sellers upon the facts of the present case. I am satisfied that when the parties spoke of force majeure, they never intended those words to include such a case as this. I, therefore, think that the learned umpire rightly awarded damages to the buyer.

The final point, and an important one, arose upon cl. 11 of the award. The following are the words of the umpire:

> "I hold that the sellers are not excused under either contract for their failure to deliver. I, therefore, award that the sellers shall pay to the buyer $12,500. In accordance with the rule, as I understand it to have been land down by ROCHE, J., in *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (13), I direct that the sellers shall pay the sum to such agent of the buyer as he shall direct in London, and in sterling at the rate of exchange of sterling for dollars ruling upon the date of this my award."

It was agreed that the date on which the sellers broke their contract to deliver in Vancouver, British Columbia, was Sept. 30, 1917. It was also agreed that damages were $2.50 per case. A vast difference existed in the rate of exchange between Canada and this country on that date, as compared with the rate on the date of the award—namely, Feb. 24, 1920. The sellers contend that the umpire should have fixed the rate of exchange as on Sept. 20, 1917, and not on the later date. As a result of fixing the later date, the sellers are exposed to a greater burden to the extent of £1,000, inasmuch as since Sept. 30, 1917, the dollar has risen greatly in value, and sterling has correspondingly fallen. The umpire, I think, rightly interpreted the view of ROCHE, J., in *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (13), where the learned judge said:

> "I am clearly of opinion that the present time is the time for calculating exchange, and I direct that dollars should be converted into pounds sterling at the rate of 4.16 to the £."

In that case, however, the defendants appealed, and the Court of Appeal held that there was no concluded contract between the parties. Hence they allowed the

A appeal without dealing with the question of exchange. It is clear, I think, that Roche, J., now gravely doubts the correctness of the view he stated in *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (13): see *Di Ferdinando* v. *Simon, Smits & Co.* (14). It is equally clear, also, that Bailhache, J., differs from the view expressed by Roche, J., in *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (13). In *Barry* v. *Van Den Hurk* (15) the matter came before Bailhache, J. He held that it was immaterial B whether it was the buyer or the seller who was in default in carrying out the contract, and that in either case the damages must be fixed as at the date of the default. The plaintiff, he said, whether buyer or seller, might issue his writ immediately the default took place, and the damages then crystallised and did not change afterwards, and the courts did not take account of the inevitable delay which must occur before the trial of the action. Upon principle I venture respectfully to think that the view C of Bailhache, J., is right. To hold otherwise would produce extraordinary results. The damages payable would depend partly on the date when the plaintiff issued his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the court, and partly on whether the judge reserved his decision or not. They might depend also on whether judgment was D entered for the plaintiff by the judge of first instance or by the Court of Appeal or by the House of Lords. Such a state of things would, I think, be most unsatisfactory. It would encourage the plaintiff to hasten or postpone the trial according to his view of the money market, and he might gamble on the rate of exchange. If the damages are fixed at the date of breach where the contract is wholly to be performed in England, such also, I think, should be the case when the E breach is out of England. There should not be varying rules in such a case. If the damages are once crystallised at the date of the breach, then a definite date is given for the ascertaining of exchange, and the amount found payable at the hearing is awarded without regard to the fluctuations of the possible date of trial. This view is, I feel, agreeable to the principle involved in such decisions as *Rodoconachi, Sons & Co.* v. *Milburn Bros.* (16), *Williams Bros.* v. *Ed. T. Agius, Ltd.* (17), and *Slater* v. *Hoyle and Smith* (18), all which were cases of sale of F goods, and to the decision in *Jamal* v. *Moolla Dawood, Sons & Co.* (19), a case of shares: see also s. 51 of the Sale of Goods Act, 1893. I can see no sound warrant in legal principle for an opposite view.

Counsel for the buyers, however, argued that the view of Roche, J., in *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (13) was right, in spite of the doubts of Roche, J., G himself. If the matter fell to be determined by American law, it may be that I should accede to his argument. The point would then have to be considered in the light of Story on the Conflict of Laws (ss. 308 to 312) and the cases there cited. Story does not appear to distinguish between non-payment of a debt and non-payment of ordinary damages for breach of contract, and he quotes *Marburg* v. *Marburg* (20), where an American court held, after citing the English and the H American decisions, that in an action in one country for debt made payable in another country, the plaintiff is entitled to judgment according to the rate of exchange at the time of trial or judgment. But I do not think that the American decisions create any imperative rule for the English courts, and it is clear that they do not distinguish between debt and damages. If I turn to the English decisions, I I find, indeed, that with regard to debt the matter seems at first sight to be settled by *Scott* v. *Bevan* (21), where, in an action brought in England for the value of a given sum of Jamaica currency upon a judgment obtained in that island, the court held that the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. I confess that I find it difficult to follow the ratio of that decision, and I most respectfully concur with Lord Tenterden when he said (2 B. & Ad. at p. 85): "Speaking for myself personally, I must say that I still hesitate as to the propriety of this conclusion." Apparently, *Scott* v. *Bevan* (21) is regarded by some as

conformable to the view of LORD ELDON in *Cash* v. *Kennion* (22). I venture to take the opposite view. For I see that LORD ELDON said there: A

> "I cannot bring myself to doubt that where a man agrees to pay £100 in London upon the 1st Jan. he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sue him, the law of that country ought to give him just as much as he would have had if the contract had been performed." B

But the result of *Scott* v. *Bevan* (21) is that a plaintiff, if the rate of exchange is to be taken as at the date of the judgment, may get far more or far less, as the case may be, than the amount he would have had if the contract had been performed. I have read the decision of *Manners* v. *Pearson & Son* (23). The circumstances there were most unusual, and they gave no real scope for raising the point now before me. The C case turned on its special facts, and it was an action for a liquidated sum to be ascertained by an account. It was not an action for damages. The court held, on the particular facts, that no debt could be treated as arising till the account had been taken. Hence the point before me did not really arise, and a close consideration of *Scott* v. *Bevan* (21) became unnecessary. I cannot elicit any guiding principle from *Manners* v. *Pearson & Son* (23), which was, moreover, a case of debt D and not of ordinary damages for breach of contract. Whatever may be the rule with regard to a claim for a liquidated sum, I can find no decision, apart from that of ROCHE, J., in *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (13), which indicates that where a claim is made for damages for breach of contract to deliver goods, the date of the judgment rather than the date of breach, should be taken as the time when the rate of exchange is to be ascertained. I respectfully adopt the view of BAILHACHE, E J., in *Barry* v. *Van Den Hurk* (15), and I hold that in the present case the rate of exchange is to be ascertained as at the date of breach, namely, Sept. 30, 1917, and not at the date of the award. In so holding, I think I shall be acting upon the present view of ROCHE, J., and probably on the actual opinion of the umpire himself. It follows that cl. 11 of the award must be varied as above stated.

With regard to the costs of the Special Case, the buyer has succeeded in main- F taining the award of damages in his favour; the sellers have, however, succeeded in securing an important variation of cl. 11 of the award. Justice will be done if I direct that the sellers shall pay to the buyer three-fifths of his costs of the Case.

Solicitors: *Wilson & Son; Waterhouse & Co.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

SPRINGER *v.* GREAT WESTERN RAIL. CO.

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), July 6, 1920]

[Reported [1921] 1 K.B. 257; 89 L.J.K.B. 1010; 124 L.T. 79; 15 Asp. M.L.C. 86]

Carriage of Goods—Sale of goods in emergency—Need to communicate with owner—Sale as a whole of cargo belonging to different owners.

To entitle a carrier to sell, without communication with the owner, goods delivered to him for carriage circumstances must exist (e.g., where the goods have deteriorated owing to delay in carriage) which put him in the position of an agent of necessity for the owner of the goods to take such action as is necessary in the interests of the owner. He must show that it was impossible commercially to communicate with the owner and receive instructions from him, and, further, that the sale was the only reasonable business course to take in the circumstances.

Where a cargo of perishable goods arrived at a port in a deteriorated condition owing to delay in sea transit and further delay in unloading was likely owing to a strike of workers at the port,

Held: although, owing to stowage, the carriers were unable to ascertain the condition of goods belonging to a particular owner, they were not entitled to sell those goods with the rest of the cargo without communicating with the owner and informing him of such facts as they did know, nor were they entitled to sell a cargo belonging to different owners as a whole so as to obtain a better price for those goods which were in a bad condition.

Sims & Co. v. *Midland Rail. Co.* (1), [1913] 1 K.B. 103, approved.

Notes. Referred to: *Prager* v. *Blatspiel, Stamp and Heacock*, [1924] All E.R.Rep. 524.

As to a carrier's duty in an emergency, see 4 HALSBURY'S LAWS (3rd Edn.) 139, 140, and cases there cited.

Case referred to:

(1) *Sims & Co.* v. *Midland Rail. Co.*, [1913] 1 K.B. 103; 82 L.J.K.B. 67; 107 L.T. 700; 29 T.L.R. 81; 18 Com. Cas. 44, D.C.; 8 Digest (Repl.) 27, *162*.

Also referred to in argument:

Taylor v. *Great Northern Rail. Co.* (1866), L.R. 1 C.P. 385; sub nom. *Great Northern Rail. Co.* v. *Taylor*, Hav. & Ruth. 471; 35 L.J.C.P. 210; 14 L.T. 363; 12 Jur.N.S. 372; 14 W.R. 639; 8 Digest (Repl.) 26, *154*.

Lister v. *Lancashire and Yorkshire Rail. Co.*, [1903] 1 K.B. 878; 72 L.J.K.B. 385; 88 L.T. 561; 52 W.R. 12, D.C.; 8 Digest (Repl.) 22, *124*.

Great Northern Rail. Co. v. *Swaffield* (1874), L.R. 9 Exch. 132; 43 L.J.Ex. 89; 30 L.T. 562; 8 Digest (Repl.) 38, *219*.

Atlantic Mutual Insurance Co. v. *Huth* (1880), 16 Ch.D. 474; 44 L.T. 67; 29 W.R. 387; 4 Asp.M.L.C. 369, C.A.; 29 Digest 265, *2135*.

Australasian Steam Navigation Co. v. *Morse* (1872), L.R. 4 P.C. 222; 8 Moo.P.C.C.N.S. 482; 27 L.T. 357; 20 W.R. 728; 1 Asp.M.L.C. 407; 17 E.R. 393, P.C.; 41 Digest 511, *3404*.

Acatos v. *Burns* (1878), 3 Ex.D. 282; 47 L.J.Q.B. 566; 26 W.R. 624, C.A.; 41 Digest 453, *2841*.

Appeal from an order of SALTER, J., in an action tried by him without a jury.

The plaintiff's claim was for £172 10s. damages for breach of duty in and about the carriage and delivery of goods by railway. He alleged that on or about Sept. 19, 1918, the defendants agreed with him to carry for him certain goods, namely, 198 half sieves of tomatoes from Jersey to Covent Garden market, and there deliver them to him, that the defendants received the said 198 half sieves of tomatoes for the purpose and on the terms aforesaid, but did not carry them from Jersey to Covent Garden market or deliver them to the plaintiff. The defendants admitted

that on or about Sept. 19, 1918, they agreed with the plaintiff by and on the terms of a consignment note dated the said Sept. 19, 1918, and signed by Marks and Proctor, Ltd., his agents, to carry for the plaintiff from Jersey to Covent Garden market, and there deliver to the plaintiff for reward to the defendants 198 half sieves of tomatoes which were on or about the said Sept. 19, 1918, delivered to the defendants by Marks and Proctor, Ltd. The defendants said that it was provided by the consignment note that in respect to any goods booked through by the defendants or their agents for conveyance partly by railway and partly by sea the defendants should be exempted from liability for any loss, damage, or delay which might arise during the carriage of such goods by sea from any or every danger or accident of the seas, rivers or navigation of whatever nature or kind soever in the same manner as if the defendants had signed and delivered to the consignors a bill of lading containing conditions to that effect. The defendants admitted that by the agreement it became and was their duty (subject to the terms thereof) to exercise all reasonable care and take all reasonable steps to procure that the tomatoes should be safely carried to their destination aforesaid within a reasonable time, but the defendants were not by the agreement laid under any further or higher duty. The defendants admitted that the tomatoes had not been carried to their destination, but by reason of the matters thereinafter appearing, they said that they had fulfilled their duty in that they had exercised all reasonable care and taken all reasonable steps, and had not been guilty of any delay, and that they were not liable to the plaintiff. The defendants alleged that in the exercise of powers had by them under the Defence of the Realm Acts or otherwise, the Lords Commissioners of the Admiralty directed and compelled them to carry all goods delivered to the defendants for carriage from the Channel Islands to England in certain vessels which were not the property of nor in any way under the control or in the possession of the defendants, and further directed and compelled such vessels to sail from the Channel Islands by first proceeding to Cherbourg and then sailing thence under convoy to Weymouth. In pursuance of such direction and compulsion the defendants loaded the tomatoes so delivered to them as aforesaid in the steamship *Croham* on Sept. 20, 1918. On Sept. 20, 21, 22, and part of Sept. 23, 1918, there was a westerly gale in the Channel, and the master of the *Croham* could not, or would not, sail until the evening of Sept. 23, 1918. On the evening of Sept. 23, 1918, the *Croham* sailed from Jersey and proceeded with due dispatch thence to Cherbourg in pursuance of the directions and compulsion aforesaid, and was thence convoyed to Weymouth, arriving there at or about 12.45 p.m. on Sept. 24, 1918. By reason of a strike of the defendants' railway servants at Weymouth and elsewhere it was difficult (and impossible without substantial delay) to discharge the cargo of the *Croham* and impossible to forward the same or any part thereof by rail or in any other way to its destination. The cargo (including the tomatoes) was unloaded by hand on to the quay at Weymouth on or about Sept. 26, 1918, and it then appeared that part of the cargo, which consisted wholly of tomatoes, was already unfit for human consumption, and that the remainder thereof would shortly become unfit unless it were promptly consumed. In the circumstances, the defendants pleaded, the best course to be adopted by them in the interests of the owners of the cargo and the only course which would avoid the cargo becoming wholly useless and valueless was to sell it immediately in the locality for what it would fetch, and in the circumstances it was practically impossible to communicate with the consignors or consignees of the cargo (including the plaintiff) and ask for instructions before selling the cargo without the same becoming meanwhile wholly unsaleable. The defendants did thereupon on Sept. 26, 1918, sell the cargo in the locality for what it would fetch. Further, in the alternative the defendants in the circumstances claimed that they were excused from further fulfilment of the agreement, the damage and delay being due to the damages of the seas or navigation. The defendants counter-claimed for freight. The plaintiff admitted that in respect of the delay the steamship *Croham* in arriving at Weymouth—she was three days overdue, owing to having been weatherbound—the

defendants were protected by the conditions of the consignment note, but the plaintiff stated in his evidence that, if the defendants had communicated with him, he could have sent a motor lorry to Weymouth to carry his tomatoes to London. Part of the cargo, including the plaintiff's tomatoes, was sent by the purchaser to London by train on the 27th and was sold in Covent Garden market on the 28th.

SALTER, J., gave judgment for the plaintiff on both claim and counter-claim, and the defendants appealed.

Barrington-Ward, *K.C.*, and *Wilfred Lewis* for the defendants.
Colam, *K.C.*, and *F. O. Robinson* for the plaintiff.

BANKES, L.J.—This is an appeal from the judgment of SALTER, J., and no complaint is made that the learned judge misconceived the law applicable to the case. But what is said is that the facts did not justify his application of them.

The plaintiff, who carried on business in Covent Garden, was the consignee of a considerable quantity of tomatoes which were packed in baskets bearing his name and consigned from Jersey in a vessel called the *Croham*. The defendants had undertaken the carriage of those goods. The vessel was detained by weather for a considerable time in the harbour in Jersey. She made a slow passage and arrived at Weymouth on Sept. 24, three days after the goods had been put on board. When she arrived a strike had broken out among the railway employees, and, as there were two other vessels to be discharged at the berth before her turn came, it was not possible to start discharging her until Thursday, Sept. 28, by which time a very considerable quantity of these tomatoes were in an unmerchantable condition. The defendants sold the whole cargo locally without communicating with any of the consignees before they did so, and the plaintiff's case was: "You ought to have communicated with me at the earliest possible moment when you realised that it would probably be impossible to complete the carriage of these goods by delivery at Covent Garden, and given me the opportunity of deciding for myself whether you should sell them locally, or whether I should try myself either to take them away or sell them myself locally; and because you did not do that you have committed a breach of your duty as carrier and are responsible to me in damages." It is admitted that the law is laid down correctly in *Sims* v. *Midland Rail. Co.* (1) in the judgment of SCRUTTON, J., and he, referring to a passage in CARVER ON CARRIAGE OF GOODS BY SEA, s. 297, says:

> "that the conditions necessary in order to make a sale by the carrier without notice valid are, first, a real necessity must exist for the sale, and, secondly, that it must be practically impossible to get the owner's instructions in time as to what should be done."

The whole cargo was sold on Sept. 26, and if the defendants were entitled to treat the whole cargo as one indivisible lot, there is no doubt that the sale was justified. But there is a very serious question whether they were so entitled. There is a preliminary question whether or not, in the circumstances, it was practically impossible to get the owner's instructions before Sept. 26 as to what should be done. With regard to that, one has to consider what opportunity the defendants' representatives had of forming a judgment as to what the condition of these tomatoes was upon the arrival of the vessel, or soon after, and forming a judgment whether it would be at all likely that it would be possible to send these goods on in merchantable state, and whether it was not obvious that, in the circumstances prevailing, a sale would have to take place. The position is this. The vessel arrived about 12.45 p.m. on Tuesday, Sept. 24, and Mr. Boyle, who was in charge for the defendant company at Weymouth when the vessel arrived, sent his representative, Mr. Gill, a clerk, on board, and Mr. Gill states in his evidence what he found the condition of things to be. He said: "The top tiers were very badly heated and overripe. Almost made me sick. The tomatoes were half-cooked." That he must have reported to his superior officer, and the superior officer's condition of mind before he received that report was, as he expresses it

in his own evidence, "I expected trouble the moment the strike began, Tuesday morning, and from the cargo having been on board so long." In those circumstances one asks oneself what conclusion must this experienced gentleman have come to? He was faced with this condition of things: a vessel arriving long overdue with a cargo of tomatoes—a perishable cargo—with a strike just broken out, the continuance of which no one could foretell. It had apparently begun in South Wales and spread to Weymouth, but whether it was going to last a day, or two days, or a fortnight, or a month, no one at that time could tell. There were two vessels at the berth which had to be dealt with before this vessel could commence her discharge. I cannot conceive it possible that that gentleman should have come to any other conclusion than that a sale of these goods was inevitable, if they were to be disposed of at all in anything like a merchantable condition. If that is so, it seems to me that the duty of the railway company was to communicate immediately with the consignees. That they did not do, and for that SALTER, J., has held them responsible, and in that view I entirely concur.

It appears now from the evidence that Mr. Boyle has, I think, misconceived what the purpose and object of communicating with the consignee is. It is to enable him to give the railway company instructions as to whether they shall sell if they consider necessary or whether they shall refrain from selling. But Mr. Boyle's reason for not communicating with the consignee is something different. He says: "I did not consider whether to notify the consignee or not, the reason being that I could not tell him the condition of his lot." It was quite true he could not tell him the condition of the lot, but what he could tell him was that he had formed the conclusion that it would be absolutely necessary in all human probability to dispose of these goods locally if they were to be saved at all, and to ask the consignee if he wished him to do that which he found to be necessary, or did he wish to deal with them himself. That sort of communication would have met the situation and relieved the defendants from liability.

I entirely agree with the view which the learned judge took, and, in my opinion, this appeal fails and must be dismissed with costs.

WARRINGTON, L.J.—I agree.

SCRUTTON, L.J.—I agree. The railway company sold somebody else's goods, and they have not the right to sell other people's goods unless they can establish certain conditions. They are agents to carry the goods, and not to sell them. To sell them, circumstances must exist which put them in the position of agents of necessity for the owners, to take the action which is necessary in the interests of the owners. Those conditions do not arise if the railway company can communicate with the owners and get their instructions. If the railway company can ask the owner what is to be done in the circumstances with any reasonable chance of getting an answer, they have no business to take upon themselves the sale of the property. They must give the owner a chance of deciding the way in which he will deal with the property, and very often he knows very much better than the railway company what is the best thing to do. The railway company, from the nature of things, cannot be experienced in dealing with every class of property which they carry, whereas the owner in the trade does know the best way of disposing of the particular kind of goods which it is his business to deal in.

The first thing which the railway company must show to justify their selling the goods is that it was impossible commercially to communicate with the owner and receive instructions from him. If they show that, they must then justify the sale by showing that it was the only reasonable business course to take in the circumstances. In the present case, on Sept. 24, when the goods came into Weymouth in a ship three days late, with a strike on, it was fairly obvious that there was a serious risk of goods not getting to London in a condition which would justify their being sent on. In those circumstances, in my view, it was the duty of the railway company to ask the consignee for instructions if there was any commercial possibility of their getting through. They were not entitled to take it upon themselves

to settle what should be done with the goods if they could with any reasonable commercial probability obtain instructions from the owner. That there was a probability of loss on the 24th is, I think, obvious from a telephone communication of the 24th. It shows that on the 24th it had been determined to sell the goods locally, pointing to the fact that on that day it was thought extremely probable that the duration of the strike, combined with the probability of sea damage through the prolonged voyage, might render it desirable to dispose of the tomatoes in some way other than by carriage. Was it commercially impossible on the 24th to communicate with the consignee at Covent Garden? The question answers itself. Of course, it was not commercially impossible. The reason why Mr. Boyle seems to have not communicated is that he did not then know the exact state of the tomatoes, and consequently could not give the fullest information to the consignee. That was not a reason which justified him in not communicating. He should, in my view, have communicated with the consignee, stating the probable delay, anything he knew about the condition of the goods, and asking for instructions as to what he should do. It is quite obvious that the consignee would then have had the opportunity of deciding: Shall I leave it to the man on the spot who knows more about the conditions locally, or shall I send down a motor lorry to get my goods and bring them up? In fact, it appears that this particular lot of goods was in a fairly good condition. I think the second mistake that Mr. Boyle made was to think that he could sell goods in good condition because it was to the best interest of goods in bad condition. Of course, if you have an all-over price, good, bad and indifferent, it is a very good thing for the indifferent goods that you put into the sale, and it is a very bad thing for the good goods that you put into the sale—they will fetch less than they otherwise would have fetched, and the indifferent goods will fetch more than they otherwise would have fetched. Mr. Boyle seems to me to have been under the mistaken impression that some sort of law of general average applies to goods when they come out of a ship, and that you can treat them as a sort of general adventure and sacrifice the good goods for the benefit of the bad goods.

As to the law, I hope I correctly stated it in *Sims* v. *Midland Rail. Co.* (1), which seems to me to be accurate. I do not gather that it is disputed in this case. What is disputed is the application of it, and on the facts of this case it seems to me that if one is to consider, as I said one has, whether there was a reasonable business necessity for the sale, with a view to the probable duration of the strike, and the nature of the goods, and whether it was possible to communicate with the plaintiff and obtain their instructions as to the sale, it was doubtful, even on Sept. 24, what was the best thing to do—whether to get motor transport to take away the consignments or to sell them there. But there was time to communicate with the plaintiff, and it was commercially possible to communicate with him and ask him what he wished done with the goods. That being so, the railway company were bound to communicate with him, and were not entitled to take on themselves the burden of deciding the question which the plaintiff was the person to decide. For these reasons I agree with the judgment which has been given by my Lord.

Appeal dismissed.

Solicitors: *A. G. Hubbard*; *C. J. Parker.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

WALLER & SON *v.* THOMAS

[King's Bench Division (Lush and McCardie, JJ.), December 15, 1920]

[Reported [1921] 1 K.B. 541; 90 L.J.K.B. 656; 125 L.T. 21; 37 T.L.R. 325; 19 L.G.R. 109

B

Rent Restriction—Application of Rent Acts—"Rent less than two-thirds of rateable value"—"Rateable value"—Net value—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *& 11 Geo. 5, c.* 17), *s.* 12 (7).

By s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy. . . ."

C

"Rateable value" in this subsection means the net and not the gross value of the premises.

County Court—Appeal to Court of Appeal—Right of respondent to rely on point not raised in county court.

D

On an appeal from an order of a county court the appellant cannot raise any point of law which he did not rely on in the county court, but the respondent may support the decision in his favour on any point arising on the facts and documents in evidence in the case even though he did not take that point in the court below.

E

Notes. Under s. 105 of the County Courts Act, 1934 (5 Halsbury's Statutes (2nd Edn.) 11) an appeal from a county court now lies to the Court of Appeal.

Considered: *Schneiders* v. *Abrahams*, [1924] All E.R. Rep. 530; *Harnham Singh* v. *Jamal Pirbhai*, [1951] A.C. 688. Referred to: *Glossop* v. *Ashley* (1921), 90 L.J.K.B. 1237; *Brakspear* v. *Barton*, [1924] 2 K.B. 88.

As to the ascertainment of rateable values under the Rent Acts, see 23 Halsbury's Laws (3rd Edn.) 723–731; and as to appeals from county courts, see ibid., vol. 9, p. 320 et seq. For cases see 31 Digest (Repl.) 657, and 13 Digest (Repl.) 467–472. For Rent Restriction Acts, 1920 and 1933, see 13 Halsbury's Statutes (2nd Edn.) 981, 1044; and for Rent Act, 1957, see ibid., vol. 37, p. 550.

F

Cases referred to:

(1) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 13 Digest (Repl.) 467, *918*.

(2) *Chapman* v. *Knight* (1880), 5 C.P.D. 308; 49 L.J.Q.B. 425; 42 L.T. 538; 44 J.P. 491; 28 W.R. 919, D.C.; 13 Digest (Repl.) 471, *947*.

G

Also referred to in argument:

Wilcock v. *Booth* (1920), 89 L.J.K.B. 864; 122 L.T. 678; 84 J.P. 76; 36 T.L.R. 213; 64 Sol. Jo. 292; 18 L.G.R. 221, D.C.; 31 Digest (Repl.) 716, *8011*.

Epsom Grand Stand Assocn., Ltd. v. *Clarke* (1919), 35 T.L.R. 525; 63 Sol. Jo. 642, C.A.; 31 Digest (Repl.) 704, *7935*.

H

Appeal by the landlords from Halifax County Court.

The plaintiffs, brewers, claimed to recover possession of premises known as the Dusty Miller Inn, Hove Edge, Lightcliffe, of which the defendant, Martha Ann Thomas, was the tenant. By an agreement made on Dec. 31, 1919, between the plaintiffs, as landlords, and the tenant the landlords agreed to let and the tenant agreed to take the Dusty Miller Inn for the term of three calendar months from the date of the agreement, and thereafter from quarter to quarter until one of the parties should give to the other three calendar months' previous notice in writing to determine the tenancy, at the yearly rent of £30, and so on in proportion for any fractional part of a year, to be paid by equal monthly instalments of £2 10s. on the 31st day of each month and, if required, in advance. The agreement provided, inter alia, that, if the tenant was convicted of any offence against the licensing laws, she was to give up to the landlords or the succeeding tenant all licences and

I

certificates then existing without further notice from the landlords and terminate the tenancy. In March, 1920, the tenant was convicted of selling beer during prohibited hours and was fined £10. On Mar. 27, 1920, the landlords gave her written notice to quit, which expired on June 30, 1920. The tenant, however, refused to give up possession, relying on the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In the county court the landlords contended that the annual rent of the premises (£30) was less than two-thirds of the rateable value thereof, namely, £50, that being the gross value, and, therefore, under s. 12 (7) of the Act of 1920, the Act did not apply to the premises. The net value was £42 10s. The county court judge refused to make an order for possession, and the landlords appealed.

By s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:

> "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . [and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed.]"

The words in square brackets were repealed by the Rent Act, 1957; see Sched. 8 at 37 HALSBURY'S STATUTES (2nd Edn.) 604.

Wootten (with him *F. Wood*) for the landlords.
du Parcq for the tenant.

LUSH, J.—This case raises some interesting and difficult questions. The action is brought by the owners of a licensed house for the recovery of possession, and the tenant pleads in her defence the provisions of the Increase of Rent and Mortgage (Restrictions) Act, 1920, upon which complicated questions often arise. The landlords gave to the tenant proper notice to quit and were entitled to possession, unless the defendant could bring herself within the Act.

The first question arises under s. 12 (7) of the Act which provides that: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy. . . ." It was argued on behalf of the landlords that the rent, which is £30 per annum, is less than two-thirds of the rateable value, and that, therefore, the Act does not apply to the tenancy in question and the house is outside the provisions of the Act. In the county court evidence was given of the entries in the rate-book from which it appeared that the gross value of the house was £50 and the net annual value £42 10s. This would be of no assistance to the landlords unless the words of the section refer to "gross" value; for the net value of this house is only £42 10s., and the rent, which is £30 per annum, is not "less than two-thirds of that amount." If, however, the section refers to gross value, then the premises are within the exception created by s. 12 (7), the rent being less than two-thirds of £50. The solicitor who represented the tenant at the trial did not contend that the words of the section should be construed as referring to net rateable value, and the point was apparently left to the county court judge without argument. I am not certain, however, that that was the course that matters took. The learned county court judge, in his note, said with regard to the question of rateable value that the counsel for the landlords contended that this case was altogether outside the Act, "because the rent, £30, is less than two-thirds of the rateable value, which I am satisfied is £50, and that, therefore, s. 12 (7) applies." There was no evidence before the judge that the house was differently assessed in 1914, which was the really important year. The only evidence on the matter came from the rate-book, and the entry of £50 per annum in that book must have related to the gross value, so I have no doubt that the county court judge treated "rateable value" in the section as referring to the gross and not to the net value. It is inconceivable that he can have mentioned the exact figure which appeared in the rate-book in connection with gross value unless that was the view he took.

The question is whether that view is correct. I have come to the conclusion that it is not, and that the words "rateable value" refer to net value. It seems to me almost impossible to suppose that the legislature used those words, which occur so frequently in the Act, to mean the gross value. For purposes of comparison, if the rent be one factor to be considered, it seems to me certain that the other factor would be the net value. One cannot imagine a useful comparison being made between the rent and the gross value. A further fact which confirms this view is that the ordinary person is only acquainted with the net and not the gross value. It is the figure which appears on the demand notes served on people for the purpose of collecting rates and taxes. This, then, is the interpretation which the words "rateable value" ordinarily bear, and it is the meaning naturally given to them having regard to the opportunity which the average person possesses of knowing what the sum is.

The difficulty is that the point was not taken by the tenant in the county court, and, therefore, it is said that it is not open to him to raise the point here as respondent on the appeal. But such a proposition, thus broadly stated, is unsound. It is true that an appellant from the county court cannot ask this court to give effect to a point of law which he himself has not raised in the court below. It is a condition precedent that he should have taken the point before the county court judge. No such rule, however, applies to a respondent, and if it can be shown by him that the judgment can be supported on some good legal ground appearing on the evidence, he can submit his point to support the judgment although he did not present it in the court below. This difference exists between the appellant and the respondent, because, if the judge decides in favour of the respondent, there is no need to call the judge's attention to other possible points, and it would be surprising if the respondent could not say: "The judgment in my favour was right, and as I succeeded on another ground, I did not ask the judge to decide this further point." This is a good contention and one which the tenant here is entitled to raise. But it is said that the tenant's solicitor in the county court acquiesced in the contention of the plaintiff, and that, if the landlords' counsel presented a view of the law to the county court judge, to which the tenant assented, in the sense that he did not oppose it, the tenant cannot afterwards turn round and say: "Although I assented to that contention in the court below, I am entitled now to point out what is the true view of the law." I do not know what is meant in this connection by "assenting to" or "acquiescing in" a contention. The tenant was not obliged to put his argument before the county court judge, and his silence or assent cannot affect his right to rely in this court on a point of law if it is sound. If the tenant actually invited his opponent in the county court to present a certain contention of law to the county court judge it might not be fair to allow him afterwards to avail himself of the opposite contention. There may be cases in which counsel for a party who is later respondent to an appeal may say: "My view of the law is this, you need not argue the point." It may be that if he does so, he could not afterwards contend the opposite on the appeal. But that is not the case here, and I see nothing to prevent the tenant from saying that the judge was mistaken in his view of the meaning of the words "rateable value." Correcting that mistake and taking rateable value to mean net rateable value, this house does not come within the words "where the rent is less than two-thirds of the rateable value." Therefore, the Act of 1920 does not apply to this tenancy.

The judge's view is that the subsection applies and that the effect of it is to except the present case from the provisions of the Act as to increase of rent, but to leave the provisions of the Act still applicable. In my opinion, what the section means is this. If the rent were less than two-thirds of the rateable value, the Act would not apply so as to protect the tenancy at all, but the last words of s. 12 (7) mean, as was here contended, that the Act would still apply to the house, and, therefore, if it were sublet at a rent exceeding two-thirds of the rateable value, so that the sub-tenancy was outside the exception, the provisions of the Act would

apply to that sub-tenancy. [The last words of the subsection, to which this comment related, were repealed by the Rent Act, 1957 : see supra.]

[His Lordship dealt with a contention that in refusing to make an order for possession the county court judge failed to consider the provisions of s. 5 (1) (a) of the Act of 1920 relating to making an order where an obligation of the tenancy had been broken, and said that the case must go back for a new trial.]

McCARDIE, J.—The landlords had a public-house in the north of England called the Dusty Miller. The rent of that public-house, which was held by the defendant, was £30 a year. The landlords duly gave the defendant notice to quit, but she refused to leave the premises. Thereupon they took proceedings in the county court, and at the hearing they proved that the gross value was £50 and the annual value of the premises was £42 10. The learned judge took the view that the sum of £50 was to be treated as the rateable value of the house for the purposes of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7).

It was contended, on behalf of the landlords, that, as the rent payable was less than two-thirds of the rateable value, then, by virtue of s. 12 (7), the Act of 1920 did not apply. If rateable value in s. 12 (7) means gross estimated rental, the contention of the landlords would be correct, but if the rateable value there means the net annual value of the house, the contention of the landlords would be wrong, having regard to the figures that I have mentioned, the rent being £30 and the rateable value, as appearing in the rate-books which were put in, being £42 10s. I entertain no doubt at all that the words "rateable value" mean, and mean only, the net annual value of the premises. It is impossible for anyone who is cognisant of rating matters to take the gross estimated rental as being the rateable value of the premises, and, indeed, it seems quite clear to my mind, if the Acts dealing with rating are looked at, that the rateable value must mean the net annual figure upon which the rates are actually paid by the tenant.

The Parochial Assessments Act, 1836, by s. 1 [see now Rating and Valuation Act, 1925, s. 22 (1) (b), applied to London by Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5 (6), and 32 Halsbury's Laws (3rd Edn.) 64 et seq.], provides that the rate is to be made on an estimate of the net annual value of the premises. Then it states in substance that the gross estimated rental is to be taken in the first place, and from that an appropriate reduction, such as repairs, is to be made in order to arrive at the net annual value of the premises. This definition is, I see, supplemented by the definition of gross estimated rental in s. 15 of the Union Assessment Act, 1862 [repealed, Local Government Act, 1948]. The matter, I think, is concluded by the Schedule to that Act where there is a form set out containing various headings, among others, "Description of Property," "Name of Owner," and "Name of Occupier," and it has two final headings before the amount of the rate is taken. The first is "Gross Estimated Rental," and the second "Rateable Value." Therefore, when an Act of Parliament speaks of the rateable value of premises it is clear, to my mind, that it is speaking of the net annual value—that is, the sum upon which the tenant actually pays rates fixed by the local authority. Therefore, upon the figures given by the landlords, this house fell within the scope and operation of this Act of 1920.

But a point has arisen before us whether the tenant, in the circumstances which had occurred, could take the point in this court, that £42 10s., the net annual value, was the figure to be contrasted with the £30 rent which was paid. I will not repeat what my lord has said with respect to the judgment of the learned county court judge and the various views he took, but upon the question of raising in the Divisional Court a point which had not been raised in the court below, I desire to say one or two words. I must recognise the rule which has been established by the House of Lords in *Smith* v. *Baker & Sons* (1) that a point of law cannot be raised here by an appellant which he has not raised in the court below. Although bound by the rule thus stated, and by other circumstances, I confess I am

unable to understand why, when a point of law bears upon the undisputed evidence and documents, and with regard to which no further evidence can be given, the appellant could not raise his point in this court arising upon these facts and documents. The rule of law is, however, otherwise, but this rule which is applicable to an appellant, a highly technical rule to my mind, does not apply to a respondent, and I conceive that there is no obligation upon a respondent, if he have one good point arising upon the facts and documents in the case, to be bound to make every other point he can make made in the county court, although the learned county court judge be in his favour on the first point. The only effect of such a requirement would be to involve the successful party in the county court in an expensive and most inconvenient prolongation of the proceedings. Therefore, I think it is open to the respondent to support the judgment of the learned judge upon points which arise either upon the evidence of the other side or upon admissions or undisputed documents in the case. That view is, in my opinion, supported by *Chapman* v. *Knight* (2).

[His Lordship dealt with the point under s. 5 of the Act of 1920 and continued:] All that the learned judge was entitled to consider was whether, in spite of the breach of covenant (if any) by the tenant, it was reasonable in the whole circumstances to make an order giving the landlords possession of the premises. The learned judge obviously took other matters into consideration, and, therefore, as my lord has said, there must be a new trial. [His Lordship then considered whether the premises were a dwelling-house or business premises, but under s. 1 (3) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the Rent Acts ceased to apply to licensed premises, and, therefore, the remainder of his judgment does not call for report. The learned judge agreed that the appeal must be allowed and a new trial must take place.]

Appeal allowed.

Solicitors: *Godden, Holme & Ward*, for *H. M. Dawson*, Bradford; *Gibson & Weldon*, for *H. Bastide*, Halifax.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

WHITE *v.* RILEY AND ANOTHER

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), July 21, 22, 23, 26, 1920]

[Reported [1921] 1 Ch. 1; 89 L.J.Ch. 628; 124 L.T. 168; 36 T.L.R. 849; 64 Sol. Jo. 725]

Trade Union—Threat, coercion, or intimidation—Notice to employer of strike unless fellow-workman joins trade union or is dismissed—Conspiracy by workmen to injure fellow-workman—Procurement of breach of contract of service—Need to prove knowledge and intention.

Where workmen "quietly and peaceably" give notice to their employer that they will cease work on a specified date unless a fellow-workman joins their trade union or leaves the employer's employment, that does not constitute at common law an actionable threat, coercion, or intimidation, those being [per LORD HERSCHELL in *Allen* v. *Flood* (1), [1898] A.C. 1, at p. 129], "terms which are often applied in popular language to utterances which are quite lawful and give rise to no liability either civil or criminal, but put pressure, perhaps extreme pressure, on the person to whom they are addressed to take a particular course." If such action by workmen is impugned at common law on the ground that thereby they procured a breach of their fellow-workman's contract of employment, it must be proved that the procurement was brought about with knowledge and intention.

Allen v. *Flood* (1), [1898] A.C. 1, applied.

Trade Union—"Trade dispute"—"Dispute connected with employment of a person"—Refusal by workman to join trade union—Notice to employer by fellow-workmen of strike unless workman joins union or is dismissed—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 5 (3).

A dispute between workmen in a factory and one of their number arising from the refusal of the latter to join the trade union to which the rest of the men belonged, the majority of the workmen giving notice to the employer that they would cease work unless the man in question joined their union or left the employers' service, **held** to be a "dispute between workmen and workmen connected with the employment of a person" within s. 5 (3) of the Trade Disputes Act, 1906, and, therefore, a "trade dispute" within s. 3 of the Act.

What is a trade dispute within the Act is a question of fact in each case.

Hodges v. *Webb* (2), post, p. 447, approved.

Valentine v. *Hyde* (3), [1919] 2 Ch. 129, disapproved.

Notes. Distinguished: *Royal London Mutual Insurance Society, Ltd.* v. *Williamson* (1921), 37 T.L.R. 742. Referred to: *Sorrell* v. *Smith*, [1925] All E.R. Rep. 1; *Hardie and Lane, Ltd.* v. *Chilton*, [1928] All E.R. Rep. 36; *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] 1 All E.R. 142; *Huntley* v. *Thornton*, [1957] 1 All E.R. 234.

As to torts arising out of the operations of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 338, 339, 516–524; and for cases see 43 DIGEST 112 et seq. For Trade Disputes Act, 1906, see 25 HALSBURY'S STATUTES (2nd Edn.) 1267.

Cases referred to:

(1) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, *1164.*

(2) *Hodges* v. *Webb*, post, p. 447; [1920] 2 Ch. 70; 89 L.J.Ch. 273; 123 L.T. 80; 36 T.L.R. 311; 43 Digest 121, *1240.*

(3) *Valentine* v. *Hyde*, [1919] 2 Ch. 129; 88 L.J.Ch. 326; 120 L.T. 653; 35 T.L.R. 301; 63 Sol. Jo. 390; 43 Digest 122, *1243.*

(4) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179.*

(5) *Conway* v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, *1237*. A

(6) *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, *1226*.

(7) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*. B

Also referred to in argument:

Pratt v. *British Medical Association*, [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; 35 T.L.R. 14; 63 Sol. Jo. 84; 43 Digest 113, *1180*.

Larkin v. *Long*, [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455, H.L.; 43 Digest 121, *1241*. C

Santen v. *Busnach* (1913), 29 T.L.R. 214; 57 Sol. Jo. 226, C.A.; 43 Digest 117, *1208*.

Mogus Steamship Co. v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51*.

Scottish Co-operative Wholesale Society v. *Glasgow Fleshers' Trade Defence Association* (1898), 35 Sc.L.R. 645; 5 S.L.T. 263; 43 Digest 114, *1184 v.* D

Bulcock v. *St. Anne's Master Builders Federation* (1902), 19 T.L.R. 27; 47 Sol. Jo. 32; 43 Digest 115, *1192*.

Mackenzie v. *Iron Trades Employers' Insurance Association*, 1910 S.C. 79; 34 Digest 189, *1553 ii*.

Connor v. *Kent*, *Connor* v. *Ritson*, *Gibson* v. *Lawson*, *Curran* v. *Treleaven*, [1891] 2 Q.B. 545; 61 L.J.M.C. 9; 65 L.T. 573; 55 J.P. 485; 7 T.L.R. 650; 17 Cox, C.C. 354, C.C.R.; 15 Digest (Repl.) 917, *8812*. E

Appeal from an order of ASTBURY, J.

The plaintiff, a leather worker, sought to restrain the defendants, who were fellow-workers with him in the employment of the Leamore Currying Co., Walsall, from interfering with him in his employment and with his right to dispose of his labour as he would. The plaintiff alleged that the defendants, both severally and conspiring in combination, had, by threats, intimidation, and coercion, procured a breach of the contract of service between himself and his employers, whom they had caused to terminate this contract without notice on Dec. 5, 1919. The plaintiff claimed an injunction and damages. The defendants, while denying these allegations, relied on the Trade Disputes Act, 1906, and alleged that, if they had acted as alleged, they had done so in contemplation or in furtherance of a trade dispute. ASTBURY, J., held, on the authority of *Valentine* v. *Hyde* (3), that the defendants did not act in contemplation of a trade dispute, and that (apart from the statute) the defendants were guilty of conspiring by threats to injure the plaintiff and of inducing a breach of contract by the employers. The defendants appealed. F G

Micklem, *K.C.*, and *Howard Wright* for the defendants. H

Luxmoore, *K.C.*, and *Slesser* for the plaintiff.

LORD STERNDALE, M.R.—This is an appeal from the decision of ASTBURY, J., who gave judgment in favour of the plaintiff in this action. We have had an interesting discussion of the law on the matter, but, with the exception of one or two points, I do not think it is necessary for me to go into the questions of law very much because, as happens in so many cases, when the matter has been thoroughly heard it is found that the greater part of the solution of it turns upon the questions of fact. The learned judge has here found two findings of fact, one of which is vital and which, if it be supported, gets rid of any questions of law at all. In order to understand them it is necessary to see what the nature of the action is. I

The plaintiff is a person who was called a "buffer" working in the leather trade. He was a member of a union which is now shortly called the Workers Union. The

A defendants are persons who were also working for the Leamore Currying Co. They were members of a union called the Curriers Union. The defendant Riley occupied a position which entitled him, apparently, to the designation of "my Lord" in the shop, but he had in fact, I think, no actual authority more than any other workman in the shop. He presided at the meetings of the members, and I think that if any representations had to be made to the master he made them on behalf of the men. B The defendant William Wood had no position which entitled him to titular rank, but he was in some ways quite as important a person in the shop as, or more so than, "my Lord," because he was a member of the district executive of the Curriers Union, and, as a member of the district executive committee, he would have considerable influence. The action was brought against the defendants on the ground that they conspired in combining among themselves during the months of C August to December, 1919, by threats, intimidation, coercion, or otherwise, to procure, cause and induce the employers to threaten to terminate their contract of employment with the plaintiff unless he left the Workers Union and joined the Curriers Union and because, by such action, on Dec. 5, 1919, they caused the employers to suspend the plaintiff from his employment and to abstain from continuing him therein. The learned judge in the court below has found that in D so doing that the defendants were guilty of a wrongful or illegal conspiracy to threaten the employers and to cause them by intimidation to dismiss the plaintiff. If the learned judge's finding be right that this was a malicious conspiracy to get the plaintiff discharged by threats and intimidation, then, of course, there is an actionable wrong committed and the defendants are liable and no question as to the meaning and effect of the Trade Disputes Act, 1906, arises. Therefore that is, E as I ventured to call it before, a vital finding of fact. If that can be supported, the appeal fails altogether. The learned judge has arrived at another finding of fact which is that the defendants knowingly and wrongfully induced the employers to commit a breach of the contract with the plaintiff. That is actionable unless it can be brought within the Trade Disputes Act, 1906. If it can be brought within that Act, if it be only an inducement to break a contract of employment, it is not F actionable under s. 3 of that Act.

The first, and the most important, question is: Does the evidence support the first finding of malicious and wrongful conspiracy to injure? We have to approach that question from the point of view from which this court always approaches findings of fact in the court below upon viva voce evidence. I need not repeat the principles that have been so often laid down. It comes to this, that this court will G not interfere unless it is quite clear that the evidence does not support the finding. In the present case I regret to say that I do not think the evidence does support the finding. If there was a finding of disputed fact resting upon contradictory evidence and the learned judge had believed one side and disbelieved the other, I should not think of interfering. It is true that he says he does not think the defendant Wood was a good witness and that he does not accept his evidence where H it conflicts with the evidence of the plaintiff and the employers, and that he thinks the plaintiff and the employers gave their evidence very well, and we accept it. I have looked through the evidence with some care, and I cannot find that on any material points the witnesses on the one side and on the other differ. There are some slight differences which are, to my mind, immaterial. The defendant Wood, for instance, says that in the interview, to which I shall refer later, he did not I assert that there would be any trouble with the men. The plaintiff says that he did. Let us accept the plaintiff's evidence as against the defendant Wood's for that purpose. I think that that is the only, or almost the only, point on which they differ which could be supposed to be material at all. Another difference is that the plaintiff says that when he saw Wood he did not tell Wood that he had seen a person in authority (I think the secretary of the Workers Union), and was acting on his advice, whereas Wood says he did. Let us accept the plaintiff's evidence and say that he did not. It is quite immaterial, to my mind.

The plaintiff entered the employment of the Leamore works, which were carried on by a gentleman of the name of Dean in partnership with another gentleman of the name of Meek, in 1915. Very soon afterwards he was asked to join the Curriers Union. I think his employer, Mr. Dean, suggested it to him in the first instance; he suggested it because he wished to have only one union to deal with in his negotiations with his men. The plaintiff declined to do so, and nothing more happened then, but in 1916 a man called Mead, who at that time occupied the position of "my Lord" which Riley afterwards occupied, saw the plaintiff at the request and the instance of the men. He said:

> "I spoke to the plaintiff about joining the Curriers. I was deputed to do so by the shop. I said anyone working there should join the Curriers as we did not recognise any other. He said he would join if he could remain in his union. I said I did not think this would be allowed."

The plaintiff gives the same account except that he adds that Mead told him when he saw him that, if it rested with him, he would not interfere with him. His account was this:

> "Mead was the man who first approached me to join the Curriers. I said I would if I could still remain in the Workers Union. He said he would inquire if I could do this, and later he said I should have to leave my union. He said if it had been left with him he would have let me remain."

That was the last thing that was said about it for some three years, but it was quite clear from that that the question had arisen between the men in the shop belonging to the Curriers Union and the plaintiff as to whether the plaintiff would be allowed, so far as they could prevent it, to work in conjunction with them in the shop. Mead stated that he reported the plaintiff's answer to the shop and no suggestion was made to cease work; he reported the refusal to the district executive, they gave no instructions and the shop passed no resolution. Therefore, although the question had arisen then, no action was taken upon it.

In 1919 the matter seems to have been raised again by a man of the name of Hardwick, who asked if the plaintiff had joined the union. He said that he had asked, and was told that he had not, and Riley was deputed to see him. Wood, the defendant, had at that time come to work at the shop, and the learned judge in the court below has found that Wood was really the cause of all the trouble and was the mischief-maker who stirred up dissension, and in consequence all the trouble resulted. I will accept the finding of the learned judge in this sense, and I think it is only correct in this sense, although I think there is very little evidence to support it that Wood, being a member of the executive of the district committee and being, perhaps, a keener trade unionist than some of the other men, was more anxious that the Curriers Union should insist upon the position that they had taken up. To that extent I am quite content to accept the learned judge's finding. But if it means that Wood caused mischief from any personal motive or any malicious motive towards the plaintiff, in my opinion there is no evidence whatever to support that. Indeed, so far as personal feelings and personal motives go the evidence of all the witnesses is unanimous that there was no personal feeling at all between the parties. They were all, personally, good friends, but they were not agreed as to whether the plaintiff was to be allowed to work there. I daresay when the defendants and the others in the shop asserted what they thought was their right to make the plaintiff either join their union or go, the plaintiff did not entertain the same affectionate feeling towards them, but so far as personal malice or motive goes there is no evidence of any.

The evidence that the plaintiff gave of what happened in 1919 was this. He said that Wood approached him in August, 1919, and asked him to join, and he said he would not if he could not remain in the Workers Union, and that Wood then said the men would refuse to work with him, and that would mean trouble. He asked for an answer, yes or no, and the plaintiff gave the answer: "No."

Wood's evidence was substantially to the same effect. He said: "I spoke to the plaintiff, I asked if he would not join the Curriers; he said he had been thinking of doing so and was in arrear with his contributions. I said if he left the Workers Union and joined ours he would lose no benefits." In August, he said, he saw him again and asked him, and he said again that he would not join, and Wood says that on that occasion he said the federation were engaged on this—that is, the Leather Trade Federation—and they would not admit the Workers Union to membership, and to get their rate he would have to join. Wood said that the plaintiff said that he had seen the officials of the Workers' Union, and that, if there was any trouble, the Workers Union would support him. Wood also said that on that occasion he did not tell him that the men would refuse to work with him. That is one of the matters on which they are at variance, and, following what the learned judge in the court below said, I will accept the plaintiff's statement that he did admit that there would be trouble and that the men would not work with him. The matter then went on until on Nov. 21 there was a meeting in the shop and this matter of the plaintiff was discussed, and Riley was deputed to see him. The evidence of the plaintiff as to what took place then was this. He deposed that Riley came and said: "I have been appointed by the shop to ask you if you would join and I said 'No.'" Riley gave the same account. He said:

> "It was proposed and seconded at the meeting that I should approach plaintiff to join the union. I told him, and he said, having had a conversation with someone in the Workers Union he had decided not to join."

Then there came an important meeting of Nov. 28, at which there was another meeting of the shop, and the matter was again discussed. Riley reported the interview that he had had with the plaintiff, there was a discussion, it was proposed that he should join, and it was decided that, if he did not, they would give notice to cease work. Tom Wood (that is the brother of the defendant Wood) drafted a notice, which was signed by Riley and was as follows. It is addressed to the firm:

> "Sirs, we hereby give you notice that we shall cease work on Friday next unless E. White either joins our society or leaves your employment. Signed on behalf of the shop, W. Riley."

That was in effect the overt act of the conspiracy to intimidate and threaten—followed by some other acts, no doubt, but that was the first one. That was given to Mr. Meek, who was not called at the trial, but there is no doubt, I think, what passed. Mr. Meek had no power to deal with the matter, and he said he would send for the plaintiff because he could not have the works upset for one man. That notice was also given to the plaintiff. The plaintiff said it was not for him, and that it ought to be given to the office. He was told that it was to give him another chance, that is to say, if he would then join all would be well. The matter, I understand, continued in that way until Dec. 1. Mr. Dean, the employer, tried to settle the matter in the meantime, but it could not be done. On Dec. 1 the defendants Riley and Wood saw the employers, and something was said about withdrawing the notice. On Dec. 5 there was a meeting of masters and men in the currying trade in the Walsall district, and the defendant Wood, as one of the men's executive, was there. It was to discuss a variety of things which the Curriers Union wanted done. Mr. Dean reported to that meeting what had happened about White, and the masters refused to go further with the conference until this notice was withdrawn. Thomas Wood says that they wanted it withdrawn for a week so that all the notices would come into line with the other notices that had been given for all curriers in Walsall to cease work in a week owing to a dispute between the curriers and the employers about non-union and female labour.

For the purposes of the present case the plaintiff would be considered as a man engaged in non-union labour, although he belonged to the Workers Union, because the Curriers Union would consider anyone in his position as being a non-unionist. Apparently, the members of the executive did not see any objection to withdrawing

the notice, but they thought they could not do so without consulting the shop. They, therefore, went back, and they saw the people at the shop, who declined to withdraw the notice, and the defendant Wood said that he thought the notice ought not to be withdrawn. They went back and they told the employers that it would not be withdrawn, and the result was that the employers, finding that the notice would not be withdrawn, gave notice suspending the plaintiff, and afterwards discharged him. There was a conversation as to what was to happen about the plaintiff's week's wages, and it is on this and on what took place with regard to it that the question of breach of contract or no breach of contract turns. There is no evidence directly as to what were the terms of the plaintiff's employment. He was working on piecework, and, therefore, it was quite possible that he was not entitled to any notice at all. But it was assumed throughout by the employers, the plaintiff, and the defendants that he was working on terms which would entitle him to a week's notice or a week's wages, and it seems to me that the whole matter proceeded on the assumption that, if he got his week's wages, there would be no breach of contract. It may be that he was employed on the terms that his employment might be terminated either by a week's notice or by a week's wages, and the evidence, so far as it goes, seems to show that this method of ending his employment was the one that was assumed to exist by all parties concerned with the matter. The notice had been served on Nov. 28, which would have given just time to give notice terminating the employment on Dec. 5, but that notice had not been given; the men at the interview, the defendant Riley, Thomas Wood, the employers, and the plaintiff, all knew that the notice had not been given, and the question was raised as to what was to happen with regard to the week's wages. The employers' evidence was: "We could not afford a strike, and we were reluctantly compelled to suspend the plaintiff." It is right perhaps to say here that the plaintiff was an entirely satisfactory workman working at the proper trade union wages for skilled men, and there was no objection whatever to him except that he was not a member of the Curriers Union. Riley says: "We reported that we should not withdraw the notice to the employers, and they said they were sorry and asked, if they did not pay wages in lieu of notice, whether we would. Later we agreed to do so." The result was that the men agreed to find the week's wages for the plaintiff which he had not been paid. Riley says that later on the employer Dean said that he would not have anything to do with that, and one of the men says that the way they were going to find the money was that they authorised the employers to stop the money out of their wages and pay it to the plaintiff.

The question upon that evidence is whether the finding of wrongful conspiracy to threaten and intimidate can be supported. There is no act in the matter showing such a conspiracy except the sending of the letter to the employers and the refusal to withdraw it on Dec. 5. There are no other threats which are expressly stated in the evidence, nor is there any conduct beyond the actual giving of the notice and the refusal to withdraw it from which any further threat or intimidation can be inferred. I think it is quite clear that the mere statement of a number of workmen that they will not work with another, and that, if that man is retained in the employers' service, they will strike, is not of itself actionable. Nothing it seems to me can be clearer as to that than the statement of Lord Watson in *Allen* v. *Flood* (1) ([1898] A.C. at p. 99). The dispute there was that some men were objectionable, not personally, but because of trade union matters, to the boilermakers who were working at the Regent Dock, Millwall, and the noble and learned Lord said:

> "That the boilermakers who were employed at the Regent Dock, Millwall, did seriously resent the presence among them of the respondents very plainly appears from the evidence of the respondents themselves; and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact of the case. They were not under any

A continuing engagement to their employers, and, if they had left their work and gone on strike, they would have been acting within their rights whatever might be thought of the propriety of the proceeding. Not only so; they were, in my opinion, entitled to inform the Glengall Iron Co. of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or as they preferred, by the appellant as their B representative."

That is a perfectly clear statement that if a set of men object to work with another man or another set of men they have a perfect right to say that they will not work with him any longer, and, more than that, they have a perfect right also to tell their employer what they are going to do. It is sometimes expressed that they have a right to give him a warning, but they have not a right to threaten. Both C of those words are difficult to define, and I prefer to say that they have a right to make the statement to him that they are going to do it, and that that is not actionable, whatever epithet or substantive you may apply to it, if they do not go beyond that. Lord Herschell said very much the same thing. I am glad to see that he considered, as I do, that the words "threat and coercion and D intimidation" are sometimes used without any very accurate consideration of the meaning which it is intended to attach to them. He said (ibid. at p. 129):

> "On the other hand, it is undeniable that the terms 'threat,' 'coercion,' and even 'intimidation' are often applied in popular language to utterances which are quite lawful and which give rise to no liability either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and E perhaps extreme pressure, on the person to whom it is addressed, to take a particular course."

With regard to the question of what workmen are entitled to do, he continued thus:

> "I understood it to be admitted at the Bar, and it was, indeed, stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a F subsequent engagement to work in the company of the plaintiffs. At all events, I cannot doubt that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had 'called the men out.' They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions G of its authorities, though no doubt if they had refused to obey any instructions which, under the rules of the union, it was competent for the authorities to give, they might have lost the benefits they derived from membership."

Lord Macnaghten gave the same opinion.

I can find nothing more in the present case than the statement of the employers H that the men informed them that, if the plaintiff did not join the Curriers Union or leave the employment, the other men in the shop would refuse to work. That, no doubt, in a sense, may be said to have coerced the masters. The employers did not want to dismiss the plaintiff; but they dismissed him rather than have their whole business upset by the other workmen leaving their work. Whether that was right or whether it was wrong from a general point of view I have nothing I to do. I have got the statement in the House of Lords in *Allen* v. *Flood* (1) that at any rate it is not actionable, and that is all we have to do with in the present case. It does not of itself constitute actionable intimidation and coercion, and I have got the statement also that it does not constitute such an actionable wrong even if it is done by a number of people. Lord Macnaghten expressly contemplated the case of the workmen all going and telling the employer that they would not work any longer with the other workman, because, if they all go together it is obviously done in combination. If they all go, not in person but in the person of a delegate, it is also done in combination. In the present case, therefore, it

seems to me that they are doing nothing but state what they would do if the plaintiff did not join their union or leave. Within the decision of the House of Lords in *Allen* v. *Flood* (1) there is no actionable wrong. But it has been argued that there must be, because the defendants knew or must have known that the employers would have to give in, as one of the partners said when the notice was given, they could not have their works upset for one man, and the men must have known that they were putting pressure upon the employers which must succeed. How that can make any difference in whether what they do is an actionable wrong or not, I have been unable to see. It is possible that in some circumstances it might be a fact tending to show that their action was not bona fide from a trade union point of view, but that they were doing it from some malicious motive towards the plaintiff. The whole of the evidence in the present case, however, entirely negatives any such conclusion as that, and, as I say, I fail to see how an act which is not an actionable wrong if you think it will succeed becomes an actionable wrong because you know that it will. It seems to be no logical distinction at all, and, therefore, in my opinion, on the first and main ground, the evidence does not bear out the finding of the learned judge in the court below.

With regard to the second point, it is not enough to show that the defendants have in fact procured a breach of contract. They must have done it knowingly and intentionally. In all the reported decisions it has been so stated. In the present case, in my opinion, all parties—the employers, the plaintiff, and the defendants—were of opinion that there was no breach of contract if the plaintiff got either a week's notice or a week's wages. If we are to conclude the terms of employment from the very fragmentary evidence there is, it seems to me that the evidence would rather point to that being his employment because it was accepted as being so by everybody. When the matter was raised, the workmen at once said that they would find the week's wages for the plaintiff themselves. The learned judge in the court below has said that they agreed to indemnify the employer against the consequences of dismissing the plaintiff without notice, thereby assuming that there was an actionable wrong. The word "indemnify" seems to suggest a holding harmless from some liability which has been incurred. I do not think that that is the true view. I think that the defendants were proposing to find the money in order that the employers might not be at a loss, and not have to pay out of their own pocket the wages which were necessary in order to make a proper termination of the plaintiff's service. As a matter of fact, those wages were never paid. But that does not seem to have been the fault of the workmen. For some reason or other, after they had made the arrangement with the employers that they should pay and stop it out of their wages, they declined to go on with the matter. I do not know what the reason was at all. It was not brought about by the workmen. Therefore, if there was a breach of contract in not paying the plaintiff's wages, in my opinion, that was not caused by the workmen's conduct.

I think, therefore, that there was nothing to sustain the finding of any actionable wrong against the defendants, apart altogether from the Trade Disputes Act, 1906. As we have had a good deal of discussion upon that Act I had, I think, better deal with the point. The Trade Disputes Act, 1906, no doubt, was passed to a certain extent in view of statements which had been made in *Quinn* v. *Leathem* (4) and in other cases. The first section provides this:

> "(1) The following paragraph shall be added as a new paragraph after the first paragraph of s. 3 of the Conspiracy and Protection of Property Act, 1875: 'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.' "

I do not know that very much turns upon that section. Certainly not in the conclusion to which I have come that there is nothing here actionable if done either

A by one or by many. But it is perfectly obvious, I think, that if one workman goes to his employer and says: "I will not work for you any longer if A.B. continues in your employment," that is not actionable, and if there be a trade dispute here, the section would make it not actionable if it were done by the combination of the whole shop. In my opinion, it is not necessary to have to resort to that, but if it be a trade dispute that would deal with the case. Section 3 provides:

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> "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

C Assuming, therefore, that was a breach of contract in getting rid of the plaintiff on Dec. 5 without the payment of his wages for the week that would be protected by that Act, if there was in fact a trade dispute. The definition of a "trade dispute" is in sub-s. (3) of s. 5 as follows: ". . . the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen. . . ." "Between workmen and workmen" is an addition in this Act, D and it was probably added in view of what was said in *Quinn* v. *Leatham* (4) and other cases that a dispute of this description would not be a dispute between employers and workmen which was the only dispute protected in the earlier Act. The subsection continues:

> "which is connected with the employment or non-employment, or with the conditions of labour, of any person, and the expression 'workmen' means all E persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises."

It was suggested that the words "which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person" do not apply to a dispute between workmen and workmen. I F cannot follow that. It seems to me that you cannot read the subsection in that way, and, therefore, a dispute between workmen and workmen which is connected with the employment or non-employment of any person is a "trade dispute."

Was there a "trade dispute" in the present case? That, in my opinion, is a question of fact. It has been so treated in several authorities, and it being a question of fact it is not easy, nor, indeed, is it possible, to lay down any general G rule to apply to all cases. We have to see what are the circumstances to which we have to apply our minds in determining the question of fact in this present case. It seems to me there is no doubt there was a dispute between the two unions. The curriers objected to the workers including in their membership craftsmen such as the plaintiff and to their negotiating with the employers on behalf of such men, and they insisted that all craftsmen should be members of their union. To this H the Workers Union would not agree. There was a dispute between the two unions on this point. We had a good deal of discussion whether it was a burning question or not. I rather agree with the learned counsel for the plaintiff that it did not burn very brightly. But there was the dispute, there is no question about that, and in accordance with and by reason of the attitude of the two unions the plaintiff soon after he went to the Leamore works was asked to join the Curriers Union. I It was suggested to him by his employers—and he refused to do so unless he was allowed still to remain a member of his own union. In 1919 the matter was raised in a more acute form, and the plaintiff was told that the workmen would not work with him unless he joined the Curriers Union and that if he did not either join or leave the employment they would cease work. He was quite willing, as he said, to do it if he could remain in his own union, but that they would not allow. In those circumstances it seems to me the only fair conclusion of fact is that there was a "dispute between workmen and workmen in connection with the employment of a person," namely, the plaintiff, the dispute being that the workmen in the

shop insisted that no skilled workman should be employed unless he belonged to the Curriers Union, and this dispute arose because of the restrictions which the union thought fit to put upon the employment of persons as buffers, in what they thought was the interest of their union, and its members, and, perhaps, in the interest of the trade at large.

It is said that this conclusion is inconsistent with *Conway* v. *Wade* (5) and *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (6), but I do not think that is so. The facts in those cases were different from those in the present case. The complaint which the other workers had against the plaintiffs in those cases and the cause of their refusing to work with them were not matters in connection with the regulation of employment in the trade, but were matters of complaint against the personal conduct of the plaintiffs as members of their union. It was truly said by the learned counsel for the plaintiff that it is very difficult to draw a line between what is a "trade dispute" and what is not. That is always the case in questions of fact, and I do not intend to attempt a general definition. I must, however, say that I prefer the reasoning of PETERSON, J., in *Hodges* v. *Webb* (2) to that of ASTBURY, J., in *Valentine* v. *Hyde* (3), and I think it really almost a reductio ad absurdum of s. 5 (3) to say, as the plaintiff is bound to say, that it does not include any dispute between union and non-union men at all, and if union men and non-union men are working in the same employment and the union men say: "We will no longer work with the non-union men unless they join our union," that is not a "dispute between workmen and workmen connected with the employment or non-employment of any person." It seems to me that is contrary to the words. I do not think that it is necessary, as I have said, to say where the limitation lies which is to be put upon this subsection. It is a question of fact, and I decide it as a question of fact. It is quite possible that the extension of this legislation which was originally passed for the benefit of workmen in their disputes with their employers to disputes between workmen and workmen produced results which many workmen in some trade unions did not anticipate. But it does not seem to me that that is any reason for not giving to the section its natural meaning. I do not think it necessary to consider whether there was or was not a "dispute between workmen and employers." I do not at all say that there was or that there was not, and I do not say that the act of the workmen in the shop could not be considered to be taken in furtherance or contemplation of a dispute between workmen and employers. It may very well be that when the defendants had once intimated to the employers that the plaintiff ought to join the union, and they knew that the employers wished to retain him in their service after that the action which they took with regard to the employers may have been in contemplation of a dispute between the workmen and the employers. I think it is quite a possible construction also. But, as I think this case comes within the words, "a dispute between workmen and workmen," I do not consider it necessary to give any decision on that point. This appeal should be allowed, and judgment entered for the defendants here and below.

WARRINGTON, L.J.—I am of the same opinion. This is an action brought by the plaintiff against two defendants founded upon the procuring by the defendants of certain acts on the part of other persons. The acts complained of are, first, the alleged wrongful dismissal of the plaintiff from his employment under those other persons, and, secondly, the refusal of those other persons to continue to employ him irrespective of contract. It has been stated by LORD WATSON, in addressing the House of Lords, in *Allen* v. *Flood* (1) what are the grounds upon which such an action as the present can be founded. He said this ([1898] A.C. at p. 96):

> "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly, and for his own ends,

induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (7), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against the third party."

It is for the plaintiff to establish that one or the other of those two grounds exists in the present case. The learned judge in the court below has held that he has established both grounds of complaint. With all respect to the learned judge I do not think that he has established either. I will examine that in a little more detail presently.

The action arises in this way. I am not going through the facts in detail. They have already been stated by the Master of the Rolls, and it is quite unnecessary for me to go over them again. But I must just give a short summary. The plaintiff and the two defendants were, in 1919, employed as curriers under the same employers, the Leamore Currying Co., which consisted of two gentlemen carrying on business in partnership. The defendants were both of them, as were all the workmen employed in the shop except the plaintiff, members of an old craft union, which I will call, for shortness, the Curriers Union. It was a craft union that was established some 200 years ago, its object being to protect the interests of the workmen who were by their calling curriers, and those alone. The Curriers Union comprises only skilled workers in the curriers' trade. The defendant was a member of a large omnium gatherum union called the Workers Union, which comprised among its members skilled workmen and non-skilled labourers of all classes, not confined to any particular craft, but ready to welcome as a member any artisan or labourer whatever might be the nature of his employment. It appears to be the policy of the craft union to insist as far as may be that the workers in the craft should be members of their union and not belong to such a union as the Workers Union, in order that the craft union, who devote themselves to the interests of that craft, may be the persons and the only persons entrusted with the duty of negotiating with employers and furthering the interest of the men employed in that craft. That in itself is a perfectly reasonable and intelligible policy. It is for the consequence of carrying out that policy in this particular shop that the two defendants are sued in the present action.

It is said, first, that they have knowingly procured from the employers the breach of their legal obligations to the plaintiff, that is to say, a breach on their part of the plaintiff's contract of employment, and it is said also that they have by illegal means procured the non-employment by the employers without any breach of contract of the plaintiff. On the pleadings the procuring of the refusal by the employers to employ the plaintiff is said to have been brought about by threats, coercion, and intimidation, and the threats, coercion, and intimidation complained of are that the defendants threatened the employers that the labour of the workmen in the defendants' union would be withdrawn. The only so-called threat of which any evidence was given consisted of a letter signed by the defendant Riley, and written on behalf of the men who had been present at a shop meeting, giving notice to the manager that:

"We [the men employed in the shop] shall cease work on Friday next unless E. White [the plaintiff] either join our society [the Curriers Union] or leaves your employment."

No other threat is alleged except that at a subsequent meeting between the workmen and the employers the workmen, through their spokesman, determined to adhere to the notice which they had already given.

The question arises: Is the giving of a notice of that sort on behalf of the workmen a wrongful act at common law quite independently of the Trade Disputes Act,

1906? That an act of that sort done by an individual is not at common law a wrongful act I think is quite plain from the decision of the House of Lords in *Allen* v. *Flood* (1). An act of that sort done by a number of men, is, to my mind, shown to be not at common law an unlawful act, not directly by the decision in *Allen* v. *Flood* (1), but by the judgments of three noble Lords at all events, who addressed the House in that case—namely, LORD WATSON, LORD HERSCHELL, and LORD MACNAGHTEN. I propose to read a short passage in LORD WATSON's address to the House of Lords, but I would further point out this as the result of what, to my mind, those three noble Lords express to be the law. It is perfectly lawful for one workman to withdraw his work, or for any number of workmen to withdraw their work, and to allege as the reason for the withdrawal that they refuse to work while a certain workman or class of workman is or are employed by those employers. It would be a most extraordinary thing if it is lawful for them to withdraw their work, but unlawful for them to intimate their intention to their employers, because, if that is the law, it amounts to this—that what is now called, generally, a "lightning strike" would be legal, whereas a strike taking place after notice would be illegal, a most extraordinary conclusion. But that I am right in what I have just said as to my view of the law as laid down by the learned Lords whom I have mentioned, I think, is shown quite plainly by this passage in LORD WATSON's judgment. First, he said ([1898] A.C. at p. 98):

> "It is, in my opinion, the absolute right of every workman to exercise his option with regard to the persons in whose society he will agree to continue to work. It may be deplorable that feelings of rivalry between different associations of working men should ever run so high as to make members of one union seriously object to continue their labour in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views. . . . They [the workmen in question] were not under any continuing engagement to their employers, and, if they had left their work and gone out on strike, they would have been acting within their rights, whatever might be thought of the propriety of the proceeding. Not only so, they were, in my opinion, entitled to inform the Glengall Iron Co. of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or, as they preferred, by the appellant as their representative."

There cannot be a clearer intimation, first, that the workmen were entitled, as a body, to withdraw their work if they pleased, and on the ground on which they did withdraw it, and, secondly, that they were entitled to intimate to the master the conclusion at which they had arrived, and to do that either as one or as a body together, or represented by some person whom they chose to represent them. I do not propose to read LORD HERSCHELL's speech, but I want to read just a few words of LORD MACNAGHTEN's speech in the same case. He said (ibid. at pp. 147, 148):

> "The jury found that the settlement of this dispute was a matter within Allen's discretion. The only way in which he could settle it was by going and seeing the manager. There was surely nothing wrong in that. There was nothing wrong in his telling the manager that the iron-men would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned the iron-men were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason; any one of them might have gone singly to the manager, or they might have gone to him all together (if they went quietly and peaceably), and told him that they would not stay any longer with Flood and Taylor at work amongst them."

Those last words are important for the present purpose. That what was done in the present case was done "quietly and peaceably" there can be no doubt at all.

A The evidence is quite clear that there was no personal grudge whatever against the plaintiff, and that all that the workmen were anxious for was that he should join the Curriers Union. So far as they were concerned, it did not matter to them whether he remained a member of the Workers Union as well. But the Curriers Union did object to his remaining a member of the Workers Union. He could only join the Curriers Union by giving up his membership of the Workers Union. B The object of the workmen, however, was to obtain his accession to the Curriers Union. With reference to this part of the case the learned judge in the court below has found as a fact that the defendants were guilty first of conspiring by threats to injure the plaintiff by obtaining his dismissal from his employment because he would not leave his own union and join the Curriers Union. In my opinion, that finding is not capable of being sustained on the evidence. They did C not, in my judgment, conspire by any threat at all to injure the plaintiff. They did not conspire by any threat to obtain his dismissal from his employment. What they did seek to do was to obtain that, if he remained in the employment, he should become a member of the Curriers Union. What they did they did by means which were, in my opinion, perfectly lawful means.

The second finding of fact of the learned judge is that they were guilty of inducing D and intentionally obtaining severally and in combination a direct breach by the employers of the plaintiff's agreement for service. That again, if possible, is even less to be supported on the evidence than the previous finding. [HIS LORDSHIP reviewed the evidence.] The answer, therefore, to that claim is that they did not knowingly and intentionally endeavour to induce or succeed in inducing the master to commit a breach of that contract. What they intended to do was to avoid a E breach of contract. The first grounds, stated by LORD WATSON to be those on which such an action as the present can be founded, in my opinion, is not proved in the present case.

That being so, it is really unnecessary to consider the construction and effect of the Trade Disputes Act, 1906. But as it has been a good deal discussed, and, as we have also had discussed before us *Valentine* v. *Hyde* (3) before ASTBURY, J., and F *Hodges* v. *Webb* (2) before PETERSON, J., I think that I ought to say just a few words about it. The discussion has really turned upon s. 5 (3), the definition section, as to what is a "trade dispute." The subsection enacts that:

> ". . . the expression 'trade dispute' means any dispute between employer and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the G conditions of labour of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . ."

What is a dispute between employer and workmen or between workmen and workmen which is connected with the employment or non-employment of any person? H In my judgment, that is a question of fact in every case. In the present case there was, I think, quite plainly a dispute between workmen and workmen, and it was a dispute whether or not the plaintiff should, in the position in which he then stood in relation to the unions, be employed by the particular employers. In my opinion, that was a dispute connected with the employment or non-employment of the plaintiff. It was also a dispute connected with the employment or non- I employment of the other workmen because they were unwilling to continue in the employment if the plaintiff was also in that employment. On this point I wish to say for myself that I cannot appreciate the reasoning of ASTBURY, J., in *Valentine* v. *Hyde* (3). He treats it as if in such a case as the present the dispute was whether or not the workman in question should join the particular union. In my judgment, that is only an incident to the dispute. The dispute is whether, while he is not a member of the union to which the other men belong, he should be employed by the employer. It is a dispute as to the terms upon which he should continue in the employment. On this point I very much prefer the reasoning of

PETERSON, J., in *Hodges* v. *Webb* (2) to the reasoning of ASTBURY, J., in *Valentine* v. *Hyde* (3) and in the present case. The result is that, in my opinion, the illegal acts charged against the defendants have not been established, the action fails, and the judgment pronounced for the plaintiff must be set aside and judgment must be entered for the defendants with costs here and below.

YOUNGER, L.J.—This, in my opinion, is not a case in which there is any real dispute of fact. It is, however, a case in which not only the facts themselves, but more particularly the proper inferences to be drawn from them, may strike different minds in different ways.

The learned judge in the court below was of opinion that the evidence justified him in inferring that the shop meetings at the Leamore currying works of the workmen members of the Curriers Union claimed to decide, as he puts it, whether and in what circumstances their employers and their fellow-workmen should be allowed to earn their daily bread, and he came to the conclusion that the action of the defendants complained of by the plaintiff in this action was in furtherance of that claim and regardless of all other considerations. Although not in words, the arguments of counsel for the plaintiff were directed towards maintaining that view of the facts. The defendants, on the other hand, used the facts which were proved in the case as indicating that the members of the Curriers Union, in pursuance of what may be called the principle of craft unionism, have merely manifested what they conceive to be their justifiable objection to the continued employment at these works of the plaintiff, who did not belong to their union, by exercising what they say is their undoubted right of refusing to continue to work for their employers unless the cause of their objection was removed. These may both of them be somewhat extreme views of the position really disclosed by the evidence. But, however the case be stated, it is, I think, quite manifest that it raises for the consideration of those whom it may properly concern questions of trade union policy with reference to which there is room for acute difference of opinion. It may even be that the action of the defendants and of the shop towards the plaintiff would strike many minds, even of convinced trade unionists, as neither considerate nor wise, nor, in the permanent interest of trade unionism itself, expedient, but with all such questions this court has no concern, and it must in all these cases always be vigilant to see that it is not influenced in its views of the facts, or of the proper inferences to be drawn from them, by any prepossession which, on more general principles, it may in the particular case be tempted to feel with the policy or attitude of either one side or the other. We are in all these cases confronted with a claim by both parties to the dispute freely to exercise their own freedom of activity irrespective of the fact that such exercise may bring them into conflict with one another, and the passage in LORD HERSCHELL'S judgment in *Allen* v. *Flood* (1), which is quoted by PETERSON, J., in *Hodges* v. *Webb* (2), is, I think, equally apposite to this case as it was in the case before PETERSON, J. LORD HERSCHELL said:

> "I am not behind my noble and learned friend in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful."

The learned judge in the court below has found in the present case that the defendants were guilty, first, of conspiring by threats to injure the plaintiff by obtaining his dismissal from his employment because he would not leave his own union and join the Curriers Union, and, secondly, of inducing and intentionally obtaining severally and in combination a direct breach by the employers of the plaintiff's agreement of service. I cannot myself concur with either of these findings, nor, in my view, are they justified by the facts proved in the court below. As to the first, the only evidence of threats which was given or relied upon by the plaintiff was the handing to the employers on Nov. 28 of the letter of that date which has

been read by the Master of the Rolls, and by the refusal of the shop or of the defendants to withdraw that letter on Dec. 5. That the letter was a threat in the sense that it intimated to the employers that if one of two things with reference to the plaintiff did not happen the Curriers Union men would leave the employers' service at the end of the week I do not doubt. But I do doubt whether that was a threat for the purposes of the law appertaining to the present case. Further, that which was threatened, if it was a threat, the men were lawfully entitled to carry out. It was part of the liberty of action which they themselves possessed, and apart from intending or inducing any breach of contract with the plaintiff—a question which I will consider separately—I cannot see that there was anything actionable in their intimating beforehand their intention to exercise their liberty of action in that regard. The letter of Nov. 28 embodied the resolution previously come to by the workmen themselves. But even if those who presented the letter—and that so far as this action is concerned would extend to the defendant Riley only—had so threatened, the result so far as the liability on this head is concerned would have been, in my opinion, the same. This appears to me to be clear from the speech of LORD HERSCHELL in *Allen* v. *Flood* (1), who, again assuming no breach of contract, in terms stated that the officials of the union could not have been sued merely for calling out the members of the union any more than the workmen themselves could have been sued for ceasing work.

With reference to the action of the defendant Wood, who, I agree, took a very active part in advising, or, if you like, leading, the men in this matter, I cannot find any particular activity of his proved in the case which exposes him to any special individual liability. After the workmen had refused to strike he did assure them that the union would support them if they did. It is said he induced them to agree if necessary to strike by making that statement. But if he did the statement was, so far as anything has been shown in this case to the contrary, perfectly true, and I know not why he should not have made it if he chose.

True it is, I think, undoubtedly that Wood's craft unionism was an enthusiasm. It may even go further. He certainly is from his own point of view a purist in such matters, and he is entitled to be so if he thinks it right, and although his zeal in this case brought him into conflict with the plaintiff and the plaintiff's union, there is, so far as I can find in the evidence, nothing to show that he was actuated in anything he did by any malicious or vindictive feeling towards the plaintiff as a man, or that in any action he took or advised he acted otherwise than in the interests, as he conceived them, of craft unionism in general and the Curriers Union in particular. I do not fail to observe that his attitude is not exceptional because one circumstance given in evidence as increasing the plaintiff's damages is that no employment is open to him in Walsall at any shop where the workmen employed belong to the Curriers Union. It follows, in my opinion, that apart from any question of breach of contract the plaintiff has not brought himself within the only ground which, LORD WATSON stated, made a person who procures the act of another legally responsible for its consequences, namely, that if

> "when the act induced is within the right of the immediate actor, and is, therefore, not wrongful in so far as he is concerned, it may yet be to the detriment of a third party, and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (7), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

But it is said, and the learned judge in the court below has so found, that the defendants were guilty of inducing and intentionally obtaining severally and in combination a direct breach by the employers of the plaintiff's agreement of service, and his finding with regard to that matter is expressed in these words:

> "At the time when this last decision was arrived at by the defendants and the rest of the shop they knew that no notice to terminate his engagement had been given by the employers to the plaintiff, and that to discharge him in that

way would amount to a breach of contract, and they further knew and intended that this would and should be the result of their last intimation or threat to their employers who had previously stated that they could not face a strike in connection with the dispute as to which union the plaintiff should belong to. The shop, including the defendants, further agreed to indemnify the employers for discharging the plaintiff without notice."

That statement of the learned judge imports, undoubtedly, that the view which he took of the evidence was that the arrangement made between the workmen through the defendant Riley and the employers on Dec. 5 was that the plaintiff's services should be dispensed with without notice and without payment, and that the employers would be indemnified by the workmen in respect of any consequences which might ensue by reason of the non-payment or want of notice. But when the evidence is looked at it is plain that that was not the arrangement at all. The arrangement on Dec. 5 to which the employers assented was that they would make payment to the plaintiff of the sum in lieu of notice to which on all hands it was agreed or supposed he was entitled, and that having made that payment, an arrangement by deducting it from their pay or otherwise, should be implemented by which it would be repaid to the employers, so that they would not be out of pocket in respect of it, and the reason why, notwithstanding that arrangement, the payment was not, in fact, made was that the employers at a later date thought better to withdraw from the arrangement and informed the defendant Riley that they would have nothing to do with the payment to the plaintiff of his money. The result, therefore, is that the finding of the learned judge in the court below is not borne out by the evidence on either side, and, in my judgment, so far from any breach of contract with the plaintiff having been intended by the defendants, their intention was that the contract with the plaintiff should be fulfilled to the full at their expense. It seems to me, therefore, impossible to hold that the defendants knowingly procured the commission of an illegal act in this respect, and, therefore, again they are not within the ground on which, according to LORD WATSON'S speech in *Allen* v. *Flood* (1), it would be possible to make them liable, namely, that they knowingly and for their own ends induced the commission of an actionable wrong. In the view which I take of the facts of the case, the question with regard to the Trade Disputes Act, 1906, does not arise, and all I would wish to say with regard to that statute is that I concur entirely in the view which has been expressed by my Lord with reference to its provision. The appeal will, therefore, be allowed with costs here and below.

Appeal allowed.

Solicitors: *Stooke-Vaughan, Taylor & White*; *Gibson & Weldon*, for *Randle J. Evans*, Wolverhampton.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WARE AND DE FREVILLE, LTD. *v.* MOTOR TRADE ASSOCIATION AND OTHERS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), November 2, 3, 4, 5, 8, 9, and December 20, 1920]

[Reported [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213; 65 Sol. Jo. 239]

Trade—Person injured through performance of lawful acts—Trade—Trading association—Maintenance of price of goods—Refusal to supply trader selling at unauthorised price—Publication of trader's name in "stop list."

A combination to do by lawful means acts the natural consequence of which is to injure another in his trade or business is not actionable, as, e.g., in order to secure that goods be sold at a certain price, by the members of the combination refusing to supply him with goods in the absence of an undertaking by him that he will only sell at the authorised price, taking steps to prevent his getting the goods indirectly, and publishing an announcement of the refusal in a periodical circulating among members of the trade or business in question. Aliter, if the means employed were unlawful as being the commission of a tort, e.g., an inducement to break a contract, the use of physical violence, or threatening to commit a tort.

Libel—Defamatory words—Statement of intention to perform lawful act—Absence of special circumstances giving words libellous meaning.

In the absence of evidence of special circumstances giving a libellous meaning to the words the statement that the author proposes to do what he has a legal right to do—as, e.g., that he will not supply goods to a person who will not agree not to sell them at other than a specified price—is not capable of a defamatory meaning.

The plaintiffs were motor-car dealers; the defendant association was a certified trade union, and other defendants were the chairman and members of the council of the association. The members of the association were manufacturers of cars and motor accessories, who fixed prices at which the goods should be sold. The byelaws of the association provided that on proof that any person had offered for sale or sold any proprietary price-maintained article at a price other than that on the "protected list", the council might place the name of that person on a "stop list" and give notice thereof to all members, and that no member of the association should supply any such article to, or have any trade relations in regard to such articles, with, a person whose name was on the "stop list." The council might also place on the "stop list" the name of any person supplying proprietary price-maintained articles to, or having any trade relations in regard to those articles with, any person whose name was on the "stop list." The plaintiffs, who were not members of the defendants association, advertised for sale, on behalf of a customer, a motor car manufactured by a member of the association, at a price greater than the price fixed by the manufacturer. The defendants, after giving the plaintiffs a hearing, published in the trade journals a "stop list" with the plaintiffs' name on it. The plaintiffs thereupon sued the defendants for an injunction restraining them from publishing the plaintiffs' name in the "stop list" or from publishing any libel on the plaintiffs prejudicing them in their business. The "stop list" stated: "In pursuance of its policy of conserving the fixed retail prices scheduled in its protected lists, the Motor Trade Association issues the subjoined stop list under power of its byelaws. . . . Until further notice the following parties [which included the plaintiffs] are not to be supplied directly or indirectly with any of the articles on the protected lists of the association."

Held: (i) the members of the defendant association had a right to trade with

the plaintiffs or not, as they chose; they had done what they did bona fide in protection of their trade interests; and neither the coercion or threats which were used nor the acting by the defendants in combination rendered their actions unlawful or actionable; and, therefore, the plaintiffs were not entitled to the injunction they claimed.

Mogul Steamship Co. v. *McGregor, Gow & Co.* (1), [1892] A.C. 25; *Allen* v. *Flood* (2), [1898] A.C. 1; *Quinn* v. *Leathem* (3), [1901] A.C. 495; and *Conway* v. *Wade* (4), [1909] A.C. 506, considered.

Vegelahn v. *Guntner* (5) (1896), 167 Mass. 92; and *Hodges* v. *Webb*, [1920] 2 Ch. 70, approved.

(ii) the words complained of were not capable of a defamatory meaning in the absence of evidence that they would be understood in a meaning other than their ordinary meaning, and of such evidence there was none.

Trade Union—Action against union—Competency—Claim for injunction—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4 (1).

By s. 4 (1) of the Trade Disputes Act, 1906 (25 HALSBURY'S STATUTES (2nd Edn.) 1267): "An action against a trade union . . . in respect of any tortious act alleged to have been committed by or an behalf of the trade union, shall not be entertained by any court."

Held (by SCRUTTON, L.J., and ATKIN, L.J.): the word "action" in this section includes a claim for an injunction restraining a trade union from doing certain acts, and, therefore, such a claim cannot be granted.

Notes. The Restrictive Trade Practices Act, 1956, provides for the registration and judicial investigation of certain restrictive trade agreements and the prohibition of such agreements when found contrary to the public interest.

Followed: *Sorrell* v. *Smith*, [1925] All E.R. Rep. 1. Considered: *R.* v. *Denyer*, [1926] 2 K.B. 258. Followed: *Auto-Mart (London), Ltd.* v. *Chilton* (1927), 43 T.L.R. 463. Considered: *Hardie and Lane, Ltd.* v. *Chilton*, [1928] All E.R. Rep. 36; *Cookson* v. *Harewood*, [1931] All E.R. Rep. 533; *Thorne* v. *Motor Trade Association*, [1937] 3 All E.R. 157. Referred to: *Hardie and Lane, Ltd.* v. *Chilton*, [1928] 1 K.B. 633; *De Jetley Marks* v. *Greenwood*, [1936] 1 All E.R. 863; *Crofter Hand Woven Tweed Co.* v. *Veitch*, [1942] 1 All E.R. 142; *British Motor Trade Association* v. *Salvadori*, [1949] 1 All E.R. 208; *D. C. Thomson & Co.* v. *Deakin*, [1952] 2 All E.R. 361; *Huntley* v. *Thornton*, [1957] 1 All E.R. 234.

As to freedom of trade generally and torts arising out of the operations of trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 338, 339, 516–524; as to what words are defamatory, see 24 HALSBURY'S LAWS (3rd Edn.) 19–29; and as to injunctions, see ibid., vol. 21, p. 343 et seq. For cases see 43 DIGEST 8–11, 112 et seq.; 28 DIGEST (Repl.) 737; 32 DIGEST 17 et seq. For Trade Disputes Act, 1906, see supra.

Cases referred to:

(1) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; affirmed, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51*.

(2) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, *1164*.

(3) *Leathem* v. *Craig*, [1899] 2 I.R. 667; affirmed sub nom. *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179*.

(4) *Conway* v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, *1237*.

(5) *Vegelahn* v. *Guntner* (1896), 167 Mass. 92.

(6) *Hodges* v. *Webb*, post p. 447; [1920] 2 Ch. 70; 89 L.J.Ch. 273; 123 L.T. 80; 36 T.L.R. 311; 43 Digest 121, *1240*.

(7) *R.* v. *Rowlands* (1851), 17 Q.B.D. 671; 2 Den. 364; 21 L.J.M.C. 81; 18 L.T.O.S. 346; 16 J.P. 243; 16 Jur. 268; 5 Cox, C.C. 466; 117 E.R. 1439, C.C.R.; 14 Digest (Repl.) 128, *891*.

(8) *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; 35 T.L.R. 14; 63 Sol. Jo. 84; 43 Digest 113, *1180*.

(9) *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (1898), 35 Sc.L.R. 645; 5 S.L.T. 263; 43 Digest 114, *1184 v.*

(10) *Valentine* v. *Hyde*, [1919] 2 Ch. 129; 88 L.J.Ch. 326; 120 L.T. 653; 35 T.L.R. 301; 63 Sol. Jo. 390; 43 Digest 122, *1243*.

(11) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286, H.L.; 36 Digest (Repl.) 256, *67*.

(12) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 28 Digest (Repl.) 791, *411*.

(13) *Temperton* v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 43 Digest 114, *1185*.

(14) *Sweeney* v. *Coote*, [1906] 1 I.R. 51; affirmed, [1907] A.C. 221; 76 L.J.P.C. 49; 96 L.T. 748; 23 T.L.R. 448; 51 Sol. Jo. 444, H.L.; 42 Digest 984, *143*.

(15) *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K.B. 545; 72 L.J.K.B. 893; 89 L.T. 393; 52 W.R. 165; 19 T.L.R. 701, C.A.; affirmed sub nom. *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 43 Digest 114, *1186*.

(16) *Larkin* v. *Long*, [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455, H.L.; 43 Digest 121, *1241*.

(17) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*.

(18) *Capital and Counties Bank* v. *Henry* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, *121*.

(19) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 72, *1010*.

(20) *Isaacs* v. *Hobhouse*, [1919] 1 K.B. 398; 88 L.J.K.B. 668; 120 L.T. 331, C.A.; Digest (Practice) 601, *2422*.

(21) *Nash* v. *Rochford R.D.C.*, [1917] 1 K.B. 384; 86 L.J.K.B. 370; 116 L.T. 129; 81 J.P. 57; 15 L.G.R. 103, C.A.; Digest (Practice) 603, *2437*.

(22) *A.-G.* v. *Hackney Local Board* (1875), L.R. 20 Eq. 626; 44 L.J.Ch. 545; 33 L.T. 244; 38 Digest (Repl.) 131, *913*.

(23) *Flower* v. *Low Leyton Local Board* (1877), 5 Ch.D. 347; 46 L.J.Ch. 621; 36 L.T. 760; 41 J.P. 548; 25 W.R. 545, C.A.; 38 Digest (Repl.) 147, *1041*.

(24) *Harrop* v. *Ossett Corpn.*, [1898] 1 Ch. 525; 67 L.J.Ch. 347; 78 L.T. 387; 62 J.P. 297; 46 W.R. 391; 14 T.L.R. 308; 42 Sol. Jo. 365; 38 Digest (Repl.) 131, *908*.

(25) *Chasemore* v. *Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; 23 J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 34, *252*.

(26) *Connor* v. *Kent*, *Connor* v. *Ritson*, *Gibson* v. *Lawson*, *Curran* v. *Treleaven*, [1891] 2 Q.B. 545; 61 L.J.M.C. 9; 65 L.T. 573; 55 J.P. 485; 7 T.L.R. 650; 17 Cox, C.C. 354, C.C.R.; 15 Digest (Repl.) 917, *8812*.

(27) *J. Lyons & Sons* v. *Wilkins*, [1896] 1 Ch. 811; 65 L.J.Ch. 601; 74 L.T. 358; 60 J.P. 325; 45 W.R. 19; 12 T.L.R. 278; 40 Sol. Jo. 372, C.A.; 15 Digest (Repl.) 919, *8824*.

(28) *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, *1226*.

Also referred to in argument:

Hilton v. *Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur.N.S. 587; 4 W.R. 326; 119 E.R. 789; 43 Digest 10, *50*.

Gregory v. *Duke of Brunswick* (1843), 6 Man. & G. 205; 6 Scott, N.R. 809; (1844), 6 Man. & G. 953; 7 Scott, N.R. 972; 2 L.T.O.S. 188; 8 Jur. 148; on appeal (1849), 2 H.L.Cas. 415, H.L.; 42 Digest 972, *32*.

Davies v. *Thomas*, [1920] 2 Ch. 189; 89 L.J.Ch. 338; 123 L.T. 456; 84 J.P. 201; 36 T.L.R. 571; 64 Sol. Jo. 529, C.A.; 43 Digest 116, *1200*.

R. v. *Eccles* (1783), 3 Doug.K.B. 337; 1 Leach, 274; 99 E.R. 684; 15 Digest (Repl.) 914, *8793*.

White v. *Riley*, ante p. 371; [1921] 1 Ch. 1; 89 L.J.Ch. 628; 124 L.T. 168; 36 T.L.R. 849; 64 Sol. Jo. 725, C.A.; 43 Digest 122, *1242*.

A.-G. of Commonwealth of Australia v. *Adelaide Steamship Co., Ltd.*, [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp.M.L.C. 361; 29 T.L.R. 743, P.C.; 43 Digest 12, *68*.

Appeal by defendants and **Cross-appeal** by plaintiffs from an order of ROWLATT, J., made in an action tried by him without a jury.

The plaintiffs were dealers in motor cars. The defendants, the Motor Trade Association, were a trade union certified as such under s. 2 (3) of the Trade Union Act, 1913. The defendant Mobbs was a member and chairman of the council of the association, and the defendants Atkey and Carver were members of the council. The defendant Crane was the solicitor to the association, and acted as the "stop list" superintendent. The plaintiffs claimed

> "an injunction restraining the defendants, their servants and agents, and each of them, from publishing the name of the plaintiff company in a stop list or black list, or from publishing any libel of the plaintiffs injuriously affecting them in their business of dealers in motor cars, or from publishing any statement calculated to prevent any persons, firm, or company from dealing with the plaintiffs, or calculated to induce any person, firm, or company to break their contracts with the plaintiffs. . . ."

The objects of the association were set out in a book entitled "Objects, Regulations, and Byelaws," and were (inter alia) to encourage, promote, and protect the motor industry in the United Kingdom and throughout the world, and generally to watch over and protect the interests of manufacturers, wholesalers, retailers, and users of motor goods and of others having commercial relationship with the motor industry.

The byelaws of the association included the following:

> "1. On proof to the satisfaction of the council that any company, association, firm or person (all of whom are hereinafter referred to as 'person') has offered or advertised or sold any proprietary price-maintained article at a price above or below that scheduled on the association's protected lists, or price fixed by the manufacturer or concessionaire to which the association has granted protection, the council may place the name of such person on a list to be called the 'stop list,' and give notice thereof to all members of the association or otherwise. . . .
>
> 4. No member of the association shall supply any proprietary price-maintained article to, or have any trade relations in regard to proprietary price-maintained articles with, any person whose name is on the stop list so long as the name of such person remains on the stop list. Provided that any proprietary price-maintained article supplied under a contract existing at the date of admission to membership of the proprietor, and which the proprietor

A or his agent has no power to terminate, shall be exempt from the operation of this byelaw.

5. The council may also place on the stop list any person, whether a member or not, who shall supply proprietary price-maintained articles, to, or have any trade relations in regard to proprietary price-maintained articles with, any person whose name is on the stop list.

B 6. The council may also place on the stop list any person whose business is to their satisfaction so identified with that of a person on the stop list as to render it desirable in pursuit of the objects of the association.

7. No person shall be put upon the stop list without being first invited to explain the allegations made concerning him and being afforded an opportunity of so doing and his explanation (if any) being fairly considered.

C 8. Members of the association shall insert the following clause in all contracts under which they supply any article on the protected lists: 'This contract may be declared at an end by the said [member's name] if at any time the name of the said [other party to the contract] shall appear on the stop list of the Motor Trade Association, and on such declaration it shall be at an end accordingly, but without prejudice to claims already accrued.'

D 9. The expression 'proprietary price-maintained article' in these byelaws means an article entered and published in the current protected list of the association or to the price whereof protection has been granted by the association. . . ."

The statement of claim alleged that the objects of the defendant association were unlawful as being in restraint of trade, and that the members of the association E had unlawfully conspired or combined to enforce or to endeavour to enforce the said objects by placing the name of persons who were alleged to have disregarded their rules as to prices on the "stop list" referred to in the byelaws; that the defendants threatened to add the plaintiffs' name to the "stop list"; that such an act would be unlawful as being an endeavour to enforce an illegal agreement and conspiracy or combination by unlawful means—namely, by combined action and F threats which if carried into execution would cause loss of business and breaches of contract by persons with whom the plaintiffs had contractual relations, and interference with the legal rights of the plaintiffs to carry on their business and to have free dealings with other persons willing to deal with them. Further or in the alternative it was alleged that the members of the defendant association, including the defendants Crane and Mobbs, with intent to injure the plaintiffs in G the way of their business and well knowing that the plaintiffs had contracts with and were in the habit of dealing with members of the defendant association and other persons in the motor trade, wrongfully conspired and combined among themselves to procure, cause, and induce those persons to break their contracts with the plaintiffs. Further or in the alternative it was alleged that the members of the H defendant association, including each of the other defendants, conspired as aforesaid to induce their members to do or abstain from doing the acts referred to by threats and coercion towards them. Further or in the alternative it was alleged that the defendants threatened falsely and maliciously to defame and libel the plaintiffs by publishing the plaintiffs' name in a "stop list." The plaintiffs said that by the words complained of the defendant association meant and would be understood to I mean that the plaintiffs had been guilty of unfair dealing and dishonourable conduct in their business and had thereby injured persons carrying on business in or connected with the motor trade, and the said words would hold the plaintiffs up to public odium and contempt. Rowlatt, J., held that to hold out the prospect of inclusion in the "stop list" was a "threat," and a means of coercion, primarily, to the person whose inclusion was contemplated, and, secondarily, to persons who might deal with him, and he granted an injunction against the individual defendants, but not against the association. The individual defendants appealed, and

the plaintiffs cross-appealed against the refusal of the injunction against the association.

Disturnal, K.C., *Douglas Hogg*, K.C., *Bernard Campion* and *Harold Smith* for the defendants.

Sir John Simon, K.C., *Maugham*, K.C., and *Sir Albion Richardson* for the plaintiffs.

Cur. adv. vult.

Dec. 20. The following judgments were read.

BANKES, L.J.—This appeal raises an extremely important question as to the right of an association of traders to place the name of persons whom they consider to have offended against their byelaws upon a "stop list," which is extensively published in the trade papers. The plaintiffs carry on business as dealers in motor cars. The defendant association is certified to be a trade union under the Trades Union Act, 1913, s. 2 (3). The defendants, other than the defendant Crane, are members of the association, and members also either of the council or of the stop list committee who dealt with the complaint against the plaintiffs. The defendant Crane is the solicitor to the association, and acted as the stop list superintendent, whose duty it was to report upon complaints submitted to the sub-committee and to the council. The plaintiffs brought the present action claiming "an injunction restraining the defendants, their servants and agents, and each of them from publishing the name of the plaintiff company in a stop list or black list, or from publishing any libel of the plaintiffs injuriously affecting them in their business of dealers in motor cars, or from publishing any statement calculated to prevent any person, firm, or company from dealing with the plaintiffs, or calculated to induce any person, firm, or company to break their contracts with the plaintiffs." The claim was based upon three alternative grounds: (i) an unlawful conspiracy to injure the plaintiffs; (ii) an unlawful threat to place the plaintiffs' name upon the stop list; (iii) a threat to publish a libel upon the plaintiffs. ROWLATT, J., who tried the action, does not deal in his judgment with the first or last of these alleged causes of action.

With regard to the reference to libel in the plaintiffs' statement of claim, in the absence of evidence that the words complained of would be understood in some other than their ordinary meaning, they are not, in my opinion, capable of a defamatory meaning. At the trial an attempt was made to put in evidence a copy of the "Autocar" newspaper for Dec. 30, 1916, which was said to contain a communication from the defendant association which would supply the evidence required to establish the fact that the stop list would be understood by those who saw it as casting an imputation upon those whose names appeared in it. A Mr Lafone, the present editor of the "Autocar," was called to produce the material documents. He produced a typescript letter on paper headed with the name of the defendant association in print, and at the end of the letter their name typed followed by the initials H.C. He also produced a manuscript article which the writer of the letter requested might be inserted in the "Autocar" newspaper. The witness knew nothing about these documents, except that they had been sent up to him from the office of the paper at Coventry. All he could say about the signature to the letter was that he thought the initials H.C. were the initials of the secretary of the defendant association. The defendants' counsel objected to the admission in evidence of either the letter, the manuscript, or the newspaper, and the objection was persisted in. The learned judge admitted the documents, thinking apparently that it was a mere useless formality to call the secretary of the defendant association, a Miss Helen Cornish, whose initials were said to be those appended to the signature to the letter. In my opinion, the objection was well founded, and if persisted in ought to have been allowed, and the documents rejected, as there was in fact no evidence connecting the defendants, or any of them, with the letter, or with the manuscript, or with the article in the newspaper. In view

of the decision of this court upon this point, counsel for the plaintiffs applied for leave to call Miss Helen Cornish as a witness. He said, and said truly, that a great distinction ought to be drawn between a case where a party who has failed in the court below is endeavouring to turn the failure into a success in the Court of Appeal by the calling of fresh evidence and a case like the present, where the application is made by the party successful in the court below for leave to give the technical proof which a too obliging judge was willing to dispense with. In every case the court must exercise its discretion upon the facts of the particular case. Here the difficulty arises from the position occupied by the witness whom the plaintiffs desire to call. The lady occupies the responsible position of secretary to the defendant association. She it is who has sworn on their behalf the answers to interrogatories and to the affidavits. Once she is in the witness-box, it is not possible to limit her evidence to the one point, namely, whether she is responsible for the writing of the letter to which the initials "H.C." are appended. The defendants' counsel may cross-examine her on any point. It seems probable that putting her into the witness-box may result in the re-opening of the whole trial, and render necessary the calling of still further evidence. In these circumstances the application to call the further evidence ought not, in my opinion, to be acceded to. As the plaintiffs have failed to establish that the publication of their name in the stop list is capable of being treated as a libel upon them, they fail upon this part of their claim.

The much more important question whether the threat to publish the plaintiffs' name in the stop list is an actionable wrong remains to be considered. ROWLATT, J., held that it was. We have had an able and exhaustive examination of all the authorities presented to us by counsel on both sides. It will not, in my opinion, serve any useful purpose to go through these authorities. The problem to be solved is whether, applying the principles to be extracted from the decisions in the House of Lords to the facts of this case, the plaintiffs have made out that the defendants have committed or threatened to commit an actionable wrong.

The decisions in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), *Allen* v. *Flood* (2), and *Quinn* v. *Leathem* (3) are all in agreement to this extent, that a combination of persons to do some act the object of which is to injure some third person is wrongful and actionable; so too is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person. It was faintly argued in the present case that the plaintiffs had made out a case of an unlawful conspiracy to injure them. If this case had been tried by a jury, they might have been induced to share the view taken by the jury in *Quinn* v. *Leathem* (3), in which case it might have been difficult to disturb their verdict. As matters stand the evidence is, in my opinion, quite insufficient to establish a case of a conspiracy to injure. If the plaintiffs can succeed at all, it must be upon the ground that the means proposed to be adopted by the defendants to carry out the object of their combination were unlawful. This raises what is, to my mind, upon the authorities an extremely difficult question. The material facts upon this part of the case are as follows. The defendant association is composed of persons or firms engaged in, or having commercial relationship with, the motor industry. The members are divided into classes, and they include manufacturers or sole concessionaires of mechanically propelled vehicles; manufacturers of or factors in motor goods and their agents; wholesale and retail dealers in cars, and others having commercial relationship with the motor industry; persons, firms, or companies letting motor cars on hire. No evidence was given of the number of persons or firms who were members of the association, but from the evidence of one of the plaintiffs' witnesses, who spoke of the "tremendous" range of proprietary or price-maintained articles, and that all the accessories and details connected with a motor agent's business in different departments are to a very large extent included in the protected lists, it must, I think, be assumed that the membership of the association must cover, if not all, a very large proportion of, the motor trade. The professed

object of the association is to maintain the price of all articles entered and published in the current protected list of the association, or the price of which is protected by grant from the association. The means by which this object is sought to be attained is by stopping the supply of any proprietary priced article, not only to any person whether a member of the association or not who sells such an article above or below the protected price, but also by stopping the supply of such articles to any person who supplies such articles to an offending person. The stopping of the supply is sought to be attained by placing the name of an alleged offender on the stop list, which is widely published and contains a notice that the persons whose names appear in the stop list are not to be supplied directly or indirectly with any of the articles on the protected lists of the association. The association are not content with placing the name of an offender, or alleged offender, upon the stop list. Byelaw 5 is in these terms:

> "The council may also place on the stop list any person, whether a member or not, who shall supply proprietary price-maintained articles to, or have any trade relations in regard to proprietary price-maintained articles with, any person whose name is in the stop list."

The association appear to have been quite alive to the danger of inducing persons to break their contracts with an alleged offender. To meet this difficulty, byelaw 8 has been introduced. It is not, I think, necessary in the present case to consider what the effect of inserting such a clause in the contracts of members may be, because any ground of complaint that the plaintiffs might have had in reference to the breaking of contracts made with them was removed by an order of this court made when the appeal in reference to the interlocutory injunction was before it.

The plaintiffs are not members of the defendant association. They advertised a Vauxhall car for sale at a price above the association's protected list price. The association complained upon the ground that the Vauxhall Motor Co. were members of the association, and that it was not permissible for their cars to be offered or sold on terms other than those stipulated by them. The plaintiffs replied that the protected list did not apply to the case, as the car had been placed in their hands for sale by a private customer, and, though new in the sense that it had not been used, it was secondhand in the sense in which that expression must be construed in connection with a protected list of prices. The plaintiffs did not attend the meeting of the sub-committee of the association to which they were invited, and at which the complaint against them was considered, because both the manager and the managing director were engaged in Paris on the date fixed for the meeting. The committee dealt with the matter in their absence, and recommended the council to add the plaintiffs' name to the stop list. The council met on Nov. 6, when the plaintiffs were represented by counsel, who submitted for the consideration of the council the grounds upon which the plaintiffs contended that no infringement of the association's byelaws had been committed. The council confirmed the recommendation of the committee unless the plaintiffs preferred to pay a fine and apologise. The decision of the council was conveyed to the plaintiffs in a letter dated Nov. 8, 1919:

> "We write to give you formal intimation of the decision of the council of this association made on Thursday last and verbally announced to you that the recommendation of the sub-committee to add your name to the stop list be accepted, unless within seven days from Thursday last you accept the following alternative, which—under the circumstances put before them by your counsel and yourselves, they have decided to offer you: (i) That within such period you send us cheque for £50 to be passed by us forthwith to the Cycle and Motor Trade Benevolent Fund as a donation to that charity; (ii) that within the same time you write to us undertaking to exercise such better supervision as to prevent such an occurrence happening again. To prevent misunderstanding, as the point was mentioned in your presence, we may mention that,

should you accept the alternative course, neither the apology nor the fine is to be advertised. In dealing with our stop list, the council, as you probably know, sometimes orders undertakings of this sort to be advertised at the expense of the party called to account, whilst in other cases the undertaking is simply filed in this office. The condition attached to your alternative course is of that kind."

The plaintiffs preferred to test the legality of the association's proceedings by action, and they issued their writ on Nov. 11. Their case, put broadly, is this. The defendants have combined to threaten to punish us for an alleged offence against the rules of the association, of which we are not members, and which offence we have not in fact committed, and in the attempt to coerce us into carrying on our trade according to their rules as interpreted by themselves, they threaten to do us a serious injury by inserting our names in their published stop list. We maintain that such conduct is an actionable wrong. On the other hand, the defendants say that they have done nothing wrong; they claim that they are only exercising their indisputable right to trade, or to refrain from trading, with whom they please, and to give public notice that they will not trade with persons who do not follow their rules as honestly interpreted by themselves, or who supply protected priced goods to such persons.

Which of these contentions is right? It appears to me to lead only to confusion to dwell too much upon the question whether threats have been used, or coercion or intimidation applied. In a case like the present, threats, coercion, or intimidation are only the means to an end. The material question must be whether, if the end sought to be attained is lawful, the means are in themselves unlawful. There are cases in which there can be no doubt as to the unlawfulness of the means used, as, for instance, where the threats are to use personal violence or to publish a libel. On the other hand, there are many cases in which threats, intimidation, or coercion are lawful and justifiable, even when used by persons acting in combination. PETERSON, J., has, I think, done good service in drawing attention to this view of the matter in his very instructive judgment in *Hodges* v. *Webb* (6). In every case the question must be: Is what is complained of unlawful? Are the persons complained of exceeding their legal rights? The distinction between what persons acting in combination may lawfully do and what they may not unlawfully do is, I think, well pointed out by ERLE, J., in his summing-up in *R.* v. *Rowlands* (7) (17 Q.B.D. at p. 686 n.). After pointing out that there was nothing unlawful in a combination of persons for their own protection and to obtain a benefit which by law they can claim, he goes on to say that a combination for the purpose of injuring another is a combination of a different nature directed personally against the party to be injured, and the law allowing persons to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. Herein, I think, lies the distinction between such cases as *Quinn* v. *Leathem* (3) and *Pratt* v. *British Medical Association* (8), on the one side, and the *Mogul Case* (1) and *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (9), on the other. In each of these cases there was combination; in each threats and coercion by the combination. In the first two cases the combination was held to be unlawful because its object was to injure and punish the individuals threatened. In the last two the combination and the threats used were held to be lawful because the object was merely the legitimate protection of trade interests. There may be cases in which, if the matter is looked at merely from a plaintiff's point of view, a defendant's action might appear to be unlawful. This is what I think LORD LINDLEY must have had in mind when in *Quinn* v. *Leathem* (3) he says:

> "But coercion by threats, open or disguised, not only of bodily harm, but of serious annoyance and damage, is primâ facie, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded."

The question in the present case is not so much whether the plaintiffs have made out a primâ facie case as whether the defendants have justified their action. Have they, to use the language of BOWEN, L.J., in the Court of Appeal in the *Mogul Case* (1), shown "just cause or excuse" for what they did? In his summing-up in *Leathem* v. *Craig* (3), FITZGIBBON, L.J., left certain questions to the jury as to whether the defendants had acted "wrongfully and maliciously" towards the plaintiff, and in explaining to the jury the meaning of these words he said that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable—namely, securing or advancing their own interests, or those of their trade, by reasonable means, including lawful combination. If the lord justice was right in his view thus expressed, the reasonableness of the action taken by the defendants in the present case was a matter for the court to consider, and then I think that the defendants might have been in a difficulty owing to the fact that they elected to call no evidence. It appears to me, however, that the weight of authority is against the view taken by FITZGIBBON, L.J. BOWEN, L.J., in the *Mogul Case* (1) definitely states that it is no part of the duty of the court to inquire whether the action of the defendants in that case was either selfish or unreasonable, but that it was sufficient if it appeared to have been taken bona fide in their own interest in the exercise of their trade. This view of BOWEN, L.J., does not appear to have been at any time dissented from in the House of Lords, and it appears to have been shared by LORD HANNEN in the *Mogul Case* (1) ([1892] A.C. at p. 59), where he says that he knows of no restriction imposed by law on competition by one trader with another. Accepting this view of the law I cannot come to any other conclusion upon the evidence in this case except that what the defendants did, and what is complained of in the present action, was done by them bona fide in protection of their trade interests. In these circumstances neither such coercion or threats as were used, nor the acting by the defendants in combination, render their action, in my opinion, unlawful or actionable. For these reasons the appeal must be allowed with costs, and the judgment for the plaintiffs must be set aside and judgment entered for the defendants with costs. The view which I have expressed renders it unnecessary to consider any of the other points which were raised in argument, or to deal with the cross-appeal, which must also be dismissed with costs.

SCRUTTON, L.J.—This appeal raises a number of questions of law on which, in view of the state of the authorities, it is very desirable that the House of Lords should make clear the effect of its various decisions. [HIS LORDSHIP stated the facts and continued.] In these circumstances ROWLATT, J., found in favour of the plaintiffs on the ground that this was an attempt to prevent a person making a lawful disposition of his own or his principal's property by threats addressed to him and those who might deal with him. Though he mentions a suggested justification by trade interest under the *Mogul Case* (1), and, apparently, rejects it, he does not make any express finding as to whether the threatened action was taken in protection of trade interests. He makes no finding on, and does not rest his judgment on, any cause of action, for libel. The threats appear to be threats to do acts which the association has a legal right to do—namely, to refuse to supply goods to the plaintiffs or to persons dealing with them. This case, therefore, may raise the questions treated as doubtful by LORD LOREBURN, L.C., in *Conway* v. *Wade* (4), his judgment being concurred in by LORD MACNAGHTEN. He said:

> "But suppose one person simply induced someone not to employ another or not to serve another, without violence or threat or breach of contract, would an action lie, and in what circumstances in such a case? I believe there has not been an exhaustive answer to that question. The further difficulty arises, what is a sufficient justification? Is it supplied by self-interest, or by trade competition, or by what other condition or motive? No answer in general terms has ever been given, and perhaps no answer can be given. A parallel

A difficulty arises where the inducement is by two or more persons acting together."

It may further raise the question whether a threat to do an act, which one has a lawful right to do, can ever be actionable, even if actuated by motives of personal spite. On these matters we were referred to the mass of authorities and dicta, many of them contradictory, contained in at least ten House of Lords cases, a large number of decisions of the Court of Appeal, and a number of able and conscientious attempts by judges of first instance to state the results of decisions by which they are bound, and by which they should be enlightened. Of these *Pratt* v. *British Medical Association* (8), per McCARDIE, J., and *Valentine* v. *Hyde* (10), per ASTBURY, J., are recent examples on one side of the controversy, and *Hodges* v. *Webb* (6), per PETERSON, J., on the other. I have read these cases, some of them several times, and find it quite impossible to harmonise them. The only tribunal which can hope to bring order into chaos is the House of Lords itself, and I do not think any useful purpose would be served by attempting to reconcile or criticise the conflicting statements in these cases. I can only state some points that appear to me to be fairly clear.

I take *Allen* v. *Flood* (2) and *Bradford Corpn.* v. *Pickles* (11) to decide that an act otherwise lawful, though harmful does not become actionable by being done maliciously in the sense of with a bad motive or with intent to injure another. This is LORD LINDLEY's statement in *Quinn* v. *Leathem* (3) ([1901] A.C. at p. 533) of the effect of *Allen* v. *Flood* (2). Therefore, the reasons given by LORD ESHER for deciding *Bowen* v. *Hall* (12) and *Temperton* v. *Russell* (13) in the way he did are erroneous. This is stated by LORD MACNAGHTEN in *Quinn* v. *Leathem* (3). I take the *Mogul Case* (1) as deciding that a combination to do acts the natural consequence of which was to injure another in his business, was not actionable if those acts were not otherwise unlawful, such as assaults, or threats of assaults, and were done in furtherance of the trade interests of those combining. I understand *Quinn* v. *Leathem* (3) to decide that a combination to injure another in his trade and business, not in furtherance of the trade interests of those combining, but out of spite against the person injured, is actionable, and I must take it that the noble Lords who decided *Quinn* v. *Leathem* (3) thought that the acts there proved were subject-matter which might reasonably justify the finding of the jury. Of those acts the inducement to break an existing contract with Dickie would clearly support an action, but I have great difficulty in seeing why the other acts were not in furtherance of the trade interests of the combiners. The workmen took the view that it was important for the interests of workmen that all members of their trade should be members of their union. They, therefore, endeavoured (i) to persuade employers only to employ union workmen by stating that, if they did not, union workmen would not work for them. But some masters employed no union workmen; the union, therefore, endeavoured to induce them to change their system and employ union men by informing them that, if they did not, the union would persuade people who dealt with them not to continue to deal with them. (ii) In pursuance of this combination the union informed a large customer of the employer that, if he continued to deal with the employer, all union men working for him would be withdrawn. These combined acts would appear in effect to be a statement to the employer Leathem and to his customer Munce: "Choose between on the one hand continuing to deal with each other and having to work without union men, and on the other hand Munce's stopping dealing with Leathem and enjoying the advantage of union men, and Leathem dismissing his present men and employing only union men." It would seem to be very similar to the facts in the *Glasgow Fleshers' Case* (9), where a combination of butchers informed auctioneers that no butcher would buy from them if the auctioneers sold to the co-operative stores, this course being taken to protect the interests of the butchers, by driving their competitors, the co-operative stores, out of business. But LORD LINDLEY in *Quinn*

v. *Leathem* (3), describing the action of the butchers as "threats," said: "There was nothing unlawful in this," and stated the distinction in these words:

> "The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to show."

I am quite unable to understand the distinction between the two cases, or to see why the "threats" in the *Glasgow Fleshers' Case* (9) were not like the "coercion" LORD LINDLEY speaks of in *Quinn* v. *Leathem* (3). MCCARDIE, J., whose judgment in *Pratt's Case* (8) seems to me to reach the extreme limit on one side of the controversy, can only say of the *Glasgow Fleshers' Case* (9), first, that it illustrates the difficulty of this branch of law; secondly, that LORD LINDLEY gives the sound explanation in *Quinn* v. *Leathem* (3). But LORD LINDLEY speaks of the action of the butchers as "threats," while MCCARDIE, J., had just been pointing out that "any element of threat" made actions unlawful.

I respectfully concur on this point with the admirable judgment of HOLMES, J., in *Vegelahn* v. *Guntner* (5) (167 Mass. at p. 107) where he remarks that the unlawfulness of "threats" depends on what you "threaten," and of "compulsion" on how you "compel." If you may lawfully do a thing it cannot be unlawful to say you are going to do it; if men may refuse to work for a master, they may surely tell him they propose to do so if he acts in a certain way. In my humble judgment, the discussion of this question would be much more lucid if the disputants would observe certain simple rules. First, to avoid question-begging epithets, as "boycotting," "ostracism," "the pillory," "coercion," and the like. Secondly, when they use the word "maliciously" to say in what sense they use it, whether as connoting personal spite or intentional action from which harmful consequences to another must follow, or more unlawfulness. Thirdly, to have in mind the criticism of BOWEN, L.J., in the *Mogul Case* (1) (23 Q.B.D. at p. 612), approved by LORD WATSON in *Allen* v. *Flood* (2) ([1898] A.C. at p. 93), on the use of the words "wrongfully," "injure," "maliciously." I cannot think it really helps the matter to say that "wrongfully and maliciously" to do something gives a cause of action: *Quinn* v. *Leathem* (3). "It is illegal to do wrong" does not carry us very far. Nor is it useful to say that intentionally to employ unlawful means is unlawful (*Pratt's Case* (8)), especially when it is added that means may be unlawful though no act composing the means is unlawful. I do not myself think it helps the discussion to say that, though damage and not conspiracy is the gist of the action of conspiracy (BOWEN, L.J., in the *Mogul Case* (1), 23 Q.B.D. at p. 616), yet conspiracy will make an act causing damage unlawful which would be lawful if done by one. I respectfully agree with FITZGIBBON, L.J.'s view to the contrary as expressed in *Sweeney* v. *Coote* (14) ([1906] 1 I.R. at p. 109). Conspiracy appears to me to become actionable when the end is unlawful and causes damage, or the means by which a lawful end is pursued are unlawful and cause damage, and not to be actionable when neither the end nor the means are unlawful. It is said that the end is unlawful if it is to cause damage to another. My comment on this is that it is not true. One may stop underground water from flowing into the land of another, intending to damage him; one may erect a hoarding to block out light from the windows of his newly erected house, intending to damage him; one may open a shop next door to him, and intentionally ruin him by selling similar goods to his at unprofitable prices; and none of these things (and many other instances may be given) is unlawful. It is attempted to explain these cases by saying that there is in each case just cause or excuse for damaging another. The question really is: Have you a right to do the act complained of? If you have, it is

A immaterial that it injures another. In some specified classes of cases, such as nuisance, the lawfulness of the act may depend on whether you injure another. A man may make an offensive smell on his own land, but will be stopped if the smell becomes a legal nuisance on the land of another. There is here a legal injury to another, and the creation of such a smell is an unlawful act. But this cannot, in my view, be extended by saying a man has a right to trade, and, therefore, B everyone must trade with him, and refusal to do so is an unlawful act; and no one may compete with him, and injurious competition is a wrongful act, because it injures him in his trade.

Apart from consideration of the binding effect of decisions of the House of Lords, the statements of opinion that seem to me personally most enlightening and accurate are the judgment of LORD HERSCHELL in *Allen* v. *Flood* (2), the opinion C of WRIGHT, J., in the same case, the admirable judgment of HOLMES, J., in *Vegelahn* v. *Guntner* (5), and the judgment of PETERSON, J., in *Hodges* v. *Webb* (6). But I am, of course, bound by decisions of the House of Lords, and, among others, by the decision in *Quinn* v. *Leathem* (3). I take that case to decide that, while combinations intended to secure the interests of the confederates in their trade by reasonable and legitimate means are not actionable, combinations which exceed D this limit and cause damage by action intended to injure are actionable. If so, the question in this case is whether a combination (i) intended to secure that new goods shall be sold at a fixed price, neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price; and (ii) to inform the confederates who such persons are by means of a stop list; and (iii) to take steps to insure that the person, who is not to be supplied with goods directly, E is not supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. In my view, it is. While low prices may be good for the public for the time, they are not a benefit if all the suppliers are thereby ruined. A steady level price may have considerable advantages over violent fluctuations from very high prices in times of scarcity, and fierce competition and unremunerative prices in times of plenty or financial pressure. This combination seems to F me at least as unobjectionable as the combination in the *Mogul Case* (1), which was intended to drive a particular shipowner out of the trade. So far, therefore, as the injunction prevented the publication of a shop list calculated to prevent any persons from dealing with the plaintiffs, I think it should not have been granted.

There is more difficulty as to that part of the injunction directed against publication calculated to induce persons to break their contracts with the plaintiffs. The G defendants' byelaws contemplated that contracts made by members of the association, before they became such members, should be carried out in spite of the stop list. It was assumed that, on becoming members, traders would only make contracts which could be terminated if the other contracting party appeared in the stop list. The association did not consider what would happen to contracts made H without the power of cancelling contemplated by the byelaws. It is clear law that a combination to induce persons to break contracts is actionable: *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (15); *Larkin* v. *Long* (16); *Lumley* v. *Gye* (17); and I think the defendants would be well advised to make it clear in any future stop list that existing contracts, not containing a power of terminating them, must be carried out in spite of the stop list. But at the trial there was no evidence I that any existing contracts had in fact been broken, and there was evidence that the association had informed any persons of whom they knew who had such contracts that they might be carried out. I appreciate that the association did not at first take this position, but in view of the state of things at the trial and the action of the defendants, the absence of any damage in fact, and the failure of the plaintiffs in the most substantial part of their claim, I do not think it necessary to grant an injunction on this minor point. I do not think there is any risk of future damage under this head.

There remains the cause of action for libel, on which the judge below has apparently expressed no opinion. The material words of the alleged libel:

> "In pursuance of its policy of conserving the fixed resale prices scheduled in its protected lists, the Motor Trade Association issues the sub-joined lists. Until further notice the following parties are not to be supplied directly or indirectly with any of the articles in the protected lists of this association."

The list contains the name of the plaintiffs. The natural meaning of this appears to be that the plaintiffs have been selling such articles at other than the fixed prices, and that the members of the Motor Trade Association do not propose to supply them with any more protected articles, either directly or indirectly. This course I have already held they have a right to take, and the question, therefore, is whether, in the absence of evidence of special circumstances giving a libellous tendency to the words, the statement that you propose to do what you have a legal right to do is capable of a defamatory meaning. In my view, the decisions of the House of Lords in *Capital and Counties Bank* v. *Henty* (18) and *Nevill* v. *Fine Art and General Insurance Co.* (19) bind me to decide this point in favour of the defendants. In the first case Messrs. Henty issued a circular that they would not receive in payment cheques drawn on the plaintiff bank, and this circular was followed by a run on the bank to the extent of a quarter of a million. The House of Lords held that, as Messrs. Henty had a right to refuse such cheques and to say they would refuse them, the circular was incapable of a defamatory meaning. This seems to me to cover the present stop list. The plaintiffs endeavoured at the trial to give evidence of special circumstances affixing a defamatory meaning to the stop list by proving an article in a paper alleged to be inspired by the defendants. Their method of proving this was for the present editor of the paper to produce a typewritten document on paper bearing the printed heading of the association, and with the association's name typewritten at the foot, followed by the written initials H.C. Whose writing the initials were in was not proved by anybody, but it was pointed out that Helen Cornish was an official of the association. I should have thought it was elementary that such evidence alone did not make the document evidence against the association. The document must be proved to be the document of the defendants, and the fact that it purports to be so does not prove it against them. The only further evidence was that the present editor said that someone unknown told him that the document was found on the files of the paper devoted to the defendants' business at Coventry. He himself neither found it nor received it. The learned judge was impatient with what he thought was a technical objection and brushed it aside, the defendants' counsel vigorously objecting all the time. The objection may be technical, but it was clearly good in law, and we so held during the argument of this case. The plaintiffs then applied for leave to subpœna and call before us Miss Helen Cornish. The consequences of this were obvious; she might be cross-examined by the defendants, and with the advantage of leading her they might produce evidence unfavourable to the plaintiffs, who might, therefore, wish to call some of the evidence they stated at the trial they would abstain from calling, and the defendants might then re-consider their determination not to call witnesses. It was clearly impossible to re-open the whole case in the Court of Appeal, and the alternative of a new trial was suggested. But the plaintiffs had full notice of the objection, and elected to disregard it, and take their chance of getting the document in and keeping it in on the materials they then had. In my view, when they had taken this course and proved to be wrong in disregarding what seems to me an obvious and elementary objection, they cannot ask to try again with fresh evidence. This appears to be the principle laid down by the Court of Appeal in *Isaacs* v. *Hobhouse* (20) and in *Nash* v. *Rochford R.D.C.* (21). I only desire to say further that, as I am in favour of the defendants on general grounds, I do not discuss the question of their individual liability except to say that I should in any case have considerable doubt as to the position of the defendant Crane.

In view of the result already arrived at it is not necessary to express a final opinion on the cross-appeal, but as the question involved is of some importance I state my present view. The cross-appeal by the plaintiffs is against the decision of ROWLATT, J., that the action will not lie against the Motor Trade Association because they are a trade union, in view of s. 4 of the Trade Disputes Act, 1906. This section provides that

> "an action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

The cross-appeal was rested on the ground that this did not prevent an action for an injunction, and this in turn was supported by two Chancery decisions, *A.-G.* v. *Hackney Local Board* (22) and *Flower* v. *Low Leyton Local Board* (23). The latter case allowed proceedings for an injunction without complying with the formalities of s. 264 of the Public Health Act, 1875, which provided that a "writ or process" should not be served without one month's previous notice. The explanation of this may be that "writ or process" is not the correct term to apply to a bill in equity. But I notice that when all these statutes imposing conditions on proceedings against public authorities were consolidated in the Public Authorities Protection Act, 1893 [repealed by Law Reform (Limitation of Actions, &c.) Act, 1954 (34 HALSBURY'S STATUTES (2nd Edn.) 463)], the language used was: "Where any action . . . or other proceeding is commenced in the United Kingdom," certain conditions shall be fulfilled. In 1898 in *Harrop* v. *Ossett Corpn.* (24) it was attempted to argue that the section only applied to the same actions as the Public Health Act, 1875, and did not prevent proceedings in the Chancery Division to obtain injunctions. But ROMER, J., took the view that "action" covered all actions in the Chancery Division, whether for an injunction alone, or accompanied with damages. In my view, the word "action" in the Trade Disputes Act, 1906, has the same meaning. The section, however, uses the terms "an action . . . in respect of any tortious act alleged to have been committed." I cannot think these words were intended to exclude an action "in respect of" a tortious act threatened to be committed. The words "in respect of" seem framed with intentional width to cover all remedies asked for in relation to a tortious act, whether committed or about to be committed. It was clearly intended that a trade union should as such be free from liability for damages for tort. A request for an injunction may be dealt with by the courts leaving the party to his remedy in damages, which, however, could not be given against a trade union. I cannot think that Parliament intended to allow injunctions to be granted in respect of acts for which, when done, no damages could be claimed, and, therefore, though I feel I am straining the language of the Act, I must read "alleged to have been committed" as including allegations that trade unions are about to commit tortious acts. The appeal should, in my opinion, be allowed, and the cross-appeal dismissed, in each case with costs, and judgment entered for all defendants with costs.

ATKIN, L.J.—The facts in this case have been sufficiently stated in the judgments which have been read, and I do not propose to repeat them. The plaintiffs' claim in the pleadings is based upon: (i) A conspiracy to effect an unlawful object —namely, to enforce rules which are unlawful as being in restraint of trade; (ii) a conspiracy to effect the same unlawful object by unlawful means—namely, by combined action, including threats, which would interfere with the rights of the plaintiffs to trade as they lawfully pleased; (iii) a conspiracy to injure the plaintiffs by inducing members of the defendant association and others to break their contracts with the plaintiffs, and to cease to deal with the plaintiffs; (iv) a conspiracy to induce the members of the association to break contracts and cease to deal with the plaintiffs by threats and coercion. Apart from the claims based upon conspiracy, the plaintiffs further allege that the defendants threatened to publish a libel upon them by publishing their name in a stop list. The plaintiffs do not

allege that they have in fact suffered damage, and the relief they ask is confined to an injunction against publishing their name in a stop list calculated either to injure them in their business, or to prevent any persons dealing with them, or to induce any persons to break their contracts with them. It is obvious that the pleadings allege the complaint in various ways some of which overlap, but the contentions were before us more closely defined. The learned judge does not appear to treat the allegation of conspiracy as material—at any rate, the word is not mentioned in his judgment. He treated the case as one where the defendants were all guilty of a joint wrong—namely, an attempt to prevent the plaintiffs from making a lawful disposition of their property by threats addressed to the plaintiffs and those who might deal with them. By "threat" he meant an "instrument of coercion." He, therefore, granted an injunction restraining the defendants from publishing the name of the plaintiffs in any stop list calculated to prevent any persons from dealing with the plaintiffs, or to induce any persons to break their contracts. He did not decide the claim based upon a threat to libel the plaintiffs, and the injunction was, accordingly, limited as above. From the judgment in this form as against the defendants other than the association there is no cross notice of appeal. The learned judge refused to give relief against the defendant association on the ground that they were a trade union protected by s. 4 of the Trade Disputes Act, 1906. From this refusal there is a cross-appeal by the plaintiffs, and by that appeal they ask for an order against the defendant association in the terms of the claim for relief in the statement of claim, which would include relief in respect of the threat to libel.

Before considering the contentions raised before us, it is necessary to state that there is no finding, no proof, no evidence that the defendants or any of them in doing the acts complained of had any intention to injure the plaintiffs. Moreover, in my judgment, the facts affirmatively prove that the defendants had no such intention, direct or indirect, and bore no malice or ill-will towards the plaintiffs. The case, indeed, was argued before us on this assumption; but, whether admitted or not, the fact is as above stated. It is a fact which, shortly stated, may appear to lose its importance in relation to the lengthy discussion on other points, but I think that eventually it will prove to be the governing factor in the solution of the present problem. The propositions that were put before us by the plaintiffs, as I understood their arguments, were these: (i) This may have been a combination to protect the trade interests of the defendants, but in seeking to effect that object they acted to the disadvantage of the plaintiffs by interfering with their right to carry on their business as they pleased, and they can only justify that interference by showing that the steps they took were reasonably necessary to protect their interests. It was not, I think, an essential part of the contention to throw the onus of proving reasonableness upon the defendants. The point of the contention is that the means were unreasonable (whether unlawful or not) and not merely that the means were unlawful. (ii) Alternatively, this may have been a combination to protect the trade interests of the defendants, i.e., for a lawful object, but it was also a combination to effect the object by unlawful means. Such means were: (a) An improper attempt by threats to coerce third parties not to deal with the plaintiffs. (b) An attempt to induce third persons to break their contracts with the plaintiffs. (c) A proposal to defame the plaintiffs by publishing their name in the stop list. This last contention raises the question of libel or no libel, but was quite rightly treated in dealing with the question of conspiracy as distinct from the claim to relief based simply on a threat to libel.

It is not necessary to say much in dealing with the first contention. The general proposition could not be put more favourably for the plaintiffs than by BOWEN, L.J., in the *Mogul Case* (1):

> "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."

A I do not stay now to consider whether that proposition is too widely stated. The lord justice went on to consider whether the injury was done without just cause or excuse, if done without an intention to injure, but in furtherance of trade interests by a competition carried to a length which is not fair or reasonable. He decides in the negative. He said:

> "There is surely no doctrine of law which compels a man to use his property
B in a way that judges and juries may consider reasonable: see *Chasemore* v. *Richards* (25),"

and I would add now, "see *Bradford Corpn.* v. *Pickles* (11)." If there is no such fetter upon the use of property known to the English law, why should there be any such fetter upon trade? The decision in the House of Lords in the same case indubitably affirms this view. The proposition to the contrary seems to involve
C the statement that, if a man does an act (a) calculated to injure a third person; (b) unreasonably, he is liable to an action at the suit of the person injured. The effect of such a doctrine on commerce would be incalculable. I cannot conceive that the common law imposes such grievous fetters upon individual liberty. The truth is that the right of the individual to carry on his trade or profession or execute his own activities, whatever they may be, without interruption, so long as
D he refrains from committing tort or crime, affords an unsatisfactory basis for determining what is actionable, inasmuch as such right is conditioned by a precisely similar right in the rest of his fellow men. Such co-existing rights do in a world of competition necessarily impinge upon one another, and it appears to me illogical to start with the assumption that an interruption of the power of a man to do as
E he pleases within the law is primâ facie a legal wrong, which in every case needs to be justified. The true question is: Was the power interrupted by an act which the law deems wrongful?, with the practical result that to determine liability one has to concentrate, not upon the effect on the plaintiff, but upon the quality of the act of the defendant. I think that the first contention fails, and that the plaintiffs must succeed, if at all, by showing that the acts done or threatened to be done by
F the defendants were unlawful.

I proceed, therefore, to consider the plaintiffs' claim to succeed by reason of an attempt by the defendants by threats to coerce third parties not to deal with the plaintiffs. It is well known that this branch of the law is made difficult by the omission of lawyers to define their terms. In this case, as in so many others, the whole vocabulary of vague vituperation was invoked—threats, menaces, intimida-
G tion, coercion, compulsion, molestation, undue interference. It is as well to bear in mind the facts to which they have to be applied. The association consists of members who are engaged in the production and distribution of motor cars and their accessories. It is, in their opinion, in the interests of their trade that their members' goods should be distributed at their members' fixed prices, no more and no less. That this is a lawful object I have no doubt. Manufacturers of goods in
H the motor trade are by no means the only class who adopt a similar policy. To insure their object they refuse to sell to anyone who refuses to sell at the fixed or list prices. In order to secure that their goods do not come into the hands of a recalcitrant seller, they refuse to sell their goods to anyone who supplies such a seller; and in order that the names of such sellers may be known to those concerned they publish their names in the trade journals in what is called the stop list, which
I includes an intimation that until further notice those named in the list are not to be supplied with the goods in question. If the object be lawful, I find it difficult to see why any of the above means of carrying out the object should be unlawful. If I were called upon to decide whether the measures taken by the association were reasonable for the desired purpose, I should myself, I think, find them to be both reasonable and indeed necessary, for I do not know how the object could otherwise be obtained. All the intermediate sellers of goods are not members of the association; the trade is of vast dimensions, and intimation in the trade papers would appear to be a usual and reasonable method of conveying information to

members of the trade. However, it is sufficient for me that the association and its members consider the course taken to be desirable in their trade interests. The stage at which the procedure became unlawful varied in the course of the plaintiffs' argument. That the members of the association might refuse to sell to the plaintiffs was admitted. That they might refuse to sell to persons who sold to the plaintiffs was not so clear. But that they might refuse to sell to persons who sold to persons who sold to the plaintiffs, was plainly molestation, undue interference, coercion. And in any case an intimation to members of the trade that, if they sold the protected goods to those on the stop list, they themselves would not be supplied with such goods, was intimidation and threat.

If we have to consider the question whether it is actionable to coerce a third person to act lawfully in a manner calculated to prejudice another, it seems advisable to define our terms. It has to be admitted that the words "coercion" and "threats" are vague terms capable of being applied to conditions which no one would suggest were unlawful. It becomes necessary therefore to seek for some differentia which will distinguish lawful coercion and lawful threat from the unlawful species. No one can gainsay the wisdom of the saying that the uncertainty of the law is a public danger; nor can there be a domain of the law to which that remark is more applicable than the law of tort. I suppose that all men from time to time engage in attempts to induce others to do things they are reluctant to do, and as a part of such inducement make statements of consequences that will follow if the desired result is not achieved. Yet if the layman wishes to keep within the law, high judicial authorities refuse to give him any guidance; he may be told that he must be guilty of "oppressive misconduct," which is not of much assistance. As a practical result the test whether he has committed a wrong, or, if he acts in combination, a crime, appears to turn upon the approval or disapproval of his conduct by the particular judicial tribunal who happens to try the case. It never has been the wont of the common law to measure wrongs by the judicial foot. I think that we can, even in the welter of judicial dicta, find some firm ground on which to place "coercion" and "threat" as factors in constituting a legal wrong.

What is meant by coercion? If it means no more than procuring a person to do what he does not want to do, it covers many cases where no cause of action can be suggested to exist. The use of parental rights of property, the deprivation of social advantages, may be so applied as to make it plain to the person affected that he must yield or be ruined. A necessary servant or agent may compel advantages to himself or herself by offering as an alternative the withdrawal of his or her services, and in the same way may compel disadvantageous treatment of third parties. I conceive that the logical mind of CAVE, J., on his view of the law was working on lines of necessity in accepting the view that if the cook says to the master: "Discharge the butler or I leave you," and the butler is consequently discharged, the cook is liable to an action: *Allen* v. *Flood* (2) ([1898] A.C. at p. 36). Yet the decision in *Allen* v. *Flood* (2) repudiated this view. In my opinion, the wrongfulness of the inducement applied to the third person cannot depend upon its weight. Coercion, therefore, cannot simply mean successful or even inevitably successful inducement. I am satisfied myself that it means nothing at all on a question of tort except in reference to the means employed.

This brings me to the consideration of inducement by "threats." Here again is a word that requires definition. It appears to me obviously to denote an intimation that consequences will follow disagreeable to the addressee which the threatener has the power to control. It does not necessarily involve any feeling of hostility or ill-will. Intimations of conditional intention to disinherit, to close a place of public resort, to deprive schoolboys of a holiday, would ordinarily be called threats, but do not necessarily import ill-will. The word has had a place in the common law with a definitely restricted meaning. A promise made under duress may be avoided, and duress includes threats, but only threats of personal violence.

A "Yet it must not be a vaine feare, but such as may befall a constant man": Co. Litt. 253*b*. In a long line of statutes dealing with similar subject-matter to the present, the statutes against combination of workmen, threats or intimidation intended to affect the relations of master and servant in various specified ways have been made illegal. By the Conspiracy and Protection of Property Act, 1875, s. 7, every person who, with a view to compel any other person to do an act, which B such other person has a right to abstain from doing, wrongfully and without legal authority uses violence to or intimidates such other person, commits an offence. It was held in *Curran* v. *Treleaven* (26) that intimidation in this section means such a threat of personal violence as would justify a magistrate in binding over the intimidator to keep the peace. There are provisions in the Larceny Act, 1916, where obtaining or demanding money or other advantages by menaces is made a C criminal offence, but the menaces are defined as being threats to accuse of particular crimes, or to publish defamatory matter, and the like. These are the only instances I know of threats held by the law to be definitely unlawful. For the purposes of the present discussion there may well be other unlawful threats, threats to injure property, or threats to bring proceedings without reasonable or probable cause. But I know of no cases where injury done by threat of a lawful D act has been held to be in itself actionable at the suit either of the person threatened or the person injured in consequence of the threat. The added element of an intention to injure the plaintiff may make a difference which has to be discussed, but that element is missing in the present case, and would presumably be irrelevant if injury produced by any threat were in itself actionable.

A significant case on this point is the *Glasgow Fleshers' Case* (9), significant E because it appears to be approved by LORD LINDLEY in his speech in *Quinn* v. *Leathem* (3), a speech which may be said to record the high-water mark of the doctrine favoured by the respondents in this case. There the trade defence association had plainly told the auctioneers that their members would not buy from them if they sold to the co-operative society. The market in which the auctioneers were selling was the only market in Scotland where United States and Canadian F cattle could be lawfully landed and sold. Here, if ever, was a compelling inducement addressed to the auctioneers. It was held to afford no cause of action to the co-operative society. There was a further allegation in the pursuer's claim that the defendants had induced divers hide merchants to refrain from purchasing tallow and hides from the society by threatening the hide merchants with a withdrawal of their custom unless they declined to do business with the co-operative societies. G This seems even stronger than the present case, for it seems to mean: "We will not sell you hides unless you abstain from buying the plaintiffs' hides." Yet it was held to afford no cause of action. It appears to me that any man has a right to intimate to a third person that he intends to do something which he lawfully may do; that it is immaterial whether the intimation is courteous or the reverse, expressed in letters of hostility or not; and that it is equally immaterial whether H or not it affords an irresistible inducement to the addressee to act upon it. If this be true, does it make any difference that two or more persons in combination make the same statement under the same conditions? We are still discussing a state of facts where there is no intention to injure the person aggrieved. I can appreciate the fact that an act done in combination may be unlawful, while if done by one is not unlawful, as for instance in the case of a combination to do acts intended I to injure the plaintiff. It will logically follow that an intimation of an intention to do such an act may be unlawful, though a similar intimation by one person to do a similar act will not. But if two or more in combination intimate an intention to do what the two or more in combination may lawfully do, such an intimation cannot, in my opinion, be an unlawful act.

Now, in what respect does an intention to injure the plaintiff affect the legal position stated above? It appears to me to be finally decided by the majority in the House of Lords in *Allen* v. *Flood* (2) that an act otherwise lawful is not made

unlawful by an intention to injure, except in the case of a combination to injure. That decision is binding upon every tribunal in the land; it certainly binds the Court of Appeal; and though, after it was given, divers judicial personages more or less respectfully kicked against the pricks, speaking humbly for myself I unreservedly accept the reasoning of the majority judgments. An illustration of the application of the decision is afforded by comparing the decision in *J. Lyons & Sons* v. *Wilkins* (27), on application for an interlocutory injunction, before the decision in the House of Lords in *Allen* v. *Flood* (2) with the decision on the hearing of the action, after *Allen* v. *Flood* (2). In that case the defendants, officers of a trade union, had ordered a strike of the plaintiffs' workmen, and had picketed the plaintiffs' works in order to prevent non-strikers from working for the plaintiffs. In pursuance of the same object they had endeavoured to induce one Schoenthal, who was a sub-manufacturer for the plaintiffs, to cease work for the plaintiffs, and on his failing to do so had ordered a strike of and picketed his works, and in the interlocutory motion and appeal the picketing both of the plaintiffs and of Schoenthal was found by the court to be an unlawful besetting within s. 7 (4) of the Conspiracy and Protection of Property Act, 1875. The strike against the plaintiffs was held not to be unlawful, but the strike against Schoenthal was held to be unlawful. In the earlier decision LINDLEY, L.J., says ([1896] 1 Ch. at p. 826):

> "Schoenthal's case is one in which it appears to me that the defendants have clearly gone too far, and it is idle to say that their object in doing what they did to Schoenthal was not to compel Messrs. Lyons to do that which the trade union wanted. Schoenthal was the outworker, and what they did was to tell people not to work for him, in order to prevent his working for Messrs. Lyons, and in order to hit Messrs. Lyons through him."

KAY, L.J., says (ibid. at p. 830):

> "Still more clearly is it illegal to induce a man or to prevent a man in the position of Schoenthal from working for the plaintiffs by calling out the workmen of that man, and inducing them not to work for him, that being done for the purpose of putting pressure both upon Schoenthal and upon Messrs. Lyons by preventing Schoenthal from working for Messrs. Lyons."

The interim injunction, as settled by the Court of Appeal (ibid. at p. 832) after restraining the defendants from watching or besetting the plaintiffs' works for the purpose of, &c., proceeded:

> "And also from preventing Schoenthal or other persons from working for the plaintiffs, by withdrawing his or their workmen from their employment respectively."

The difference as between the plaintiffs and Schoenthal is apparent. The hearing of the action took place before BRYNE, J., in November, 1897. He reserved his decision until after the decision of the House of Lords in *Allen* v. *Flood* (2), which was given in December, 1897; and gave judgment in February, 1898. He gave effect to the House of Lords' decision by cutting down the injunction in respect of Schoenthal to watching and besetting Schoenthal's premises. The Court of Appeal affirmed this decision, but it is noteworthy that the reason now relied on for the decision in respect of Schoenthal was the watching or besetting said to be wrongful, (a) because a violation of the statute of 1875; (b) because a common law nuisance, i.e., because the means of compulsion were both a crime and a tort. For the reasons I have given above I think that the dictum of ROMER, L.J., in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (28) is too wide if by "threats or special influence" he includes the use of means in themselves lawful; and I think that, by introducing the element of the "design to carry some spite," he is seeking to restore to the law the element of confusion which was finally eradicated by the majority in *Allen* v. *Flood* (2). The case was decided by the majority on the ground that there was a combination to injure.

A The case that has caused me real difficulty in this respect is *Conway* v. *Wade* (4) ([1909] A.C. at p. 508). LORD LOREBURN, L.C., states the fact to be that

> "the defendant Wade, in order to compel the plaintiff to pay a fine due to the trade union and to punish him for not paying it, procured the foreman to dismiss him by threats that unless they dismissed the plaintiff the union men
B in their service would leave off work, which was not true."

The intention to injure the plaintiff is dwelt upon without any reference to *Allen* v. *Flood* (2). LORD LOREBURN discusses the matter as though intention were immaterial (ibid. at p. 510):

> "It is material to see in what circumstances an individual could be sued for inducing someone not to employ or not to serve another. . . . If the induce-
C ment was accompanied by violence or threats (always remembering that a warning is one thing and a threat is another) there was a good ground of action."

The Lord Chancellor says (ibid. at p. 511): "It is always a source of danger when the law is uncertain." He must have had in his mind some definite conception
D of what is meant by threat; for the word is consistent with a father threatening to withdraw an allowance if a son insisted on taking a job as a bookmaker's tout. It is consistent with "violence or threat of violence," and from the language of LORD JAMES OF HEREFORD it seems probable that that learned Lord considered that such a threat had been proved. "The sense in which the words are used may have to be determined by many surrounding circumstances, even those of voice
E or gesture." The difficulty is caused by the statement that the threat was that the men would leave off work, a statement of something which they lawfully might do. For the purposes of this case it is sufficient to say that the decision is not inconsistent with the proposition that an intimation that a man is going to do what he lawfully may do is not a threat, for in *Conway* v. *Wade* (4) it was undoubtedly the fact that he had no power to do what he said he would do—namely,
F call out the men, if in fact that was the threat relied on.

It is now necessary to say something about *Allen* v. *Flood* (2) and *Quinn* v. *Leathem* (3), which were relied on in the argument as throwing light upon the question of coercion and threats. In *Allen* v. *Flood* (2) the act of the defendant complained of was that he had told the manager and foreman of the works, where the plaintiffs were employed, that unless they were discharged the union men
G would be called out; that the manager had no option; and that, wherever the plaintiffs were employed, the boiler workers would cease work. The manager gave evidence that if the men had been called out it would have stopped the company's business, and that in fear of the threat being carried out he told the foreman to discharge the plaintiffs. The trial judge had ruled that there was no evidence of conspiracy or intimidation or coercion, and the jury found that the defendant had
H maliciously induced the plaintiffs' employers to discharge them. I have looked at the cases and appendix in this case, and I do not see that there was any cross-appeal from the ruling of the learned judge as to intimidation or coercion. Nevertheless it seems to me that the House of Lords must have thought the question open to discussion, for the question propounded to the judges was: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence
I of a cause of action fit to be left to the jury?" The judges clearly thought the whole matter open, for they discuss the question of threats and intimidation with some freedom. HAWKINS, J., for instance, stated his opinion that there was abundant evidence fit to be left to the jury that "the defendant has wilfully, unlawfully, unjustly, and tyrannically invaded and violated the plaintiffs' right by intimidating and coercing their employers. It was said in the speeches in *Quinn* v. *Leathem* (3) that the decision of the majority was given on the footing that there were no threats and no coercion. If that be so, the decision appears to show that the majority took the view that what HAWKINS, J., was able to call intimidation

and coercion was not of such a character as to be actionable, even if committed with an intention to injure. A

I am inclined to think that in one passage LORD WATSON definitely lays down the doctrine that I have imperfectly attempted so far to maintain:

"Assuming that the Glengall Iron Co., in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. According to the decision of the majority in *Lumley* v. *Gye* (17) already referred to, a person who by illegal means, that is means which in themselves are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he is made answerable. So long as the word 'means' is understood in its natural and proper sense that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him. It has been maintained, and some of the learned judges who lent their assistance to the House have favoured the argument, that the appellant used coercion as a means of compelling the Glengall Iron Co. to terminate their connection with the respondents; but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Co., who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and operating upon the company. It must be kept in view that the question of what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive, a wrongful act. According to the doctrine ventilated in *Temperton* v. *Russell* (13) and the present case it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive."

I think, therefore, that *Allen* v. *Flood* (2) supports the view I am expressing. On the other hand, it is said that in *Quinn* v. *Leathem* (3) the learned Lords relied upon the use of threats by the defendants to establish the cause of action by the plaintiff. It is true that there are passages in some of the speeches then delivered that describe the conduct of the defendants in calling out the men employed by Munce, one of the plaintiffs' customers, as threats. LORD HALSBURY in particular says: "there was conspiracy, threats, and threats carried into execution." But the case seems to me not to turn in any degree on the evidence as to threats. The foundation of the decision was the principle, expressly reserved in the decision in *Allen* v. *Flood* (2), that a combination to injure may be unlawful where the intention by one is not. The speeches in the House of Lords should be read in conjunction with the judgments under appeal in the Irish courts, which are all based expressly upon the conspiracy to injure. It will be found that HOLMES, L.J., whose judgment is expressly adopted both by LORD MACNAGHTEN and by LORD ROBERTSON in terms, disclaimed relying upon threats or coercion. He says:

"I am not prepared to hold that as the case now stands the means prepared were in themselves illegal. The Lord Chief Justice was of opinion that unlawful intimidation and coercion were in contemplation. This question was not left to the jury; and I doubt if there was evidence that anything was intended beyond withdrawing from Munce and Leathem's other customers union labour. The threats instanced by the Lord Chief Justice were not

A referable to this branch of the case; and under any circumstances I am unable to regard them as of real importance. If there was illegality in the combination, it must, I think, be looked for in the object proposed."

I think that the adoption of this judgment in *Quinn* v. *Leathem* (3) by LORD MACNAGHTEN, who was one of the majority in *Allen* v. *Flood* (2), makes it clear B that, in his judgment at any rate, the cause of action was the conspiracy to injure the plaintiff. It appears to me to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood* (2) and *Quinn* v. *Leathem* (3) is this: that, on the one hand, a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with C intent to injure another. That it is the combination to injure that makes the act unlawful is so plainly laid down in *Quinn* v. *Leathem* (3) that it seems to me with respect useless for judges, who are bound by the decisions of the House of Lords, to suggest that the fact of combination in that case was only an incidental feature of the case, and not the gist of the matter: see per MCCARDIE, J., in *Pratt* v. *British Medical Association* (8) ([1919] 1 K.B. at p. 260). So far as the judgment D in that case lays down as law that an act otherwise lawful becomes unlawful if done by one with an intent to injure, or that a threat by a man to do what he lawfully may is unlawful or becomes unlawful if done with an intent to injure, I think that it is contrary to principle and is incorrect. The ultimate finding in that case that there was a combination to injure is quite sufficient to support the actual decision. I find myself in complete agreement with the judgment of PETERSON, J., E in *Hodges* v. *Webb* (6). It is impossible for the law to prevent all oppressive exercise of legal rights. If rights are used tyrannically or to the public danger, the legislature can control their exercise and impose all necessary checks and safeguards. To enunciate and apply as legal propositions wide prohibitions of misty import may well lead to greater oppression than the evil sought to be repressed.

The remaining part of the case can be dealt with at less length. It is said that F the unlawful means used by the defendants were unlawful attempts to induce third parties to break their contracts with the plaintiffs. To induce a person to break his contract is not unlawful unless done knowingly and intentionally, and there is no evidence in the present case that the defendants had any knowledge of contracts between the plaintiffs and third parties which would be broken by publication of the stop list, or intention to induce third persons to break such G contracts. Moreover, so far as their own members were concerned, the defendants were entitled to assume that the cesser clause in byelaw 8 was observed. In fact as appears from the particulars delivered on Mar. 5, 1920, there were only six contracts of which the plaintiffs desired to complain, of which two had the clause in question, two more were entered into after the issue of the writ, and two only dated Aug. 13, 1919, and Sept. 29, 1919, might be relevant, though the details of H these were not proved. In view of the undertaking given by the defendants before the Court of Appeal, and accepted by the plaintiffs, that they would inform any contracting parties, whose names they were given, that existing contracts could be performed, I think it impossible to hold that the defendants ever contemplated any unlawful inducement to break contracts, and the claim based upon this ground fails. I also think that the plaintiffs failed to establish the use of unlawful means I in an attempt to defame the plaintiffs. I agree with what has been said by my brothers in reference to the attempt to put in evidence both below and in this court the document proffered by the plaintiffs. Whether such document would have affected the issue I do not know, for I have not seen it. In its absence it appears to me that the words used in the stop list are not defamatory; and, if defamatory in any sense which they are capable of bearing, are not false. If they had been proved to be false and defamatory, we should have had to consider whether publication in the trade journal to all the trade was so wide as to defeat a plea of privilege, for, if privileged, there seems to me to be no proof of malice. I think

that the claim based upon an intended libel fails, whether the intended libel is relied upon as proof of unlawful means used in the alleged conspiracy, or as an independent cause of action. In this respect also I agree with the judgments already delivered. It follows from what I have said that the cross-appeal against the association fails. But I may say I share the opinion expressed by SCRUTTON, L.J., on the point raised by the cross-appeal.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Theodore Roberts*; *Kenneth Brown, Baker, Baker.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

R. *v.* INGLIS. Ex parte COLE-HAMILTON

[KING'S BENCH DIVISION (Coleridge, Avory and Salter, JJ.), January 21, 1920]

[Reported 90 L.J.K.B. 770; 124 L.T. 704; 85 J.P. 114; 37 T.L.R. 359]

Licensing—Permitted hours—"Special occasion"—Fairs and markets—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 57 (1).

A number of licensed victuallers in the area of B. applied to the justices for special orders exempting each of them from the need to close their licensed premises for the sale and supply of intoxicating liquor for consumption on the premises between 10 a.m. and 12 noon and between 2.30 p.m. and 4 p.m. on certain market and fair days on the ground that these were days of public ceremony or gathering or the like special occasions, involving the assembly of, and necessitating the provision of accommodation for, a considerable number of persons, within the meaning of an order dated July 22, 1919, made by the Central Control Board (Liquor Traffic) under the Defence of the Realm (Intoxicating Liquor) Regulations, 1915, which had been applied to the area. The only evidence was that the days in question were market or fair days, and the justices made the orders that the licensees might be able to sell intoxicating liquors during the additional hours on the occasion of fairs and markets.

By the Licensing (Consolidation) Act, 1910, s. 57 (1): "If the holder of a justices' on-licence applies to the local authority for an order . . . exempting him from the provisions of this Act relating to general closing hours on any special occasion or occasions, the local authority may . . . grant to the applicant such special order so exempting him during the hours and on the special occasion or occasions specified in the order."

Held: the discretion in s. 57 (1) of the Act of 1910 was limited by the order of July 22, 1919, and markets and fairs were not "special occasions."

Notes. The Licensing (Consolidation) Act, 1910, was repealed by the Licensing Act, 1953, s. 168 (1), and Sched. X. For s. 52 (1) of the 1910 Act, see now s. 107 of the 1953 Act.

Considered: *R.* v. *Butt, Ex parte Brooke* (1922), 38 T.L.R. 537. Referred to: *Miller* v. *Pill*, *Pill* v. *Furse*, *Pill* v. *Mutton & Son*, [1933] All E.R. Rep. 34.

As to exemptions from provisions relating to restricted hours, see 22 HALSBURY'S LAWS (3rd Edn.) 661 et seq.; and for cases see 30 DIGEST (Repl.) 79 et seq. For the Licensing Act, 1953, s. 107, see 33 HALSBURY'S STATUTES (2nd Edn.) 239.

Rule Nisi for certiorari.

On Aug. 30, 1920, justices for the county of Brecon made an order whereby the licensee of the Queen's Vaults, Builth, the holder of a justices' on-licence for

A the sale of intoxicating liquors by retail, was exempted from the provisions of the Licensing (Consolidation) Act, 1910, relating to the general closing hours of his licensed premises, during the hours and on the special occasions specified in the order—namely, between 10 a.m. and 12 noon and between 2.30 p.m. and 4 p.m. on nineteen specified days, being market and fair days, between Sept. 6 and Dec. 27, 1920. A rule nisi was obtained upon the grounds, (i) That the justices B had no jurisdiction to grant the special order of exemption in pursuance of s. 57 of the Licensing (Consolidation) Act, 1910, save in accordance with the order of the Liquor Control Board dated July 22, 1919, and in the circumstances and for the occasion set out therein. (ii) That the justices had no jurisdiction under the order of the board to grant the exemption order in pursuance of s. 57 of the Act for market or fair days. (iii) That the market and fair days were not days of public C ceremony or gathering or the like special occasions within the meaning of the order of the board. (iv) That the justices had no power to include in one order a series of occasions extending over a period of four months. (v) That there was no evidence that the market and fair days were days of public ceremony or gathering or the like special occasions, involving the assembly of, or necessitating the provision of accommodation for, considerable numbers of persons. Similar rules on D the like grounds had been obtained in reference to other licensed premises in Builth.

The following facts appeared from the affidavit of C. G. Cole-Hamilton, chief constable for the county of Brecon, the applicant for the rule: On Aug. 26, 1920, the solicitor for the licensed victuallers of Builth gave written notice to the applicant of his intention to apply on their behalf to the justices for Builth on Aug. 30, 1920, for a general exemption order from the regulations as to closing hours and for E permission to sell and supply intoxicating liquors on their licensed premises in Builth between 9 a.m. and 12 noon and between 2.30 p.m. and 6 p.m. on market and fair days. On Aug. 30, 1920, the solicitor made application to the justices on behalf of a large number of licensed victuallers in Builth for special orders exempting each of them from closing their licensed premises for the sale and supply of intoxicating liquors for consumption on the premises between 10 a.m. and 12 noon F and between 2.30 p.m. and 4 p.m. on nineteen market and fair days between Sept. 6 and Dec. 27, 1920, on the ground that these market and fair days were days of public ceremony or gathering or the like special occasions, involving the assembly of, and necessitating the provision of accommodation for, a considerable number of persons within the meaning of the general order of the Central Control Board (Liquor Traffic) dated July 22, 1919. The application was opposed on behalf G of the applicant on the ground that the justices had no jurisdiction to grant the orders in respect of market or fair days, but the justices made the orders in the terms asked for in respect of all the licensed premises in order that the licensees might be able to sell intoxicating liquors during the additional hours on the occasion of fairs and markets.

By the Defence of the Realm (Liquor Control) Regulations, 1915, made under H the Defence of the Realm (Consolidation) Act, 1914, and the Defence of the Realm (Amendment) (No. 3) Act, 1915, the Central Control Board (Liquor Traffic) was constituted the prescribed Government authority (inter alia) for the control of the sale and supply of intoxicating liquor in any area, with the power to regulate by order the house during which licensed premises or clubs might be kept open for such sale or supply, and any such order was to have effect notwithstanding any- I thing in the law relating to licensing or to the sale of intoxicating liquor. By an Order in Council dated April 12, 1916, the regulations were applied to the area in which Builth was situated. By orders of the Board in April, 1916, March, 1919, and May, 1919, the hours during which intoxicating liquor might be sold or supplied for consumption on the premises were laid down, and by an order of the Board of July 22, 1919, it was provided that it should be

"lawful to sell and supply intoxicating liquor for consumption on the premises . . . during any specified hours between the hours of 10 a.m. and 6 p.m. on

"weekdays under a special order of exemption or licence granted in pursuance of s. 57 or s. 64 of the Licensing (Consolidation) Act, 1910, for any public ceremony or gathering or like special occasion involving the assembly of, and necessitating the provision of accommodation for, considerable numbers of persons."

No evidence was given on the hearing of the application of any public ceremony or gathering or the like special occasion involving the assembly of, or necessitating the provision of accommodation for, considerable numbers of persons on any of the days for which the orders were granted except that they were market and fair days. The orders of exemption purported to be special orders of exemption in pursuance of s. 57 of the Act.

No one appeared to show cause.

Wilfrid Lewis in support of the rules.

COLERIDGE, J.—The question in this case is whether the justices had power to consent to the exemption, on the occasions specified, from the hours of closing fixed by the Central Control Board (Liquor Traffic) of a large number of public-houses in the village of Builth. It was said that the justices had power to do so under the order of the Board dated July 22, 1919. [His Lordship read the relevant part of the order, and continued:] Now s. 55 (1) of the Act of 1910 deals with the case of fairs or markets, and contains a power of general exemption in such cases. It is obvious that no power exists to put in force the provisions of s. 55 (1), because it is overruled by the Defence of the Realm (Liquor Control) Regulations, 1915 [now revoked]. But s. 57 is the section on which the application was founded, and, apart from the regulations, s. 57 does grant power to give exemption on special occasions, and, under that section, those special occasions are, as a rule, left to the discretion of the justices. But that discretion is limited by the order of July 22, 1919, and the sole question is whether fairs and markets come within the words

"any public ceremony or gathering or like special occasion involving the assembly of, and necessitating the provision of accommodation for, considerable numbers of persons."

Apart from the objection, which may be a good one, that this was an omnibus application, yet, assuming the application to have been made on behalf of one individual, markets do not come within the words which I have quoted from the order. They are ordinary and customary incidents of country life, and they are by no means special occasions within the order. Therefore the justices were wrong in permitting the exemption, and the rules must be made absolute.

AVORY, J.—I agree.

SALTER, J.—I agree.

Rules absolute.

Solicitors: *Field, Roscoe & Co.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

SELWOOD *v.* SELWOOD

[Probate, Divorce and Admiralty Division (Horridge, J.), November 12, 1920]

[Reported 125 L.T. 26]

Will—Soldier's will—Need for definite expression of testator's wishes as to disposition of property—Ambiguity—Letter written on active service.

A document to be effective as a soldier's will must contain a definite expression of the soldier's wishes as to the disposition of his property in the event of his death.

Where, therefore, a soldier on actual military service wrote in a letter to his wife: "It is well that you have these policies then if I croke you will understand how to secure your rights,"

Held: these words were explicable otherwise than to show an intention to give the wife a beneficial interest in the policies, and, therefore, the letter was not testamentary.

Principle in *Re Stable*, *Dalrymple* v. *Campbell* (1), [1919] P. 7, and *Godman* v. *Godman* (2), [1920] P. 261, applied.

Notes. As to soldiers' wills, see 16 Halsbury's Laws (3rd Edn.) 176–179; and for cases see 39 Digest 333 et seq., 44 Digest 304, 305.

Cases referred to:

(1) *Re Stable*, *Dalrymple* v. *Campbell*, [1919] P. 7; 88 L.J.P. 32; 120 L.T. 160; 39 Digest 336, *228*.

(2) *Godman* v. *Godman*, [1919] P. 229; 89 L.J.P. 123; 121 L.T. 255; sub nom. *Re Godman*, 35 T.L.R. 513; affirmed sub nom. *Godman* v. *Godman*, [1920] P. 261; 89 L.J.P. 193; 123 L.T. 274; sub nom. *Re Godman*, *Godman* v. *Godman*, 36 T.L.R. 434; 64 Sol. Jo. 424, C.A.; 39 Digest 337, *240*.

Action for probate of a letter as a soldier's will.

Albert Selwood, a Canadian soldier of English origin, had made a good soldier's will in 1915, which was admittedly revoked by his marriage to the plaintiff on Nov. 6, 1917. By that will he had divided his property between his father, mother, and brothers. On Nov. 26, 1917, he made, whilst in actual military service, a holograph will, in which he estimated the probable value of his estate at £1,350, left his wife a legacy of £430, and left legacies to his parents and surviving brothers estimated to dispose of the rest of his estate, and in case of there being anything over, left smaller legacies to two nieces. This will and two policies of insurance, which he estimated to be worth £1,000 and £160 respectively, and consequently to form the bulk of his estate, he left in the care of his father, but subsequently on April 6, 1918, he transferred the policies to the custody of his wife's father, and a premium due on one of the polices was paid by his wife out of funds supplied by her father. On April 10, 1918, he wrote to his wife:

> "I am glad dad has attended to the policy premium promptly. I am quite confident that dad will look after it O.K. It is well for you to have these policies, then if I croke you will understand how to secure your rights."

On Sept. 27, 1918, the deceased was killed in action, and on Mar. 8, 1919, a posthumous son was born to the plaintiff. The deceased had not told his wife of his will of Nov. 26, 1917, and on hearing of it she and her father were dissatisfied with its provisions, and sued for probate of the letter of April 10, 1918, as being a good soldier's will, whereby he left his policies to the plaintiff. The original will of Nov. 26, 1917, was lost after the death of the testator, and questions were raised on the pleadings as to its execution, and whether it made the defendant an executor according to the tenor. But at the trial it was admitted on behalf of the plaintiff that the will of Nov. 26, 1917, was a good soldier's will, that the original will had been lost after the death of the testator, and that its contents were duly proved by an attested copy produced by the defendant, and on behalf of the defendant,

that it did not constitute him an executor according to the tenor. It was also admitted on behalf of the plaintiff that in the absence of any words of revocation the letter of April 10, 1918, could not be said to revoke the will of Nov. 26, 1917, and that plaintiff could, therefore, only claim that the two documents should be admitted to probate together. For the defendant it was admitted that the letter of April 10, 1918, was written by the deceased, but pleaded that it was not testamentary. Evidence was given for the plaintiff by her father of verbal declarations by the deceased, which would clearly have been good soldier's codicils, bequeathing his policies to the plaintiff. These verbal declarations had not been pleaded, and the evidence with regard to them was not objected to, but was disbelieved by the learned judge.

Durley Grazebrook for the plaintiff.
G. C. Tyndale for the defendant.

HORRIDGE, J.—This is a difficult case. The principle to be followed is that laid down by me in *Re Stable, Dalrymple* v. *Campbell* (1) and *Godman* v. *Godman* (2), and approved, as I understand, by the Court of Appeal in the latter case, namely, that there must be a deliberate expression of the soldier's wishes as to the disposition of his property in the event of his death. Here it is contended that there is such an expression with regard to the two policies in the letter in question. But the remark that the plaintiff would understand how to secure her rights may, in my opinion, have referred either to the payment of premium, which she or her father had made, or to her rights as a legatee under the will of Nov. 26, and I do not find in the letter any expression of a wish that she should take a beneficial interest in the policies. I must, therefore, pronounce for the copy of the will of Nov. 26, 1917, till such time as the original is brought into the registry, and against the alleged will of April 10, 1918, as not being testamentary. The plaintiff was, however, entitled to have the document construed by the court, so both parties must have their costs out of the estate.

Solicitors: *H. Clarke Hutton*; *Taylor, Rowley & Lewis*, for *Hedges & Sons*, Wallingford.

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

R. v. SURREY JUSTICES. Ex parte CROSFIELD

[King's Bench Division (Earl of Reading, C.J., Darling and Salter, JJ.), October 25, 26, 1920]

[Reported [1921] 1 K.B. 480; 90 L.J.K.B. 305; 124 L.T. 339; 85 J.P. 62; 37 T.L.R. 59]

Licensing—Licence—Renewal—Provisional renewal—Reference to compensation authority—Compensation authority equally divided—Effect on provisional renewal—Licensing Consolidation Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19—*Licensing Rules*, 1910 (*S.R. & O.* 1910, *No.* 1180), *r.* 41....

At a general annual licensing meeting an application for the renewal of an old on-licence was referred by the licensing justices to the compensation authority under the Licensing (Consolidation) Act, 1910, s. 19, on the ground that the renewal of the licence required consideration, and, in pursuance of the Licensing Rules, 1910, r. 41, the licensing justices granted a provisional renewal of the licence. The compensation authority, having heard the evidence, were equally divided on the question of renewal or refusal of the licence, and no judgment was recorded. A rule nisi for a mandamus directing the compensation authority to hear and determine the application for renewal having been obtained,

Held: the compensation authority only had jurisdiction to decide whether the renewal of the licence should be refused and had no jurisdiction to renew the licence; in the present case the authority had not refused the renewal; and, therefore, the provisional renewal of the licence by the licensing justices continued in operation until the next general annual licensing meeting, and the rule must be discharged.

Notes. The Licensing (Consolidation) Act, 1910, was repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. For s. 19 of the Act of 1910, see now s. 15 of the Act of 1953.

As to the compensation authority, see 22 Halsbury's Laws (3rd Edn.) 577 et seq.; and for cases see 30 Digest (Repl.) 54 et seq. For the Licensing Act, 1953, s. 15, see 33 Halsbury's Statutes (2nd Edn.) 163; and for the Licensing Rules, 1910, r. 41, see 12 Halsbury's Statutory Instruments, 41.

Cases referred to in argument:

Ex parte Evans, [1894] A.C. 16; 63 L.J.M.C. 81; 70 L.T. 45; 58 J.P. 260; 10 T.L.R. 118; 6 R. 82, H.L.; 30 Digest (Repl.) 69, *513*.

Bagg v. *Colquhoun*, [1904] 1 K.B. 554; 73 L.J.K.B. 272; 90 L.T. 386; 68 J.P. 159; 52 W.R. 494; 20 Cox, C.C. 605, D.C.; 33 Digest 346, *560*.

R. v. *Walsall Justices*, [1910] 2 K.B. 210; 79 L.J.K.B. 834; 102 L.T. 737; 74 J.P. 220, D.C.; 30 Digest (Repl.) 55, *413*.

Plaistow Working Men's Club v. *Harrod*, [1910] 1 K.B. 582; 79 L.J.K.B. 654; 102 L.T. 20; 74 J.P. 100; 26 T.L.R. 216; 8 Digest (Repl.) 670, *130*.

R. v. *Newington Licensing Justices, Ex parte Makemson*, [1914] 2 K.B. 710; 83 L.J.K.B. 1367; 111 L.T. 72; 78 J.P. 271; 30 T.L.R. 426, D.C.; 30 Digest (Repl.) 44, *341*.

Rule Nisi for mandamus.

At the general annual licensing meeting for the borough of Reigate held on Feb. 3, 1920, objection was made by the justices for the borough to the renewal of the licence of the Bull's Head alehouse in the High Street, and the hearing of the application for the renewal was adjourned until the adjourned general annual licensing meeting to be held on Mar. 2, 1920. On Feb. 19, 1920, by direction of the justices, a notice was served on Julia Isabel Mitchell, the licensee of the Bull's Head, requesting her to attend in person at the adjourned annual licensing meeting to apply for the renewal of her licence, and also intimating that it was the intention of the justices to oppose the renewal of the licence on the grounds (i) that the

premises were structurally deficient and structurally unsuitable; (ii) that a licensed house at the place where the premises were situate was not required; (iii) that, in view of the character and necessities of the neighbourhood and the number of licensed houses in the vicinity, the licence was unnecessary; and (iv) that in the interest of the public the renewal of the licence was not desirable. At the adjourned general annual licensing meeting on Mar. 2, 1920, the solicitor for the licensee applied for the renewal of the licence. Evidence was then given in support of the objection to the renewal of the licence, and, after having heard the evidence of the licensee and other witnesss in support of the renewal of the licence, the justices were of opinion that the question of the renewal of the licence required consideration on the second, third, and fourth grounds set out in the notice of objection. The justices, therefore, referred the matter to the compensation authority together with their report thereon.

Under r. 41 of the Licensing Rules, 1910, the justices granted the renewal of the licence in accordance with the terms of the application, but inserted in the licence a statement that

> "This licence is granted provisionally pursuant to the Licensing (Consolidation) Act, 1910, and the rules made under the Act. If the compensation authority, to whom the question of the renewal of the licence of the above-mentioned premises has been referred under that Act, refuse the renewal of the licence, the licence will cease to have effect, if then in force, as from the expiration of the seventh day after the date to be subsequently fixed in pursuance of these rules for the payment of compensation."

At the principal meeting of the compensation authority on June 7, 1920, application was made on behalf of the licensee and owners of the premises for the renewal of the licence, and, having heard counsel and evidence on behalf of the justices in opposition to the renewal of the licence and on behalf of the licensee and owners in support of the renewal, the six justices who had heard the case were equally divided, three being in favour of renewal and three in favour of refusal. The chairman, thereupon, stated that the bench being equally divided no judgment was recorded.

The chairman of the licensing justices subsequently moved for and obtained the rule nisi on the ground that, the compensation authority being equally divided, the application for the renewal of the licence must be refused.

The Licensing (Consolidation) Act, 1910, provides:

> "18 (1) The power to refuse the renewal of any such justices' on-licence as is described in the first part of Sched. II to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the second part of that Schedule shall be vested in the compensation authority and not in the licensing justices, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act.
>
> (2) In every case of the refusal of the renewal of an old on-licence by the licensing justices, they shall specify in writing to the applicant the grounds of their refusal.
>
> 19 (1) Where the licensing justices, on the consideration by them, in accordance with this Act, of applications for the renewal of justices' licences, are of opinion that the question of the renewal of any particular old on-licences requires consideration on grounds other than those on which the renewal of an old on-licence can be refused by them, they shall refer the matter to the compensation authority, together with their report thereon.
>
> (2) The compensation authority shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to the compensation authority unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the licensing

justices), an opportunity of being heard, and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

The Licensing Rules, 1910, provided:

"41. Where, under s. 19 of the Act, the renewal authority refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant the renewal of the licence in accordance with the terms of the application, but shall insert in the licence a statement as to the renewal of the licence being provisional.

42. If the compensation authority refuse the renewal of any licence the renewal of which is provisional . . . the licence shall cease to have effect as from the expiration of the seventh day after the date fixed under these rules for the payment of the compensation money."

A. F. W. Wootten showed cause.
G. Cecil Whiteley in support of the rule.

EARL OF READING, C.J.—The chairman of the licensing justices has obtained a rule nisi for a mandamus calling on the compensation authority to show cause why they should not be ordered by this court to hear and determine an application for the renewal of a licence to sell intoxicating liquor at the Bull's Head, Reigate. The whole question that arises is as to the effect of the compensation authority coming to no decision—in the sense that six justices sat on the matter to be determined and three were of one opinion and three were of the contrary opinion. There was, consequently, no majority, and the question is what is the effect of that? An application in the ordinary course by the holder of an old on-licence for a renewal of that licence was made to the licensing justices at the general annual licensing meeting. Perforce, the licensee had to apply for a renewal, and, perforce, the application had to be made to the licensing justices at the general annual licensing meeting. No other way is provided. When the matter came before the licensing justices, they granted the application for the renewal provisionally under the Licensing (Consolidation) Act, 1910, and referred the matter to the compensation authority. Everything depends on the effect of that reference. On the one hand, it is said by counsel showing cause that that is a reference to the compensation authority to determine whether they will refuse the renewal of the licence, and gives them no jurisdiction to grant a renewal, but merely jurisdiction to say that the renewal, which has been granted provisionally, shall now be extinguished or come to an end. On the other hand, counsel in support of the rule says that this was not the effect, and that the application to the general annual licensing meeting is mere machinery, and that, once the justices have referred the matter to the compensation authority, they are not merely referring to the compensation authority to determine whether there shall or shall not be a refusal, but are merely referring the renewal for determination to the compensation authority, and, in other words, that it is for that authority to say whether the licence is to be renewed. The question is, which view is right?

I have no doubt about the case. In my judgment, the reference to the compensation authority is of a licence which has been provisionally renewed by the licensing justices, and all that the compensation authority can do is to determine whether that licence which has been provisionally renewed shall then be refused—that is, extinguished—by the payment of compensation on the order of the compensation authority. One must remember that, before the Licensing Act, 1904, there was a discretion in the licensing justices to refuse renewal. That discretion had been the subject of much litigation and political discussion. The Act of 1904 put an end to that by enacting that, except on certain specified grounds, the licensing justices were bound to grant an application for the renewal of an old on-licence, unless, either by notice of objection or otherwise, the case could be brought within those grounds. In this case, it is not contended that there was

any ground on which the licensing justices could have refused the licence. It is a case in which the licensing justices were bound to grant the renewal. It has been said by counsel in support of the rule that the licensing justices were only doing a ministerial act. I agree it is only a ministerial act, because a vested interest was given by the Act of 1904, and that vested interest can only be destroyed by payment of compensation by the compensation authority. Parliament had to bear in mind that the compensation authority had not unlimited means. Everything depended on whether the report to them was that the licence was redundant and ought to be extinguished and whether they had the means by which they could extinguish it. For that purpose, once the licence is renewed it must go to the compensation authority who alone have jurisdiction to decide whether they should allow it to continue or extinguish it by payment of compensation. In order to do the latter they have to decide that it be extinguished, in other words, to refuse to continue it, or refuse its renewal. Nowhere in the Act, the rules or the forms do I find language which leads me to the conclusion that the jurisdiction to renew the licence is conferred on the compensation authority. They all compel me to the view that licensing justices are to renew, and that the only power given to the compensation authority is to cut the thread of this renewal by payment of money. The thread will continue until payment is made, but the decision that the licence should be extinguished is in the compensation authority, and that is all. They have no power to grant a renewal; they only have the power to say that a renewal which has been granted shall or shall not be extinguished. That is shown by reference to the Licensing (Consolidation) Act, 1910, s. 18, which in terms speaks of the power to refuse the renewal being in certain cases vested in the compensation authority and not in the licensing justices.

Then it goes on to say that it shall only be exercised on a reference from the licensing justices, and on payment of compensation in accordance with the Act. That again goes to show that in those cases the licensing justices must renew the licence which they refer to the compensation authority, but the renewal is only provisional. Section 19 seems to me to carry out that view. [His Lordship read sub-s. (1), and continued:] What is it that they refer? They refer the question of refusal of renewal in order that the compensation authority may determine whether they will refuse the renewal under s. 18 on payment of compensation. By s. 19 (2) the compensation authority can, subject to the payment of compensation under the Act, refuse the renewal of any licence. Again, the jurisdiction is to refuse. If we turn to the Licensing Rules, 1910, r. 41 and r. 42 make it clear that what is being dealt with is the renewal by the licensing authority. [His Lordship read r. 41, and continued:] Form 15 shows that that is really what is aimed at. So again, form 5 seems to be dealing with exactly the same question. There is here a renewal which must take place; it is with that renewal that the compensation authority has to deal, and it is only when the renewal has been made that the jurisdiction of the compensation authority comes in at all. It is granted subject to the compensation authority determining whether or not the licence shall continue—the logical carrying out of the whole purpose of the Act.

Once we come to that conclusion, it follows inevitably that the compensation authority never has jurisdiction to do otherwise than refuse, or not refuse, but has no jurisdiction to grant. It follows that, when the compensation authority is unable to arrive at a decision to refuse, inasmuch as there is no majority for the positive refusal, the result must be that the renewal which has been granted provisionally, and is to take effect only until the refusal by the compensation authority and the payment of compensation, continues until there is a refusal, and, if there is no refusal, the licence continues as an ordinary licence. Here, there being no majority, there can be no refusal. I see no difficulty in that. In the ordinary course of things, this licence continues until April, 1921, and before that there will be an application for renewal. When that comes before the licensing authority they will, no doubt, if there are no grounds on which they can exercise their discretion, again renew provisionally and refer the licence to the compensation

authority. I trust that, when the latter authority sits on it on the next occasion, they will take care to have an odd number of justices and not an even number, so that there must be a majority one way or the other. In my judgment, that really disposes of this case.

In order to prevent misunderstanding, I desire to say that, if counsel in support of the rule had convinced me that he was right in his view of this renewal, and that it was to be regarded, as he said, as a time permit and not as a provisional renewal, he would still have had to convince me that this court should grant a mandamus. We cannot order justices to hear and determine when they have already heard and determined. We cannot order them to come to a decision when they have sat and considered a case and have not been able to arrive at a decision because they were equally divided. I do not decide the point, but the authorities cited incline me to the opinion that the court ought not, in those circumstances, to grant a mandamus to hear and determine. The grant of a mandamus in such a case would be in the discretion of the court, and, if I were in favour of the applicant on other grounds, I should feel that it was a matter that could be equally well determined next year on an application for renewal. It seems to me to follow from what I have said that the rule should be discharged.

DARLING, J.—I agree.

SALTER, J.—I agree.

Rule discharged.

Solicitors: *Hobson & MacMahon*; *Pattersons, Snow & Co.*, for *Mole, Rosling & Co.*, Reigate.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

TETLOW *v.* ORELA, LTD.

[Chancery Division (Russell, J.), April 14, 1920]

[Reported [1920] 2 Ch. 24; 89 L.J.Ch. 465; 123 L.T. 388]

Practice—Parties—Action commenced in name of dead plaintiff—Substitution of another plaintiff—Jurisdiction of court—R.S.C., Ord. 16, *r.* 2, *r.* 11.

An action was mistakenly commenced in the name of a man, as plaintiff, who was dead when the writ was issued. On an application by the widow to be substituted as plaintiff,

Held: where an action had been commenced in the name of a dead man there was no power under R.S.C., Ord. 16, r. 2 or r. 11, which enabled the court to substitute his representative as plaintiff.

Notes. Distinguished: *Alexander Mountain & Co.* v. *Rumere, Ltd.*, [1948] 2 All E.R. 482. Considered: *Etablissement Baudelot* v. *R. S. Graham & Co., Ltd.*, [1953] 1 All E.R. 149.

As to change of parties when an action is commenced in the wrong name, see 30 Halsbury's Laws (3rd Edn.) 395; and for cases see Digest (Practice) 267. For s. 34 and s. 222 of the [repealed] Common Law Procedure Act, 1852, see 18 Halsbury's Statutes (2nd Edn.) 382, 421.

Cases referred to:

(1) *Clay* v. *Oxford* (1866), L.R. 2 Exch. 54; 4 H. & C. 690; 36 L.J.Ex. 15; 15 L.T. 286; 12 Jur.N.S. 944; 15 W.R. 109; Digest (Practice) 267, *49*.

(2) *Blake* v. *Done* (1861), 7 H. & N. 465; 31 L.J.Ex. 100; 5 L.T. 429; 7 Jur.N.S. 1306; 10 W.R. 175; Digest (Practice) 268, *53*.

(3) *Banca Nazionale Sede di Torino* v. *Hamburger* (1863), 2 H. & C. 330; 2 New Rep. 369; 8 L.T. 548; 11 W.R. 1074; 159 E.R. 137; Digest (Practice) 267, *46.* A

Also referred to in argument:

Simmons v. *Liberal Opinion, Ltd., Re Dunn*, [1911] 1 K.B. 966; 80 L.J.K.B. 617; 104 L.T. 264; 27 T.L.R. 278; 55 Sol. Jo. 315, C.A.; 42 Digest 343, *3874.*

A.-G. v. *Pontypridd Waterworks Co.*, [1908] 1 Ch. 388; 77 L.J.Ch. 237; 98 L.T. 275; 72 J.P. 48; 24 T.L.R. 196; 6 L.G.R. 397; Digest (Practice) 405, *1062.* B

Ayscough v. *Buller* (1889), 41 Ch.D. 341; 58 L.J.Ch. 474; 60 L.T. 471; 37 W.R. 529, C.A.; Digest (Practice) 404, *1057.*

Fernée v. *Gorlitz*, [1915] 1 Ch. 177; 84 L.J.Ch. 404; 112 L.T. 283; 42 Digest 350, *3970.*

Yonge v. *Toynbee*, [1910] 1 K.B. 215; 79 L.J.K.B. 208; 102 L.T. 57; 26 T.L.R. 211, C.A.; Digest (Practice) 706, *3012.* C

Adjourned Summons by which the representative of a deceased man applied to be substituted as plaintiff in an action, the writ having been issued in the mistaken belief that the man in question was alive.

A business for the manufacture of perfumery and toilet preparations had been carried on at Philadelphia in the United States of America for more than thirty years under the name of Henry Tetlow Co. It was originally started by Henry Tetlow, upon whose death it was carried on by his brother, Joseph Tetlow, who died in 1911. By his will he devised all his property real and personal to his wife, Ida J. Tetlow, whom he appointed sole executrix. Since his death Ida J. Tetlow had carried on the business under the name of Henry Tetlow Co., and she was the proprietor of the trade marks and goodwill connected with the business. Among the toilet preparations manufactured and sold by Henry Tetlow Co. was Swandown Toilet Powder, which was put up and packed in boxes which were specially and distinctly marked. The label on the boxes had been for many years the registered trade mark of Henry Tetlow Co. in England, and the powder had been largely sold there. The defendants, Orela, Ltd., were an English company recently registered, and manufacturing and selling toilet preparations. In July, 1919, it came to the knowledge of Henry Charles Quelch, whose firm had been for many years the selling agents of Henry Tetlow Co. in England, that Orela, Ltd., were selling a toilet powder packed in boxes, which he believed to be a colourable imitation of the boxes of Swandown Toilet Powders, and with labels which he believed to be an infringement of the trade mark of Henry Tetlow Co. It appeared that Quelch was not aware of the death of Joseph Tetlow, or that the business was being carried on by Ida J. Tetlow. He instructed his solicitors to commence an action against Orela, Ltd., to restrain them from passing off their preparation as the powder of Henry Tetlow Co., and from infringing the trade mark of Henry Tetlow Co. On his information the writ was issued on July 16, 1919, in the name of Joseph Tetlow as plaintiff, as the proprietor of Swandown Toilet Powder. On July 25 the plaintiff moved before Younger, J., for an injunction to restrain the defendants from passing off and from infringing the trade mark. Upon the motion the defendants gave an undertaking as to certain boxes of powder in their possession, and no order was made except that the costs should be costs in the action, and the directions were given as to the delivery of pleadings. The statement of claim was delivered on Sept. 1 and the defence on Oct. 2. In November, 1919, the American representative of Henry Tetlow Co. called upon the solicitors in connection with the action, and in course of conversation with him the solicitors for the first time heard that Joseph Tetlow had died before the issue of the writ in the action. They then communicated with Ida J. Tetlow, and, on her instructions, on Jan. 15, 1920, issued a summons in her name asking that she should be substituted as plaintiff in the place of Joseph Tetlow. D E F G H I

Rules 2 and 11 of R.S.C., Ord. 16, provide:

"Rule 2. Where an action has been commenced in the name of the wrong

person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

Rule 11. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. . . ."

The [repealed] Common Law Procedure Act, 1852, s. 34, provided:

"It shall and may be lawful for the court or a judge, at any time before the trial of any cause, to order that any person or persons, not joined as plaintiff or plaintiffs in such causes, shall be joined; or that any person or persons, originally joined as plaintiff or plaintiffs, shall be struck out from such cause, if it shall appear to such court or judge that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had originally joined in such cause."

Section 222 provided:

"It shall be lawful for the superior courts of common law, and every judge thereof, and every judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

Hildyard, K.C., for the applicant.
Clauson, K.C., and *P. S. Stokes* for the defendants.

RUSSELL, J., stated the facts and continued: This case raises a novel point. I think that if I am justified by the rules in acceding to this application I ought to accede to it, as what was done was a pure slip. The question is, can I substitute the applicant as plaintiff? It is a question of great difficulty. Unless it is a case which comes within the rules, I have no power to make such substitution.

Before I consider the rules I will refer to the position under the Common Law Procedure Act, 1852, and *Clay* v. *Oxford* (1), which is the only authority that has been cited. That was a case under the Common Law Procedure Act, 1852. Of the various sections of that Act the only material ones are s. 34, s. 35, and s. 222. Section 34 deals with the joinder of parties to actions, and provides for nonjoinder

and misjoinder of plaintiffs to be amended before trial. [His Lordship read s. 34.] Section 35 contains much the same provisions for amendment of nonjoinder and misjoinder of plaintiffs at the trial, consent of the parties to be added or struck out being required as in the preceding section. Then s. 222 provides for amendment to prevent failure of justice by reason of mistakes and objections of form. [His Lordship read s. 222.] The case of *Clay* v. *Oxford* (1) arose under s. 34 and s. 222. The headnote is (L.R. 2 Ex. 54): "Where an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs." There, the action was commenced on May 10, 1866, in the name of John Clay as plaintiff. It was afterwards discovered that John Clay died before the issue of the writ, and on June 14 a summons was taken out to substitute the names of his executrix and executor as plaintiffs. That summons was abandoned, but on Nov. 7 another summons to the same effect was taken out and came before Martin, B., who made the order prayed. A rule nisi to rescind that order having been obtained, the matter was argued before the Exchequer Chamber, and the court was unanimous in rescinding the order. Kelly, C.B., in giving judgment said (ibid.):

> "It may, perhaps, be regretted that the Common Law Procedure Act has not authorised the substituting of one plaintiff for another, or one defendant for another, in a case like this, but we have no power either by common law or by statute to do what is asked. Since the Common Law Procedure Act of 1852, by s. 34 and following sections, in express terms enables the court to add or strike out any number of plaintiffs, and by s. 136 and following sections gives a similar power of allowing the representatives of a deceased plaintiff to continue the suit, but contains no provisions in any part of it for substituting one plaintiff for another, one suing in a representative capacity for a deceased man who never was a party, I cannot but think that no such power was meant to be given. The rule must therefore be made absolute."

Then Bramwell, B., says (ibid., p. 55):

> "I think such a substitution was not within the intention of the Act. This is not a case where it can be said that persons, not formally entitled to be parties, have brought an action to try certain matters perfectly well known to both sides, which is the explanation of *Blake* v. *Done* (2) and *Banca Nazionale Sede di Torino* v. *Hamburger* (3). But here the plaintiff is altogether wrong, or rather there is no plaintiff; the man in whose name the action was brought was dead. It cannot be said that this is an amendment 'necessary for the purpose of determining in the existing suit the real question in controversy between the parties,' nor is this an application made between the parties to the suit, for there is no plaintiff, and, therefore, no existing suit and no question in controversy between the parties. If we could see some person suing who had a beneficial interest in the claim made, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted."

Channell, B., says (ibid., p. 55):

> "The sections previous to s. 222 do not affect the question, and the power to amend must be claimed under that section, if at all. That section does not provide in terms for such a case, and, as in the earlier sections the subject of the alteration and substitution of parties is discussed with great care and accuracy, and this case is not mentioned, we must infer that the power was not intended to be given."

And lastly Pigott, B., says (ibid., p. 56):

> "I was at first disposed to view s. 222 as giving us the power to make the amendment, but on looking more carefully at the Act, and considering the specific provisions that are made for the nonjoinder and misjoinder of plaintiffs,

A I think that, on the true construction of that section, it does not confer that power upon us."

Thus, under the Common Law Procedure Act there was no power to substitute as plaintiffs the representatives of a man who was dead when an action was commenced in his name, either under the special provisions of the Act, or under the general words of s. 222. In that condition of things, and in view of the decision B in *Clay* v. *Oxford* (1), the present rules were framed, and the question is whether they allow that to be done which the Act of 1852 did not allow.

In my opinion, the present rules do not give any such power, and it would be straining them to bring the case within them. The rules relied on by the applicant are R.S.C., Ord. 16, r. 2 and r. 11. [HIS LORDSHIP read r. 2.] In my opinion C that rule means that where there is an effective action subsisting between two living parties, and where the living plaintiff turns out to be the wrong person, an application may be made under the rule to the court, and the court can substitute another person for the living plaintiff, or may add another person as co-plaintiff, as the case may be. But it does not justify the court in creating a new plaintiff in an action for the first time. Then r. 11 relates to misjoinder and nonjoinder of D parties. It begins by saying that

> "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

Pausing there, it so far contemplates only effective causes or matters having living E persons as parties actually before the court. It then goes on:

> "The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiff or defendant, who ought to have been joined, F or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. . . ."

In my opinion, the names of "parties improperly joined" and the names of "parties who ought to have been joined" are, in the meaning of that rule, the G names of living persons only. I do not think, therefore, that r. 11 carries us any further. The result is that, greatly to my regret, I am bound to refuse the present application.

Solicitors: *Janson, Cobb, Pearson & Co.*; *Dod, Longstaffe, Son, & Fenwick.*

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

RAIKES *v.* OGLE AND ANOTHER

[KING'S BENCH DIVISION (Acton, J.), December 16, 17, 20, 1920]

[Reported [1921] 1 K.B. 576; 90 L.J.K.B. 588; 125 L.T. 352; 37 T.L.R. 261]

Rent Restriction—Increase of rent—Date of increase—Date when rent began to accrue—Date of going into possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo. 5, c.* 17), *s.* 1.

By a tenancy agreement dated Mar. 12, 1920, premises, which on Aug. 4, 1914, were let at a rent of £60 per annum, the landlord paying rates and taxes, were let by the plaintiff to the defendants "from Mar. 25, 1920, for the term of three years thence next ensuing . . . at the yearly rent of £230 payable by four equal quarterly payments . . . the first of such payments to be made on June 24 next." The defendants obtained the keys of the premises on Mar. 25, 1920, and went into possession on Mar. 26. The yearly rent of £230 was in excess of the standard rent and the permitted increase thereof under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Held: the rent under the agreement of Mar. 12, 1920, began to accrue on Mar. 26, 1920, and, therefore, the rent had been "increased since Mar. 25, 1920," within s. 1 of the Act of 1920; accordingly, as the increased rent exceeded the standard rent by more than the amount permitted by the Act of 1920, the excess was irrecoverable from the defendants.

Notes. Although the relevant words in s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, have been repealed by the Rent Act, 1957, s. 26 (3) and Sched. VIII, Part I, it is still necessary to know for various purposes what the recoverable rent was before the Act of 1957 came into force. For examples of these purposes, see note (a) to para. 1544 in 23 HALSBURY'S LAWS (3rd Edn.) at p. 780.

Considered: *Schmit* v. *Christy*, [1922] 2 K.B. 60. Followed: *Brakspear* v. *Barton*, [1924] 2 K.B. 88. Referred to: *Michael* v. *Phillips*, [1924] 1 K.B. 16.

As to restriction of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 772 et seq.; and for cases see 31 DIGEST (Repl.) 667 et seq. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 982.

Cases referred to:

(1) *Goldsmith* v. *Orr*, [1920] W.N. 81; 122 L.T. 656; 84 J.P. 87; 36 T.L.R. 285; affirmed, [1920] W.N. 250; 89 L.J.K.B. 901; 123 L.T. 614; 85 J.P. 1; 36 T.L.R. 731; 64 Sol. Jo. 615; 18 L.G.R. 683, C.A.; 31 Digest (Repl.) 678, *7710*.

(2) *Ackland* v. *Lutley* (1839), 9 Ad. & El. 879; 1 Per. & Dav. 636; 8 L.J.Q.B. 164; 112 E.R. 1446; 31 Digest (Repl.) 581, *7013*.

(3) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62; 43 W.R. 228; 11 T.L.R. 154; 39 Sol. Jo. 165; 14 R. 135, C.A.; 31 Digest (Repl.) 488, *6136*.

(4) *Meggeson* v. *Groves*, [1917] 1 Ch. 158; 86 L.J.Ch. 145; 115 L.T. 683; 61 Sol. Jo. 115; 30 Digest (Repl.) 484, *1274*.

Also referred to in argument:

Pugh v. *Duke of Leeds* (1777), 2 Cowp. 714; 98 E.R. 1323; 30 Digest (Repl.) 484, *1273*.

Russell v. *Ledsam* (1845), 14 M. & W. 574; 14 L.J.Ex. 353; 5 L.T.O.S. 495; 9 Jur. 557; 153 E.R. 604; affirmed sub nom. *Ledsam* v. *Russell* (1847), 16 M. & W. 633, Ex. Ch.; (1848), 1 H.L.Cas. 687, H.L.; 42 Digest 950, *235*.

South Staffordshire Tramways Co. v. *Sickness and Accident Assurance Association*, [1891] 1 Q.B. 402; 60 L.J.Q.B. 47; 63 L.T. 807; 55 J.P. 168; 7 T.L.R. 14, D.C.; on appeal, [1891] 1 Q.B. at p. 406, C.A.; 42 Digest 955, *278*.

Steele v. *Mart* (1825), 4 B. & C. 272; 6 Dow. & Ry.K.B. 392; 107 E.R. 1060; 17 Digest (Repl.) 241, *436*.

Action.

The plaintiff claimed possession of certain premises which had been let to the defendants for a term of three years from Mar. 25, 1920, at a yearly rent of £230, payable quarterly. The premises in question were three rooms on the third floor of No. 15, New Broad Street, in the City of London. On Aug. 4, 1914, these premises were let in one letting to a firm of merchants on a yearly tenancy at £60 per annum, the landlord paying rates and taxes. That tenancy terminated at Christmas, 1914. The premises were re-let twice afterwards at very slightly increased rentals, and the rent current in the early part of 1920 and up to Mar. 15, 1920, was £75 a year. By an agreement of tenancy dated Mar. 12, 1920, the premises were let by the plaintiff to the defendants at a rent of £230 per annum, the landlord paying the rates and taxes. The agreement provided that the "lessor agrees to let and the lessees agree to take all those rooms" therein described

> "from Mar. 25, 1920, for the term of three years thence next ensuing and afterwards as a yearly tenancy unless six calendar months' previous notice in writing shall be given by either party to quit at the end of the said term or on Mar. 25 in any subsequent year . . . at the yearly rent of £230 payable by four equal quarterly payments on the four usual quarter days in each year, the first of such payments to be on June 24 next and the last of such quarterly payments or such proportionate part thereof as is hereinafter mentioned to become due and be paid on the quarter day immediately preceding the determination of the tenancy hereby created."

There was a proviso entitling the plaintiff to re-enter in case the rent of £230 or any part thereof should be in arrear for twenty-one days. It was admitted that the keys were handed to the defendants on Mar. 25, 1920, and that they went into possession of the premises on Mar. 26, 1920. The defendants, in answer to a request for payment of the quarter's rent which fell due on June 24, 1920, claimed that, as the rent of the premises had been increased since Mar. 25, 1920, to an amount exceeding that permitted by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (which was passed on July 2, 1920), over the standard rent, the amount of such excess was irrecoverable under s. 1 of that Act. Correspondence ensued between the parties' solicitors, in the course of which it was agreed: That on Aug. 4, 1914, the rent of the premises was £60 per annum, the landlord paying the rates; that the proportion of the rates then payable by the landlord in respect of the premises was £11 10s. 7d.; that the rateable assessment for collection was £33 6s. 8d. in 1914 and in 1920; that the rates in 1914 were at the rate of 3s. 5½d. and in 1920 4s. 10d. in the £; that if the defendants were successful in the issue raised in the action, the yearly rent recoverable under the statute would be £81 11s. 8d. The plaintiff claimed possession for non-payment of two quarters' rent at the agreed rate, and for two quarters' rent. The defendants paid £40 15s. 10d. into court in respect of two quarters' rent.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1:

> "Subject to the provisions of this Act, where the rent of any dwelling-house to which this Act applies . . . has been, since the 25th day of March, 1920, or is hereafter, increased, then, if the increased rent . . . exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant. . . ."

Croom-Johnson and *F. S. A. Baker* for the plaintiff.
Wallington for the defendants.

Cur. adv. vult.

Dec. 20. **ACTON, J.**—By agreement, the only issue in this case is whether the rent agreed to be paid by the defendants to the plaintiff is such that the payment of it can be enforced in full during the continuance and operation of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The question which arises

turns on s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The agreement of tenancy in this case was dated and executed on Mar. 12, 1920. [His Lordship referred to the facts and the agreement, and continued:] There is no dispute in this case that the rent has been increased. The dispute is whether, within s. 1 of the Act, it is "since Mar. 25, 1920," that the rent has been so increased. There are three dates, any of which on first impression might be suggested as the date at which the rent "has been increased." Those dates are (i) the date of the agreement of tenancy under which the rent was in future to be paid; (ii) the date at which the increased rent "begins to run"—that is, the date at which the agreement of tenancy provides that the rent shall begin to accrue; and (iii) the date at which the agreement provides that the rent shall first become payable. No date other than one of these three was suggested by anyone as a possible date. The first of these dates—namely, Mar. 12, 1920, the date of the agreement of tenancy—is eliminated already by the decision in *Goldsmith* v. *Orr* (1). It was common ground in this case that this is so. Of the two remaining dates, it was not necessary to decide, and it was not in terms decided, in *Goldsmith* v. *Orr* (1), which is the material date. It does, however, appear that, in the Divisional Court, both Bailhache, J., and Sankey, J., regarded the date at which the increased rent began to accrue as the material date, and the same view seems to be indicated in the judgment of Bankes, L.J., in the Court of Appeal. There are passages in the judgment of Scrutton, L.J., which it was said tended to show that, in his opinion, the material date was the date when the increased rent began to accrue. My opinion, and it is not, I think, inconsistent with what authority there is, is that this latter date is the material date.

There remains the question, what that date in the present case is. It was contended for the plaintiff that it was Mar. 25, 1920, and that, therefore, the rent had not "since Mar. 25, 1920," been increased. It was contended for the defendants that it was Mar. 26, 1920, and that, therefore, the rent had been increased since Mar. 25, 1920. A number of authorities were cited and discussed. I do not think that any useful purpose would be served by my reviewing them at length. It is enough to say that on those authorities, and especially *Ackland* v. *Lutley* (2) and *Sidebotham* v. *Holland* (3), as explained by Peterson, J., in *Meggeson* v. *Groves* (4), I am of opinion that Mar. 26, 1920, is the date at which it was, by the agreement of Mar. 12, 1920, agreed that the increased rent should begin to accrue.

I think it cannot be said that the result of this is to attach a too technical meaning to the word "since," as used in the statute, for I think that the lay or popular view would be to the same effect. In my opinion, the ordinary meaning of the word used in the agreement of Mar. 12, 1920, would be that the quarter day on which the rent of a bygone quarter falls due and becomes payable is to be regarded as included in that quarter and not in the quarter thereafter next ensuing, so that June 24, 1920, would be included in the first quarter of the defendants' tenancy and Mar. 25, 1920, by consequence, excluded.

In my opinion, therefore, the rent has, within the meaning of the statute, been "increased since Mar. 25, 1920," and as such increased rent exceeds, by more than the amount permitted under the statute, the standard rent, the amount of the excess is, notwithstanding the agreement of Mar. 12, 1920, irrecoverable from the defendants. Of course, if the third of the three possible dates mentioned instead of the second were to be taken as the material date, a fortiori the same conclusion would be reached.

There will, accordingly, be a decree of forfeiture as asked by the plaintiff, but relief will be granted to the defendants on payment of the agreed sum of £40 15s. 10d.

Judgment accordingly.

Solicitors: *Wilkinson, Bowen & Jackson*; *John T. Lewis & Woods.*

[*Reported by* Fitzroy Cowper, Esq., *Barrister-at-Law.*]

RALLI BROS. *v.* COMPAÑIA NAVIERA SOTA Y AZNAR

[Court of Appeal (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ), February 26, 27, March 2, 3, 26, 1920]

[Reported [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 36 T.L.R. 456; 64 Sol. Jo. 462; 15 Asp.M.L.C. 33; 25 Com. Cas. 227]

Contract—Illegality—Breach of international comity—Commission of offence in foreign country—Charterparty—Provision for rate of freight payable in foreign country—Rate illegal in that country—Liability of charterer.

Where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. If the act becomes illegal the party who has agreed to do it is discharged from his obligation.

Accordingly, where under a charterparty dated July 2, 1918, a ship was chartered to load a cargo of jute at Calcutta and carry it to Barcelona, it being provided that freight should be payable at the rate of £50 a ton, and on Sept. 14, before delivery of the cargo, the Spanish government fixed a maximum rate of freight for the transport of jute from India to Spain which was less than the charter rate,

Held: the charterers were only liable to pay the charter rate.

Notes. Considered: *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*, [1925] All E.R.Rep. 530. Applied: *Kursell* v. *Timber Operators and Contractors* (1926), 95 L.J.K.B. 569. Considered: *Foster* v. *Driscoll*, *Lindsay* v. *Attfield*, *Lindsay* v. *Driscoll*, [1928] All E.R.Rep. 130; *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1933] All E.R.Rep. 82; *International Trustee for Protection of Bondholders Aktiengesellschaft* v. *R.* (1935), 154 L.T. 56; *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Atk. and Hungarian General Creditbank*, [1939] 3 All E.R. 38; *Vita Food Products Inc.* v. *Unus Shipping Co.*, [1939] 1 All E.R. 513; *Re Delhi Electric Supply and Traction Co.*, [1953] 2 All E.R. 1452. Approved: *Regazzoni* v. *K. C. Sethia (1944), Ltd.*, [1957] 3 All E.R. 286. Referred to: *Equitable and French Trust Corpn.* v. *New Brunswick Rail. Co.*, [1937] 4 All E.R. 516; *Kahler* v. *Midland Bank, Ltd.*, [1949] 2 All E.R. 621; *Zivnostenska Banka National Corpn.* v. *Frankman*, [1950] A.C. 57; *Government of India* v. *Taylor*, [1955] 1 All E.R. 292; *Compania Crystal de Vapores of Panama* v. *Herman and Mohatta (India), Ltd.*, [1958] 2 All E.R. 508.

As to the effect of foreign law on the legality of contracts and the non-performance of a contract through impossibility caused by statute, see 7 Halsbury's Laws (3rd Edn.) 78–81 and ibid., vol. 8, pp. 184, 185; for cases see 11 Digest (Repl.) 430 et seq., and 12 Digest (Repl.) 414 et seq. As to freight generally, see 30 Halsbury's Laws (2nd Edn.) 564 et seq.; and for cases see 41 Digest 620 et seq.

Cases referred to:

(1) *Ford* v. *Cotesworth* (1869), L.R. 4 Q.B. 127; 9 B. & S. 559; 38 L.J.Q.B. 52; affirmed (1870), L.R. 5 Q.B. 544; 23 L.T. 165; 18 W.R. 1169; 3 Mar.L.C. 468, Ex. Ch.; 12 Digest (Repl.) 439, *3348*.

(2) *Cunningham* v. *Dunn* (1878), 3 C.P.D. 443; 48 L.J.Q.B. 62; 38 L.T. 631; 3 Asp.M.L.C. 595, C.A.; 12 Digest (Repl.) 440, *3349*.

(3) *Barker* v. *Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 12 Digest (Repl.) 439, *3347*.

(4) *Sjoerds* v. *Luscombe* (1812), 16 East, 201; 104 E.R. 1065; 12 Digest (Repl.) 439, *3346*.

(5) *Paradine* v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, *3236*.

(6) *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589; 53 L.J.Q.B. 156; 50 L.T. 194; 32 W.R. 761, C.A.; 12 Digest (Repl.) 444, *3370*.

(7) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; 60 L.J.Q.B. 295; 63 L.T. 739; sub nom. *Re Brazilian Submarine Telegraph Co., Ltd.*, 7 T.L.R. 1, C.A.; 1 Digest 296, *246*.

(8) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, *3410*.

(9) *Atkinson* v. *Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, *2955*.

(10) *Blackburn Bobbin Co.* v. *T. W. Allen & Sons*, [1918] 2 K.B. 467; 87 L.J.K.B. 1085; 119 L.T. 215; 34 T.L.R. 508, C.A.; 12 Digest (Repl.) 452, *3400*.

(11) *Blight* v. *Page* (1801), 3 Bos. & P. 295, n.; 127 E.R. 163, N.P.; 41 Digest 454, *2849*.

(12) *Hick* v. *Raymond and Reid*, [1893] A.C. 22; 62 L.J.Q.B. 98; 68 L.T. 175; 41 W.R. 384; 37 Sol. Jo. 145; 7 Asp.M.L.C. 233; 1 R. 125; sub nom. *Hicks* v. *Rodocanachi*, 9 T.L.R. 141, H.L.; 12 Digest (Repl.) 344, *2672*.

(13) *Hulthen* v. *Steward & Co.*, [1903] A.C. 389; 72 L.J.K.B. 917; 88 L.T. 702; 19 T.L.R. 513; 9 Asp.M.L.C. 403; 8 Com. Cas. 297, H.L.; 41 Digest 547, *3746*.

(14) *Braemount Steamship Co., Ltd.* v. *Andrew Weir & Co.* (1910), 102 L.T. 73; 26 T.L.R. 248; 11 Asp.M.L.C. 345; 15 Com. Cas. 101; 41 Digest 408, *2539*.

Appeal from an order of Bailhache, J., on an award of an umpire stated in the form of a Special Case.

Differences having arisen between the owners and the charterers of the steamship *Eretza Mendi* (i) as to the liability of the latter for payment of freight, and (ii) as to the amount of freight payable by the charterers if liable, the matter was referred to arbitration. The facts as found by the umpire were as follows. The charterers, Ralli Bros., were a firm of merchants having their head office in London. The shipowners, Compañia Naviera Sota y Aznar, were a Spanish company having its head office at Bilbao, Spain, who were the owners of the steamship *Eretza Mendi*, which sailed under the Spanish flag. The owners acted in the charterparty under which the arbitration arose by their agents, Sota and Aznar, a firm of shipbrokers in London. Godo & Co. were a Spanish company having their place of business in Barcelona. On July 2, 1918, Ralli Bros. sold to Godo & Co. a cargo of jute for shipment per *Eretza Mendi*, Calcutta to Barcelona, half freight payable by Ralli Bros. on steamer sailing from Calcutta and the other half payable by Godo & Co. at Barcelona. The price agreed for the cargo included the freight thereon. The umpire found that Godo & Co. thereby were given credit for part of the freight and the amount thereof they were to pay to the owners was part of the purchase price of the goods sold, and they were to make the payment as agents for the charterers, and the court accepted the contention of the shipowners that the charterers, in spite of this provision, remained liable for the freight. On July 3, 1918, Ralli Bros. chartered the steamship *Eretza Mendi* for a full cargo of jute from Calcutta to Barcelona, Valencia, Alicante, Cadiz, Pasajes, or Bilbao, as ordered on signing final bills of lading. On Sept. 23, 1918, the *Eretza Mendi* arrived at Calcutta to load under the charter. On or about Oct. 12, 1918, the vessel, having completed the loading, sailed for Barcelona. On Oct. 22 the half freight, viz. £146,690, due on telegraphic advice of steamer sailing from Calcutta, was paid. On Dec. 28 the ship arrived at Barcelona to discharge. On Jan. 2, 1919, Godo & Co. notified F. Withy & Co., Barcelona, the steamer's agents, that, if the freight as per bills of lading exceeded the official tariff rate, they reserved the right to claim the payment of the difference which the final account on the said head might show in their favour. On Jan. 4 Godo & Co. wrote to F. Withy & Co. that they were convinced by competent persons that freight must be paid at the official rate of pesetas 875, per ton of 1,000 kilos. On Jan. 8, 1919, the captain wrote to Godo & Co. demanding from them the payment of freight at £50 sterling per ton, and, having no reply, he made a demand upon Godo & Co. on the same day through a notary, informing them that he would apply for the deposit of the cargo as

A security for the freight owing. On Jan. 10, 1919, Godo & Co. wrote the captain acknowledging his notarial demand, and continued as follows:

"There having been made on the 14th Sept. last a Royal Order of the Ministry of Supplies, by which by virtue of the powers given to the government in the law called the Ley de Subsistencias of the 11th Nov., 1916, there was fixed as the maximum freight for the transport of jute from India to Spain B 875 pesetas per ton, it is evident that all Spanish shipowners must respect and comply with that sovereign provision, which, having been inspired by consideration of the general interest and public policy, must prevail over any private agreements or contracts. By virtue thereof, as we stated in our said letter of the 4th inst., the settlement of the freight must take place in the following manner."

C Godo & Co. then reproduced in this letter their freight statement of Jan. 4, 1919, and refused to pay freight as demanded by the captain. Proceedings in the Spanish courts followed and Godo & Co. made a payment into court.

In England resort was had to arbitration, the owners, by their points of claim, claimed £96,690 as balance of freight, together with interest at 5 per cent. from Dec. 25, 1918, to the date of payment. At the hearing, however, they altered D their claim to one for damages for breach of the charterparty by non-payment of, or refusal to pay, the balance of the freight. The claim was so treated in the argument. They contended (a) that the contract was an English contract, to be decided by English law; (b) that the charterers were liable for the freight under the terms of the charterparty; (c) that deposit in court of Spain was not payment of the freight under the charter; (d) that while payment under the charter was E required in Spain at current rates of exchange on London, they were entitled to an award of damages calculated at the rate of exchange at the date of the breach, such damages to be payable in London in sterling The charterers contended (a) that the freight was not due, as the cargo was not fully discharged; (b) that the arbitration was premature, as the matter was still pending in the Spanish courts; (c) that they were only in the position of guarantors, the primary liability F being on the receivers of the cargo; (d) that any question as to the freight and the payment must be governed by Spanish law; (e) that under the charterparty the balance of the freight had to be paid in Spanish currency at the port of discharge, and that this was prohibited by Spanish law; (f) that payment was prevented by restraint of princes; (g) that payment had been made by the deposit in court in Spain of the amount claimed. In the Special Case the umpire stated:

G "1. Subject to the opinion of the court, I am of opinion that the charterers are liable for the freight reserved and that the payment into court did not discharge them from that liability. That they committed a breach of that obligation in refusing to pay the freight as demanded by the owners, and I assess the damages in respect thereof in the sum of £35,074 14s., and I direct H that the charterers pay that sum in sterling to the owners in London with interest thereon in the meantime at 5 per cent. per annum from the day of the date of this award to the day of payment inclusive, . . . together with the costs of the award and the owner's costs of the reference. 2. If the court is of opinion that the charterers are liable for the freight reserved, but that the liability was dischargd by the payment into court in Spain, then I find that I the charterers committed a breach of their obligation, and award as damages the sum of £137 0s. 8d., being the sum of £41 1s. 11d. interest on £50,000 from Dec. 28, 1918, to Jan. 3, 1919, and £95 18s. 9d., interest on £23,345 from Dec. 28, 1918, to Jan. 27, 1919, at 5 per cent. per annum, and I direct that the charterers pay this sum of £137 0s. 8d. forthwith in sterling to the owners in London, with interest at 5 per cent. per annum from the date of this award till the day of payment inclusive, and also the costs of the award. 3. If the court is of opinion that the charterers are not liable for the freight reserved, but are liable for freight at the rate of 875 pesetas a ton of 1,000 kilos, and that

such liability was not discharged by the payment into court in Spain, then I find and award that the charterers committed a breach of their obligation when they (or the receivers on their behalf) alleged that the total remaining liability for freight in respect of 29,338 bales of jute was 689 pesetas, and repudiated their liability to pay more, whereas the total liability for freight on such amount of cargo calculated at the rates of exchange ascertained on the various dates of payment was 129,375.50 pesetas, and I award as damages in respect of such breach the sum of £5, and I direct that the said sum of £5 be paid forthwith by the charterers to the owners in sterling in London, with interest at 5 per cent. per annum . . . and costs of this award. . . . 4. If the court shall be of opinion as in the last alternative mentioned, but that the charterers' liability was discharged by the payment into court in Spain, then I find and award that the charterers have not committed a breach of their obligation, and I direct the owners to pay the costs of this award, and the costs of the charterers of this reference to be taxed. . . . 5. If the court is of opinion that the charterers are not liable for the freight reserved under the charterparty, nor for freight at 875 pesetas a ton of 1,000 kilos, then I find and award that the charterers have not committed a breach of their obligation and I direct that the owners pay the costs of this award and the costs of the charterers to be taxed."

The umpire based these alternative awards on the fact that 23,064 bales had been delivered, and they were not to affect the charterers' liability (if any) to pay freight on the balance of the cargo undischarged on April 19, 1919.

On the hearing of the Special Case BAILHACHE, J., decided in favour of the charterers, and the shipowners appealed.

R. A. Wright, K.C., and *Claughton Scott* for the shipowners.

Neilson, K.C., and *Clement Davies* for the charterers.

Cur. adv. vult.

Mar. 26. The following judgments were read.

LORD STERNDALE, M.R.—This appeal from a judgment of BAILHACHE, J., on an award stated by a commercial umpire, raises a difficult question as to the rights of the parties to a charterparty when the performance of the charter, or part of it, is prevented by the law of the country in which the performance was to take place. The particular question in the present case is as to the amount of freight payable by the charterers to the shipowners. The charter was one for the carriage of a cargo of jute from Calcutta to Spain. The clauses as to freight were as follows:

"Clause 1. That the steamer shall with all possible speed proceed under steam to Calcutta . . . and shall there load in the customary manner at any safe place, always afloat, as ordered by charterers or their agents a full and complete cargo of jute, which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle . . . and being so loaded shall therewith proceed with all possible speed under steam, via the Cape of Good Hope to Barcelona, Valencia, Alicante, Cadiz, Pasajes, or Bilbao as ordered on signing final bills of lading, or so near thereto as she may safely get, and there deliver the same, always afloat, on being paid freight at the rate of £50 per ton of five bales of jute."

By cl. 18:

"Cash at the port of loading, for the expenses of which charterers are to be in no way responsible, not exceeding £2,500, to be advanced the master if required by him at the current rate of exchange for three months' documentary bills. Said advance to be a first charge against the total freight earned, and the master to so endorse on the bill of lading the amount advanced, which is to be deducted from freight due under cl. 30."

A By cl. 25:

"The freight, except as provided for under cl. 30, to be paid at port of discharge on the unloading and right delivery of the cargo by cash or approved bills (at charterers' option) at the current rate of exchange for bankers' short bills in London."

B By cl. 30:

"On receipt of telegraphic advice of steamer's sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash, without discount, one-half of the total freight earned less any disbursements under cl. 17, such payment to be a first charge against the total freight earned and the master to so endorse on the bill of lading the amount advanced, which is to be deducted C from freight due on the vessel's arrival at discharging port. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one-half on the arrival of the vessel and the remainder concurrent with discharge."

There was also an exception clause, containing, among other exceptions, that of D restraint of princes. There was no cesser clause; although cl. 30 provided that the balance of freight was to be collected from the receivers of the cargo, the charterers still remained liable in case of nonpayment by the receivers. The charter was on the charterers' usual form, and was made in London between the charterers and a firm of Sota and Aznar by telegraphic authority, and as agents for the owners, a Spanish company called the Compañia Naviera Sota y Aznar. I have no doubt E that it was an English charter and governed by English law.

The umpire has found, as a fact, that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freights payable on jute imported into Spain at 875 pesetas per ton. It appears from the documents produced to us that persons infringing this decree made themselves liable to penalties, the result being, in my opinion, that it became illegal in Spain to pay or receive F a higher freight than the maximum fixed by the decree. Messrs. Ralli had sold the cargo to a firm of Godo & Co. at a price not stated as "c.i.f.," but the invoice shows that the second half of the freight was to be paid as part of the contract price per ton. We have, however, nothing to do with the rights existing between the charterers and Godo & Co. When the vessel arrived Godo & Co. tendered freight to the amount which they considered correct, at the rate of 875 pesetas a ton, but the shipowners refused to deliver the cargo except upon payment of the charter G rate of £50 per ton. Certain litigation, which it is not necessary to discuss, took place in Spain, and eventually the rights of the shipowners and charterers upon the contract have to be decided upon the Case stated by the umpire.

The most important question is as to the obligation imposed upon the charterers in respect of the payment of freight. It is contended by the shipowners that it is H an absolute obligation to pay £50 per ton, and that the subsequent clauses as to payment in Spain are only instructions not altering that obligation. They, therefore, contend that the performance of that part of the contract may be performed in England, and that the charterers are, therefore, liable. I am not sure that if this were the obligation the contention would be right. The shipowners are a Spanish company, and a debtor must seek his creditor and pay him in his own I country. Sota and Aznar, the firm in London, are not the creditors, and have so signed the charter as to prevent their having rights or liabilities under it. But I do not think that this contention correctly states the charterers' obligation. I think the clauses as to place of payment constitute part of the obligation to pay and are not merely instructions. The contract and obligation, therefore, are to pay on delivery in Spain in cash, that is, Spanish currency, or approved bills at the charterers' option. The simultaneous acts of delivery and payment are both to be performed in Spain, and the shipowners are a Spanish company. As I have shown, it was illegal in Spain to pay or receive more freight for imported jute than

875 pesetas a ton, and, therefore, the performance of the contract was illegal by the law of the place of its performance.

In my opinion the law is correctly stated by PROFESSOR DICEY in his work on the CONFLICT OF LAWS (2nd Edn.) at p. 553, where he says:

"A contract . . . is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed."

I think this is in accordance with *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn* (2). Those cases have been criticised, notably in CARVER ON CARRIAGE OF GOODS BY SEA, s. 129, but they are still authorities, and support the view which I have expressed. It was argued by the appellants that they are inconsistent with *Barker* v. *Hodgson* (3) and *Sjoerds* v. *Luscombe* (4), and that these last cases are the authorities applicable to the present case. When these cases were decided the doctrine that a person who contracted absolutely to perform a contract must do so whatever the difficulties, as laid down in *Paradine* v. *Jane* (5), had not been qualified as has been the fact by later authorities. They may be reconciled with the later cases I have cited in the manner suggested in SCRUTTON ON CHARTER-PARTIES (9th Edn.) at p. 327. But, if there be a difference between them and *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn* (2), I prefer to follow the later authorities. The shipowners also relied upon *Jacobs* v. *Crédit Lyonnais* (6), and the headnote (12 Q.B.D. 589) at first sight seems to bear out their contention. I do not, however, think the headnote is correct. The procuring or shipment of the cargo of esparto grass was not illegal. But, by reason of insurrection, consequent government prohibitions had become difficult and perhaps impossible. There was no clause in the contract applicable to such a state of things. But it would have amounted in French law to force majeure, and it was attempted to introduce that exception of force majeure into the contract because it had to be performed in France. That is not at all the question which is raised here. That case is examined and criticised by PROFESSOR DICEY in his CONFLICT OF LAWS (2nd Edn.), p. 554. I think on principle and on authority that the charterers in the present case are not bound to perform that part of the contract, that is, the payment of freight above the maximum allowed by Spanish law, which has become illegal by the law of the place of its performance. We have not before us, and I do not decide any question as to what the result of this decision may be upon the rights of the parties as to delivery and disposal of the cargo. I do not think it necessary to express any opinion whether the exception of restraint of princes applies to the obligations of the charterers as well as to those of the shipowners. In my opinion, the decision of BAILHACHE, J., was right, and the appeal must be dismissed with costs.

WARRINGTON, L.J.—This is an appeal from an order of BAILHACHE, J., upon an award stated in the form of a Special Case by a commercial umpire in an arbitration between shipowners and charterers.

The question in the arbitration was whether the owners could require the charterers to pay the full amount of the unpaid balance of the chartered freight or only such sum, if any, as together with the sums already paid would make up the maximum freight by Spanish law in force at the time the freight was payable allowed to be paid or received in respect of a cargo of jute consigned as the cargo in the present case was to Spanish consignees at a Spanish port. BAILHACHE, J., has on this question adopted the contention of the charterers that they cannot be called upon to pay any larger amount for freight than that allowed by the Spanish law. The owners appeal. They contend that the contract is an English contract to be construed and to have effect according to English law; that according to its true construction it contains an absolute obligation on the part of the charterers to pay the freight fixed by the contract; and that, although it contemplates the payment by the receivers of the cargo in Spain, and it may be unlawful under Spanish law for them to pay it, this does not affect the obligation of the charterers. The

charterers, on the other hand, contend that though the contract as a whole is an English one, the performance of it in the material respect was to take place in Spain, that the only obligation as to the balance of the freight was that it should be paid in Spain by the Spanish receivers of the cargo, that such an obligation ought to be held to be subject to an implied condition that such payment should not be illegal by Spanish law, and that, if it is, they cannot be required to pay.

The first question, I think, is what as regards payment of the freight is the true construction of the contract. The contract is contained in a charterparty dated July 3, 1918, and made between a Spanish company, owners of the steamship *Eritza Mendi*, and Messrs. Ralli Bros., an English firm carrying on business in London. It is partly written and partly printed, the form used being one of Messrs. Ralli's ordinary forms with certain special variations. It contains an arbitration clause providing for an arbitration in London, and for making the submission a rule of the High Court of Justice in England. It is clear, I think, that the parties are right in treating the contract as a whole as an English contract. The contract provides that the steamer, then at sea, is to proceed to Calcutta, there load a cargo of jute, which the charterers bind themselves to ship, and, being so loaded, is to proceed to Barcelona or another of certain named ports in Spain and there deliver the same on being paid freight at a specified rate per ton. There is no cesser clause as regards liability for freight. There are two clauses dealing with the payment of freight—cll. 25 and 30. Clause 25 is as follows:

> "The freight, except as provided for under cl. 30, to be paid at the port of discharge on the unloading and right delivery of the cargo by cash or approved bills at charterers' option, at the current rate of exchange for bankers' short bills on London."

By cl. 30:

> "On receipt of telegraphic advice of steamer's sailing from Calcutta, charterers undertake to pay in London to the owners or their agents in cash without discount one-half of the total freight carried, less any disbursements under cl. 17. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one-half on the arrival of the vessel and the remainder concurrent with discharge."

The true effect of these provisions as regards payment of freight is, I think, this. There is no unqualified obligation on the part of the charterers to pay the freight; the introductory part of the contract contains no express obligation. "On being paid freight," which qualifies the owners' obligation to discharge the cargo, means, I think, "on being paid in accordance with the provisions hereinafter contained." The express obligation on the charterers is found in cll. 25 and 30. We are not concerned with the first half. This was duly paid. The second half is to be paid by the receivers at the port of discharge in Spain and in Spanish money. The charterers in effect contract for the payment of the balance of the freight by Spaniards in Spain. I will consider the position of the charterers in the event of a failure on the part of the receivers, justified by Spanish law, to make the payment bargained for, after I have stated the remaining material facts. The charter was entered into by Ralli Bros. for the purposes of a contract for sale of jute made by them with Godo Bros., of Barcelona. The ship arrived at Barcelona on Dec. 28, 1918, and was ready then to discharge her cargo. Questions then arose as to the amount of freight to be paid, Messrs. Godo insisting that they could not be called upon to pay more than the legal rate fixed by the Spanish law. There was then some litigation in the Spanish courts into the particulars of which I do not propose to enter, and this arbitration was commenced in London. The umpire finds that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freight on jute at 875 pesetas per ton of 1,000 kilogrammes. It appears by the translation of one of the documents annexed to the award that infractions of this decree rendered the infringer liable to legal penalties. I think,

therefore, that it is sufficiently made out that it would be illegal for a person subject to the law of Spain either to pay or to receive more than the maximum freight, and such payment or receipt would render him liable to penalties.

There remains to be considered the legal position arising from the construction which I think ought to be placed on the contract and from the facts. PROFESSOR DICEY (CONFLICT OF LAWS (2nd Edn.), p. 553) makes the following statement accepted by both parties in the present case as an accurate statement of the law:

> "A contract (whether lawful by its proper law or not) is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed."

At p. 583 he states:

> "When the contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract especially as to the mode of performance may be presumed to be the law of the country where the performance is to take place."

This last statement is in substance identical with a passage in the judgment of LORD ESHER in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (7) ([1891] 1 Q.B. at p. 83). In the present case I am of opinion that the contract is one the performance of which, so far as the payment of the second half of the freight is concerned, is to take place in Spain. It is true that the obligation with which we are dealing is that of the charterers. But what they promise is that payment shall be made by Spaniards in Spain. And it is only in case of default by those who are to make the payment that their own liability arises.

On the facts the default of these persons is justified by the law of Spain where the performance of such a contract is unlawful and the contract would be invalid. Does this position affect the liability of the English charterers? I think it does. It must be remembered that not only is it illegal in Spain for the Spanish receivers to pay more than the legal rate of freight, but it is unlawful for the owners who are also Spaniards to receive it. I think it must be held that it was an implied condition of the obligations of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country. Had the performance of the contract, so far as it was to be performed in England, become illegal by English law, performance would, in my opinion, have been excused, and on the ground that the contract was subject to an implied condition that its performance should not be illegal: see *Metropolitan Water Board* v. *Dick, Kerr & Co.* (8), and many other cases to which it is unnecessary to refer. That a similar consequence will result from a joint inability of performance arising from illegality by foreign law where that law governs the performance appears, I think, from the decision in *Cunningham* v. *Dunn* (2).

But it is said that there are authorities which lay down the proposition that if a man contracts absolutely to perform a certain act, he is not excused by the fact that such an act is illegal by the law of the place where it is to be performed. A type of such cases is *Barker* v. *Hodgson* (3). It was conceded by LORD ELLENBOROUGH in that case that had performance been rendered unlawful by the government in this country, both parties would have been excused. But he held that the same principle did not apply where the illegality arose from the law of a foreign country. I am not sure that this and similar cases would have been decided in the same way at the present time owing to the recent development of the law in reference to implied conditions. But, however this may be, it does not, in my opinion, govern the present case, in which, according to my view of the construction of the contract, there is no absolute obligation on the part of the charterers that they will themselves pay but only that payment shall be made in a particular way, namely, by foreigners at a foreign port. It was contended that *Jacobs* v. *Crédit Lyonnais* (6) was an authority contrary to the view that I have expressed. I think the criticism of PROFESSOR DICEY on the suggestion contained in the headnote to

A that case (12 Q.B.D. 589) is well founded: see CONFLICT OF LAWS (2nd Edn.), p. 554. The performance of the contract itself was not illegal by the foreign law. It was sought to be excused by saying that the collection of the subject-matter was prohibited, that such prohibition would by French law amount to force majeure, and that force majeure would by that law be good defence. It was this contention which was rejected by the court. On the whole, I come to the conclusion that in B the present case the owners could not in this country maintain an action for a larger amount of freight than that allowed by Spanish law, and that the judgment of BAILHACHE, J., must be affirmed, the point of law raised by the Special Case being there determined in favour of the charterers. An argument was founded on the exception of restraint of princes. It is unnecessary to decide whether this exception was intended to be mutual, and I prefer to express no opinion on the C point. I take it that this judgment decides nothing except that the owners cannot recover more than the freight fixed by Spanish law. How this may affect the legal relations of the parties in other respects is not before us, and I express no opinion about it. I think the appeal fails, and must be dismissed.

SCRUTTON, L.J.—This is an appeal from the judgment of BAILHACHE, J., on D a Special Case stated by a commercial umpire, and raises a question of general importance as to the effect on a contract to be performed in a foreign country of illegality by the law of the place in which it was to be performed. The question arises as to the freight payable by English charterers to Spanish shipowners for the transit of jute from Calcutta to Spain on a Spanish ship. The umpire finds that in September, 1918, there came into force in Spain a decree having the force E of law fixing the maximum freight on jute (imported into Spain) at 875 pesetas per ton. He adds certain exhibits from which it appears that this decree was part of a system for keeping down the price of goods essential for national welfare by, among other means, fixing the freight on goods coming to Spain. The exhibits, together with the full text of a decree of Nov. 11, 1916, with which we were furnished, show that penal consequences follow infractions of these laws.

F [HIS LORDSHIP stated the facts and continued:] Complicated proceedings followed in the Spanish courts. In April, 1919, 23,084 bales had been delivered by the ship and 6,274 bales were still on board. But I understand these proceedings were not brought to ascertain what was the result if freight was to be paid at 875 pesetas per ton, but to test the claim by the Spanish shipowners that they were entitled to be paid by the English charterers freight at the rate of £50 per ton, G without any regard to Spanish law. I accept the contention of the shipowners that the charterers remain liable for the freight, in spite of the provision that half of it is to be paid by the receivers. But I think they remain liable to pay it in Spanish currency at the Spanish port of discharge to a Spanish company resident in Spain; and further to pay freight in Spain to a Spaniard for goods to be discharged in Spain at a rate in excess of the maximum freight fixed by Spanish law. H What, then, is the effect on the contract of illegality by the law of the place where it is to be performed, such law not being British law?

In my opinion, the law is correctly stated by PROFESSOR DICEY in his CONFLICT OF LAWS (2nd Edn.) at p. 553, where he says:

"A contract . . . is in general invalid in so far as the performance of it is I unlawful by the law of the country where the contract is to be performed."

I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English courts. The early authorities on this point require re-consideration, in view of the obligations of international comity as now understood. The argument addressed to us was that illegality by foreign law was only impossibility in fact, which the parties have provided against by their contract,

and for which they must be liable, if they had not expressly relieved themselves from liability. This is the old doctrine of *Paradine* v. *Jane* (5): A

> "When the party by his own contract creates a duty upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

It was emphasised by LORD ELLENBOROUGH, C.J., in *Atkinson* v. *Ritchie* (9) when he said (10 East, at p. 533): B

> "No exception (of a private nature at least) which is not contained in the contract itself can be engrafted upon it by implication, as an excuse for its non-performance."

LORD BOWEN as late as 1884 in *Jacobs* v. *Crédit Lyonnais* (6) cited LORD ELLENBOROUGH's approval of *Paradine* v. *Jane* (5) with approval. But the numerous cases of which *Metropolitan Water Board* v. *Dick, Kerr & Co.* (8) is a recent example, most of which are cited in MCCARDIE, J.'s exhaustive judgment in *Blackburn Bobbin Co.* v. *Allen & Sons* (10), have made a serious breach in the ancient proposition. It is now quite common for exceptions, or exemptions, from liability to be grafted by implication on contracts, if the parties by necessary implication must have treated the continual existence of a specified state of things as essential to liability on the express terms of the contract. C D

If I am asked whether the true intent of the parties is that one has undertaken to do an act though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country, or whether their true intent was that the doing of that act was subject to the implied condition that it should be legal for him to do the act in the place where it had to be done, I have no hesitation in choosing the second alternative. "I will do it provided I can legally do so" seems to me infinitely preferable to, and more likely than, "I will do it, though it is illegal." E

Great reliance was placed by the appellants on *Jacobs* v. *Crédit Lyonnais* (6). The headnote in that case (12 Q.B.D. 589) speaks of "the prohibition by the constituted authorities of the export of esparto from Algeria." I cannot find any authority for this in the case, which only speaks of difficulty from insurrection and government commands in collecting and transporting cargo to the port of loading. No express exception covered this, and the attempt in the case was to introduce force majeure, which would be a defence by the French law into the English contract. If it had been illegal to export esparto from Algeria the question in this case would have arisen. In *Blight* v. *Page* (11) a ship was chartered with fixed lay days to proceed to Libau and load barley. On her arrival there the Russian government had prohibited the export of barley. LORD KENYON held the charterer liable for freight, the foreign illegality being no defence to an action for damages. This was followed in *Barker* v. *Hodgson* (3) where a charterer who had undertaken to load at Gibraltar in fixed days and was prevented from doing so by prohibition to load due to plague was held liable on the same principle "if he was unable to do the thing is he not answerable on his covenant?" In sharp contrast with those fixed days cases is the decision in *Ford* v. *Cotesworth* (1). That was a charter to discharge at Callao, no fixed time being mentioned, and the law implying a reasonable time. Discharge was prevented for a considerable period by prohibition of landing due to the fear of the arrival of the Spanish fleet. After a long time discharge was finished. When that case was decided, the interpretation of reasonable time, as a reasonable time in the existing circumstances, and not the normal time of discharge in normal circumstances had not been explained as it subsequently was by the House of Lords in *Hick* v. *Raymond and Reid* (12) and *Hulthen* v. *Steward & Co.* (13). LORD BLACKBURN in giving the judgment of the Queen's Bench seems to accept the position that "reasonable time" means normal time, and that the party prevented from performing his contract by an unforeseen circumstance beyond his control would be liable, but distinguishes the case where F G H I

A the act not done is one in which both parties should concur and which neither can perform, in which case he says that the obligation on each is to use reasonable diligence, and either is excused by events beyond his control. *Ford* v. *Cotesworth* (1) would now, under the House of Lords' decisions, be decided as a matter of course in favour of the party sued, for the foreign prohibition would be an existing circumstance to be taken into account in fixing the reasonable time in which the B act omitted was by implication to be done. Such reasonable time would not now be construed as normal time under normal conditions. In the Exchequer Chamber the case was again put on reasonable time—as distinguished from fixed time, and the ground that a cause of delay affecting both parties must be considered in fixing reasonable time. In *Cunningham* v. *Dunn* (2) the ship was to proceed to Malta and load dead weight, which both parties knew would be military stores, and then C proceed to a Spanish port to load fruit. On arrival at Valencia it was found that the law of Spain did not allow a cargo to be loaded on a ship which had military stores on board, and when it was found that permission could not be obtained the vessel sailed away. The charterer sued her, and the Court of Appeal held that, both parties being prevented by superior power, neither was liable, citing *Ford* v. *Cotesworth* (1).

D The late Mr. Carver forcibly criticises these two cases on the ground that in neither was there really joint disability, but takes the view, in which I concur, that they are both supportable on other grounds, which I take to be that in *Ford* v. *Cotesworth* (1), a reasonable time case, the time must be judged by the then existing circumstances, and that in *Cunningham* v. *Dunn* (2) the parties must be taken to have contracted on the basis that it should be legally possible to load that E ship. At the time those two cases were distinguished from *Barker* v. *Hodgson* (3) and other fixed lay day cases on the ground partly of no fixed time and partly on joint ability. It may be possible to put the earlier cases on the ground that a contract to load in fixed days, unless prevented by specified causes, excludes implied causes such as foreign illegality. An instance of this class of case is *Braemount Steamship Co., Ltd.* v. *Andrew Weir & Co.* (14), where a clause excusing payment F of hire in certain named events was not extended to an unnamed event, strikes, which prevented the vessel being profitably used, though strikes were included in an exception clause. In my opinion, however, at the present day, in the absence of very special circumstances, cases which decide that a contracting party who has undertaken to do something in a foreign country is not relieved from his obligation by the fact that such an act is, or becomes, illegal in that foreign country G are wrongly decided; and this is the true view to be taken of early cases like *Barker* v. *Hodgson* (3) (3 M. & S. at p. 270) decided before the courts had developed the doctrine of continued validity of contracts being dependent impliedly on the existence, or continuance, of certain states of fact.

BAILHACHE, J., treated the present case as one of a joint act to be performed by both parties, paying and receiving a fixed amount of freight, in a country where H it was illegal to pay or receive such an amount, and that such a joint act prevented by illegality comes within the principle of *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn* (2) which are binding on him. In view of the fact that the recent decisions of the House of Lords would require or enable the results of these decisions to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the reasoning that where a contract requires an act I to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not, in my opinion, assist or sanction the breach of the laws of other independent states. BAILHACHE, J., has arrived at the same result, by holding that, if there is a contract, in spite of its illegality in the place of performance, the charterer is protected by the exception of restraint of princes, rejecting the argument that in this charter the exception clause only protects the

shipowner. As the view I have already taken results in the dismissal of the appeal, I prefer to express no opinion on this point. But I may say that, as in my experience most charters at the present day avoid the difficulty by using the words "mutually excepted," it would be well in future charters to make clear the intention that the exceptions shall protect both parties. I understand our decision only to settle the point whether the Spanish shipowner can claim freight from the charterer at the rates of £50 per ton in spite of the law of Spain, and to hold that he cannot. What freight he can claim, in view of the actual facts which are not fully before us, we do not decide. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *William A. Crump & Son*; *Pritchard & Sons*, for *Andrew M. Jackson & Co.*, Hull.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

DAVIES *v.* THOMAS AND OTHERS

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), April 29, 30, 1920]

[Reported [1920] 2 Ch. 189; 89 L.J.Ch. 338; 123 L.T. 456; 84 J.P. 201; 36 T.L.R. 571; 64 Sol. Jo. 529]

Tort—Procurement of act damaging third person—Need to prove procurement of actionable wrong or of legal act by unlawful means—Conspiracy—Agreement to enforce rule of association—Rule previously held to be against public policy and void.

The rule that a person who procures the act of another can be made legally responsible for its consequences only if (i) he knowingly induces that person to commit an actionable wrong (e.g., a breach of contract) or (ii) he procures a legal act to be done by illegal means (e.g., bribery or intimidation) is of equal force where the procurement of the act of another is by the argument and persuasion of a number of persons and not by those of a single individual. On the other hand, it is easier to infer coercion in the case of a number of persons than in that of a single person.

Dictum of Lord Watson in *Allen* v. *Flood* (1), [1898] A.C. at p. 96, applied.

Decision of P. O. Lawrence, J., [1920] 1 Ch. 217, affirmed.

By r. 20 of the rules of an association it was provided that: "An employee leaving an employer who is a member of the association, the employer shall (if so desirous) report the same to the secretary, who shall advise all the members, and no other member of the association shall employ or supply him for twelve months." In *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth* (2) (1887), 36 Ch.D. 465, a rule to substantially the same effect was held to be in restraint of trade and void. Where an association of traders, acting under this rule, secured the dismissal of the plaintiff by the notice legally necessary to terminate his employment,

Held: the fact that such a rule had been held to be void did not result in the persons so acting being guilty of entering into an illegal conspiracy on the ground that they were combining to carry out something which was contrary to public policy to the injury of another, and, therefore, the plaintiff was not entitled to an injunction restraining members of the association from so acting.

Notes. Referred to: *Hodges* v. *Webb*, post p. 447; *Said* v. *Butt*, ante p. 232. As to liability for torts generally and as to conspiracy, see 32 HALSBURY'S LAWS (2nd Edn.) 174 et seq., 189, 190, and for cases see 42 DIGEST 974 et seq. As to offences arising out of the operations of trade unions see 32 HALSBURY'S LAWS (2nd Edn.) 505 et seq., and for cases see 43 DIGEST 110 et seq.

Cases referred to:

(1) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, *1164.*

(2) *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth* (1887), 36 Ch.D. 465; 57 L.T. 573; 36 W.R. 274, C.A.; 43 Digest 94, *980.*

(3) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179.*

(4) *Conway* v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, *1237.*

(5) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169.*

(6) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp. M.L.C. 120, H.L.; 43 Digest 10, *51.*

(7) *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (1898), 35 Sc.L.R. 645; 5 S.L.T. 263; 43 Digest 114, *1184v.*

(8) *Mulcahy* v. *R.* (1868), L.R. 3 H.L. 306, H.L.; 14 Digest (Repl.) 123, *856.*

Appeal by the plaintiff from an order of P. O. LAWRENCE, J. ([1920] 1 Ch. 217). The facts appear in the judgments.

Schwabe, K.C. and *R. Roope Reeve*, for the plaintiff.

Jenkins, K.C. and *C. Lyttelton Chubb*, for the defendants, were not called on to argue.

LORD STERNDALE, M.R.—This is an appeal from a decision of P. O. LAWRENCE, J., in an action brought by the plaintiff, Mr. Davies, against four defendants, William Thomas, Jonah Reynolds, William Rice, and Thomas David Williams. It is an action to restrain the defendants "from interfering in any manner howsoever with any person or persons, company or corporation with a view to causing such person or persons, company or corporation to break his or their contract or contracts with the plaintiff or to cease to employ or supply him or to abstain from entering into contracts with him."

The plaintiff entered into the employment of the last-named defendant, Mr. Williams, as a traveller or agent in Mr. Williams' business, which was that of a yeast dealer. There was some discussion about a restrictive covenant being inserted in his agreement, binding him not to compete in various ways mentioned in the clause, but although the plaintiff signed that agreement he never sent the signed document to the defendant, and it is admitted that the employment continued upon the footing of there being no restrictive clause at all. All the defendants were yeast dealers, and members of an association called the West and Mid-Wales Yeast Dealers' Association, which had primarily for its object the protection of the members of the association. A Mr. Hopkins, who is not a party to this action, was also a member of the association. Whether Mr. Hopkins communicated first to the plaintiff, or the plaintiff to Mr. Hopkins, I am not sure, but before the plaintiff left the defendant's employment, there had been communications between the plaintiff and Mr. Hopkins with the purpose of effecting an agreement between them, by which the plaintiff would enter into Mr. Hopkins' employment, and he did. He had not, I think, been in the yeast business before when he went into the service of the defendant. But he had got a considerable connection during the time when he had been with the defendant, and the object of the plaintiff in going to Mr. Hopkins was that he should take over a substantial part of that

connection. In fact, to do him justice, the plaintiff does not in the least deny that. He says that while discussing this arrangement with Mr. Hopkins and how much business he had been doing for the defendant, he said he thought that Mr. Hopkins regarded that connection as being a matter which might be valuable to him, Mr. Hopkins. He was asked this:

> "At any rate, you had the intention of canvassing the customers whom I may call the customers you got for Mr. Williams?—A. Got from Mr. Williams or for Mr. Williams? Q. For Mr. Williams.—A. I intended to canvass anybody and everybody and that is what I actually did.—Q. And you used your own connection for all it was worth, did you not?—A. I used it for the first fortnight for all that I was worth, and then when this friction started . . ."

Then the answer stops. The "friction" referred to is friction between Mr. Williams and Mr. Hopkins because the latter had engaged the plaintiff. But there is no doubt he meant to go on and say, "when this friction started, I ceased doing so." Then he is asked whether there were certain customers at Briton Ferry, whom, he said, he did not obtain for Mr. Williams, and a share of whose business he admitted he took over to Mr. Hopkins.

I do not think it is necessary to state any more than that. The plaintiff was doing what it was his legal right to do. There was no restrictive covenant in his agreement with Mr. Williams, and, therefore, he was justified in taking his connection over to Mr. Hopkins, if he wished. Whether it was a fair thing to do, I express no opinion upon at all. It is not my place to express any opinion as to the habits of the retail yeast trade. But it is obviously a thing which Mr. Williams might resent. It is equally a thing which, if it became a practice among the employees in the trade, would be a thing that all the people in the trade and all the members of the association to which I have referred, might take exception to, and they did take exception. Mr. Williams, seeing the plaintiff canvassing for Mr. Hopkins, wrote him a letter and called what he was doing "a dirty action," "anything but straightforward and honourable," and he wrote two or three days afterwards to Mr. Hopkins, asking him to give immediate notice to terminate the plaintiff's engagement, and saying that if he did not do so he, Mr. Williams, would bring the matter before the association. Mr. Hopkins refused to give that notice, and thereupon the defendant, Mr. Williams, issued a notice convening an emergency meeting of the association, and put upon the notice this agenda:

> "To consider a reduction in the price of yeast and the necessity of members complying with rr. 18 to 20."

Rules 18 and 19 had nothing to do with the matter, but r. 20 is the rule which I have now to read.

> "An employee leaving an employer who is a member of the association, the employer shall, if so desirous, report the same to the secretary, who shall advise all the members, and no other member of the association shall employ or supply him for twelve months."

That is a rule, according to the decision in *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth* (2) (36 Ch.D. at p. 467), which would be void, as being contrary to public policy. The meeting took place, and there was a discussion, and, I dare say, an animated discussion, between Mr. Hopkins, on the one side, and the defendant, Mr. Williams, and other members of the association, on the other. Many members expressed their opinion that Mr. Hopkins had done a dirty action in engaging the plaintiff, and pressed him to put an end to the engagement, and to give notice, as he was entitled to do, to the plaintiff. When I say "pressed him," I mean pressed him, without any coercion or threat, but urged him to do so. He refused. The consequence was that a resolution was carried that a small committee should be formed to get the question in dispute settled between Mr. Hopkins and Mr. Williams, and three members who were

present were chosen to act as the committee, the defendant, Mr. Thomas, who was the chairman or an official of the society, being one. That committee never met and never acted. After they had been appointed, the members who had been at the meeting went to tea, and the matter was discussed again, and ultimately Mr. Hopkins promised to give the plaintiff a month's notice to terminate his engagement.

The notice was given, and that caused the plaintiff damage, according to the learned judge in the court below, to the extent of £25. The learned judge accepted the evidence of Mr. Williams as to what took place at the meeting and after the meeting, up to the time when Mr. Hopkins consented to give notice to the plaintiff. As he accepted that evidence, I think that I am justified in treating it as a true account of what took place. Mr. Williams stated:

> "I complained to the members of the association that r. 20 was not carried out by one of them, Mr. Hopkins. I stated this as an example. Our Neath agent, who was in my employ, was taken away by Mr. Hopkins the morning following the Saturday that he left me, and he must have arranged or seen Mr. Davies in some way or other to fix up the appointment to start on the Monday while he was in my employment."

He was asked:

> "Did Mr. Hopkins explain his side of the story?—A. Mr. Hopkins said Mr. Davies had approached him with a view to carrying on the business, and that he was doing over six bags a week for us, that he would guarantee giving him that, and that was the reason why he made up the agreement for him."

The statement alleged to be made by Mr. Hopkins agrees substantially with the evidence that was given by the plaintiff himself. Later on, the witness stated what happened. He was asked:

> "Was Mr. Hopkins asked to dismiss Mr. Davies, or give him notice?—A. He was. Q.—By whom—by yourself?—A. I do not know, there were several members spoke on it, and I expect they all said it. (By P. O. LAWRENCE, J.): Q. You did, at all events?—A. Well, I asked him. By [counsel for the defendants]: Q. At that stage he said he would not?—A. He refused point blank to do anything of the sort.—Q. Did he give a reason for refusing?—A. None whatsoever."

He was asked what else took place, and he said it was all bearing on the same point.

> "They [the members of the association] thought that he did a dirty action, or an unbusinesslike action, by employing Davies, and especially to call on our own customers."

He said that after that the committee was appointed, and then they all went and had tea, and at the tea-table they discussed the matter further, and everyone went away excepting some few people, whom he mentioned, including the defendant himself. He was asked again what took place, and what he said was that after tea and when they were discussing the matter, Mr. Hopkins up to that time having absolutely refused to give notice,

> "I explained to him that I would be perfectly willing for him to keep on Mr. Davies provided he left off calling on our own customers, and he thought there was nothing left for Mr. Davies to do otherwise."

That is to say, if he did not call on the defendant's customers, there was nothing for him to do, and he was still going on to supply his own customers himself. Mr. Hopkins would look after his own old customers, and the plaintiff was to get the defendant's. The defendant only wanted to retain his own business. The learned judge in the court below found that there was no threat and no coercion employed at all. Of course, at the time when Mr. Hopkins consented to give the notice,

the three defendants, other than Mr. Williams, were not present at all, but the plaintiff's case is that the pressure had been at the meeting and that that pressure lasted until the agreement to give the notice was arrived at. He doubts very much whether there was any evidence against the defendants, other than Mr. Williams, at all. I rather share that doubt, but the learned judge found, as I say, that there was no pressure, no threat and no attempt at coercion. I have not the slightest doubt that it was present to the learned judge's mind, just as much as it must be to everybody's that one may have coercion and pressure without any actual threats or intention to exercise coercion being put into words, and I have no doubt he considered that and all the circumstances and found that as a fact. Mr. Hopkins was not called. Therefore, the only evidence of what took place at the meeting was the evidence of Mr. Williams, accepted by the learned judge, and I do no see my way to differ from the finding of the learned judge, on the oral evidence before me, that there was no coercion and no attempt at coercion or pressure on the part of any of these defendants. There may be said to have been evidence both ways in this sense, that the position which the defendants occupy, some of them as officials and all of them as members of the association, was such as of itself would constitute coercion. He has considered that, and has come to the conclusion that in the circumstances it did not, and I must accept that finding also.

The question which we have to decide is whether, on those facts, the plaintiff has established a cause of action. That being the nature of the action, we have been taken through discussions on *Allen* v. *Flood* (1), *Quinn* v. *Leathem* (2), *Conway* v. *Wade* (4), and all the other cases that have any bearing upon this matter. If I do not discuss those authorities at length it is not through any disrespect to the argument that has been addressed to us, but because I think that this case depends upon its own facts, and it does not require any statement of all the principles that may govern a variety of actions of this kind. With regard to an individual, in cases of this kind it is stated by LORD WATSON, in *Allen* v. *Flood* (1) in a passage which has been several times referred to in these words ([1898] A.C. at p. 96):

> "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is, therefore, not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (5), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

The latter instance is the one which applies to the present case. Mr. Hopkins was entirely in his legal rights in giving notice to the plaintiff. That states that the mere inducement to break a contract is in itself actionable. The inducement not to employ is only actionable if the inducement proceeds by illegal means, and the illegal means generally used in these cases is pressure, coercion for the purpose of injuring the third person referred to in that statement. That is the case of coercion by an individual. I do not think that the principle differs in the case of the inducement being by a number of persons except to this extent, that it is much easier to infer a pressure or coercion in the case of a number of persons, especially if they are in a position to make themselves objectionable in the event of a request not being complied with, than it is in the case of a single person. But so far as the principle that in order to be actionable the inducement must be by illegal means in the case of an inducement not to employ it is the same. I think that is shown in the first place by the well-known case of *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (6) and also by the Scottish case of the *Scottish Co-operative*

Wholesale Society v. *Glasgow Fleshers' Trade Defence Association* (7). Those were cases of competition, and competition was held to be a perfectly legal means of interfering with another person's business. This, of course, is not a case of competition. But I think those cases show that, as I have said, the principle that in a case of this kind the means used must be illegal applies as much to an inducement by a number of persons as to an inducement by one.

A very wide proposition indeed was contended for by the plaintiff in the present case, I think a proposition which may be put in these words—that where you have a number of persons combined, any act done by them in combination to induce one person not to deal with another, or not to employ another, is actionable. I do not assent to that proposition, and I think that it is contrary to the principles that are laid down in all the cases to which we have been referred. Therefore, I think that what we have really to examine here is whether there was any illegal means used by these persons. It was very ably argued by junior counsel for the plaintiff that this rule of the association, being contrary to public policy, and, therefore, bad, the persons who purported to act upon it were entering into an illegal and wrongful conspiracy, because they were combining to carry out something which was contrary to public policy to the injury of another. I do not think on the facts as found by the learned judge and as they appear on the evidence that such a case arises. It is for that reason that I do not go into those authorities at any length. There was no evidence here, so far as I can see, when Mr. Hopkins was persuaded to give the notice to the plaintiff that it was said that all the persons should abide by the rule and nobody should employ him. There was not even an attempt to induce Mr. Hopkins to give him notice in any event. What he was asked to do was to give him notice unless he was prepared to give up employing the plaintiff for the purpose of canvassing the defendant's customers. If he did that, there was no objection to his continuing to employ the plaintiff, and it was actually left over for future consideration whether there should not be an exception to that, and whether Mr. Hopkins should not be allowed to retain the custom of these two customers whom the plaintiff had taken over from the defendant to Mr. Hopkins. Therefore, I do not think that that general question arises. That was all that these people did, and the learned judge in the court below has found that there was no coercion, no threat, either express or implied, no improper pressure and nothing really but a request and persuasion, though, perhaps, enforced to a certain extent by strong expressions such as, that Mr. Hopkins was "doing a dirty trick."

There were, therefore, no illegal means employed to carry out this end, and as the act itself was a rightful act, an act which Mr. Hopkins had the right to do, and, as there were no illegal means employed, in my opinion, the plaintiff has not established his cause of action. My judgment proceeds entirely upon the facts of this particular case, as found by the learned judge in the court below, and disclosed in the evidence. I think that there is nothing in the learned judge's judgment, or on the evidence, to call for explanation on any of the principles that have been laid down in the number of cases to which we have referred. The only broad principle which has been cited, and which I have thought necessary to deal with, is the one that I have already mentioned, which, in my opinion, is unsound and is not justified by the cases. I think, therefore, that this appeal fails and must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The facts of the present case are found by the learned judge in the court below—and it is on those facts that I think this case must be decided—resolved themselves into this. The plaintiff Davies was, on Mar. 6, 1919, in the employ of a man named Hopkins, subject to a month's notice to determine his employment. Davies had, until a week or two before that time—until the Saturday preceding the Monday on which Hopkins engaged him—been in the employment of the defendant Williams. He occupied

with Hopkins the same capacity as that which he occupied with Williams, namely, that of canvasser for orders of the goods sold by them respectively, which were the same class of goods. He had quite lawfully taken to Hopkins, and away from Williams, a certain amount of the business which he had previously procured for Williams, so that Williams' business had been hampered and injured by the fact that his servant, Davies, had gone over to Hopkins as his rival in trade. In those circumstances Williams and certain other persons who are not parties to the action, succeeded in persuading Hopkins to yield to their representations and to give a month's notice to Davies, terminating his employment. Davies then brought this action against Williams and three other persons—not those whose representations had the success to which I have referred, but certain other persons—alleging that Williams and those persons who are made defendants had by means of improper pressure interfered with Davies' means of obtaining a livelihood by obtaining his dismissal from Hopkins' employment. Williams and the three persons who succeeded with him in persuading Hopkins to take the course he did, so as the learned judge in the court below has found, by using no threats, no coercion, no improper pressure or other illegal means. The learned judge has, therefore, found that, that being so, Williams, who is the only one of those persons sued by the plaintiff, is not liable to the plaintiff for any damage which has been occasioned to him by what was done. Is that right, or not?

Before I come to examine the law which, for this purpose, I think, is quite settled, I would just point out that three other defendants were sued by the plaintiff and are still defendants in the action and respondents to the present appeal. A man named Thomas was one, a man named Reynolds was another, and a man named Rice was another, and they held respectively, the positions of chairman, vice-chairman and treasurer of a certain association of traders, and it is alleged against them also that they, by the use of improper means, induced Hopkins to dismiss Davies. The fact with regard to them is that they did no such thing. They attempted by representations without threats, without coercion, without using any illegal means, to induce Hopkins to dismiss Davies, but they did not succeed. To their representations Hopkins returned a positive refusal, and, therefore, in any case, there could be no possible cause of action against those persons, because all that they did was devoid of success, and they never in fact injured the plaintiff.

The law applicable to this case was laid down in plain terms and with extreme simplicity in the speech of Lord Watson, in the famous case of *Allen* v. *Flood* (1). He said this ([1898] A.C. at p. 96):

> "There are, in my opinion, two grounds only upon which a person who procures the act of another [Williams in the present case procured the act of Hopkins] can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (5), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

To apply that ruling to the present case, the act which Williams and the other persons procured to be done was not an illegal act, it was an act within the contractual rights of Hopkins, because Davies was in his employment, subject to a month's notice, and he gave him a month's notice. Therefore, it cannot come within the first branch, as stated by Lord Watson. If it is to be brought within the second branch, then it is incumbent on the plaintiff to show that the act in question which is not itself illegal, has been brought about by the use of illegal means. The learned judge in the court below has found in terms that no illegal

means were used, and, therefore, it does not come within the second branch of the rule, as stated by LORD WATSON.

But I have so far omitted from consideration one fact, namely, that the persuasion and the representations were employed and made, not by one person only, but by two or more persons acting in concert. Does that make any difference? In my opinion, it does not. If I see that a man is employing a person in circumstances which make it, in my view, not quite fair or right that he should be employing him, am I committing an illegal act because I get a man who also holds the same opinion to go with me and we together represent to the employer that he is not doing what he ought to do? I think that can only be answered in one way. It seems to me, therefore, that on the facts, as I have stated them, which I think are those found by the learned judge in the court below, that the plaintiff could have no right of action against these defendants. But I must not dismiss it quite so shortly as that. Of course, it may be that if a great number of persons are engaged in the transaction, from that fact you may be able to infer pressure, and conscious pressure, or conscious influence, which it would be impossible to infer from the act of one person by himself. I do not deny that that may be so, and, in that sense, the fact that the inducements are used by more persons than one may become a material element. But it is excluded in the present case, because the learned judge has found that there was no undue pressure or undue influence of any sort. Therefore, in this case at any rate the fact that the persuasion was used by several people acting together is immaterial.

Then it was suggested that what was done was in pursuance of an unlawful conspiracy. It was said that it is an unlawful conspiracy because the parties in question were all members of this association of traders the rules of which include a rule to this effect:

> "An employee leaving an employer who is a member of the association, the employer shall, if so desirous, report the same to the secretary, who shall advise all the members, and no other member of the association shall employ or supply him for twelve months."

I do not comment on the English of that rule, though a good deal might be said about it. But I think that the fair result of it is that the members agree that an employee who leaves a member of the association is not to be employed by another member of the association for a period of twelve months. What is said is that that is an agreement which could not be enforced, because it is contrary to public policy, and that because it is contrary to public policy it is in itself evidence of an unlawful conspiracy. I confess I cannot follow that. Unlawful conspiracy was defined by WILLES, J., in *Mulcahy* v. *R.* (8), in 1868 (L.R. 3 H.L. at p. 317) in this way:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means."

That is to say, to be an unlawful conspiracy, one which gives rise to either an indictment or a right of action—it must have an unlawful object. It must be either that the act which it is intended to bring about is itself unlawful, or, if the act which it is intended to bring about is not in itself unlawful, that it is to be brought about by unlawful means. Neither of those two essentials is to be found in the agreement contained in this rule. The object which was to be brought about was that which it was lawful for any member of it to do, that is to say, to employ or not to employ a particular person. There were no means provided by the rule for its enforcement which rendered it unlawful. There was no sanction. The mere fact that, if an action had been brought on this rule, it could be held to be found as being in restraint of trade, does not in itself, in my opinion, make it an unlawful rule in the sense of making those who are parties to it parties to an unlawful conspiracy. It has been decided over and over again that if a party

enters into a contract which is not enforceable, but is void as being in undue restraint of trade, he is committing no offence. He is merely promising to do that which he cannot be compelled to do because it is in the interests of the public unduly restraining his freedom of action. It is nothing more than that. The real fact is that in the present case the rule is material only as affording a possible source from which undue pressure or undue influence might flow. But the learned judge, as I have pointed out, has found that there was no undue pressure and no undue influence. That being so, I can only come to the conclusion that the facts of the present case do not bring it within any of the principles which are stated in a large variety of forms in the very numerous cases which have been cited to us, and that the judgment of the learned judge in the court below in the defendant's favour is correct and that this appeal must be dismissed.

YOUNGER, L.J.—I am of the same opinion. I arrive at that conclusion solely upon a consideration of the facts of this case.

There can, I think, be no question that if the plaintiff in his agreement with Williams had submitted to a restriction which would have precluded him from entering into or remaining in the service of Hopkins, that restriction would have been perfectly good. No principle of public policy would have been infringed by its having been entered into. It would have been a restriction which was more than reasonably necessary for the protection of Williams' business, and, if it had been contained in the agreement which had been broken by the plaintiff, an information at the instance of Williams would have been a matter of course. A restrictive covenant in terms wider than those which I have suggested was originally contemplated to be inserted in the agreement between the plaintiff and Williams, and that it did not find a place in that agreement was not due to any reluctance on the part of the plaintiff to have it inserted. It is noticeable, also, that in the agreement into which the plaintiff did enter with Hopkins a restrictive covenant, not so far as I can see in any sense too wide, but wider than that which I have indicated, does in fact find a place. It is true, as I have already said, that there is no such restrictive covenant in the agreement concluded between the plaintiff and Williams. But I confess that I cannot, on any principle, see what objection there can be at the instance of the plaintiff to any arrangement that might be entered into between Hopkins and Williams that Hopkins should give effect to that perfectly fair provision. If Hopkins were so to argue, there would be no principle of public policy involved nor, so far as I can see, would there be any right of the plaintiff properly so called infringed.

There was something in the nature of an agreement come to between Williams and certain other people and Hopkins, the effect of which was that Hopkins gave notice to the plaintiff determining in due course the agreement which the plaintiff had entered into with Hopkins, and it is of that notice that the plaintiff complains in this action. I have said that I can see myself no objection on principle to such an arrangement being entered into between Williams and Hopkins. Equally I can see no objection to an arrangement being concurred in by other persons, or to other persons associating themselves in obtaining that arrangement if these persons were, as they were, persons associated in the business in which both Williams and Hopkins were engaged, and took upon themselves the burden of bringing before Hopkins such arguments as occurred to them which led him to take the course of giving notice to the plaintiff. It is of that notice that the plaintiff complains and it is because of the action of Mr. Williams and these other persons that he seeks to recover damages. It is not a case in which these defendants by any unlawful means have induced Hopkins to give that notice, nor is it, on the finding of the learned judge, a case whereby the defendants by improper considerations—bribery or otherwise—have induced Hopkins to take that course. It is merely a case where the defendants, or really, more properly, Williams—because, as WARRINGTON, L.J., has pointed out, the evidence against the other defendants

is really non-existent—acted as they conceived in their joint interests. They merely, as the learned judge has found, placed before Hopkins arguments and considerations which led him to give the notice to the plaintiff, a notice which he had, so far as any contract with the plaintiff was concerned, a perfect right to give. In my judgment, there was neither any illegal means adopted to induce Hopkins to give that notice, nor was there, so far as I can see, any illegal result achieved. Accordingly, on the bare facts of this case, I am of opinion that the plaintiff has shown no cause of action against the defendants and therefore I think that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook; Indermaur & Brown.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HODGES *v.* WEBB

[CHANCERY DIVISION (Peterson, J.), January 12, 13, 14, 15, 16, 19, 20, February 20, 1920]

[Reported [1920] 2 Ch. 70; 89 L.J.Ch. 273; 123 L.T. 80; 36 T.L.R. 311]

Trade Union—Legality of acts—Threat, coercion, or intimidation—Workers called out on strike if plaintiff (member of other union) employed—Statement to employers that strike would continue unless plaintiff removed—No threat of violence—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3.

The plaintiff and the defendant were members of different trade unions in the same trade, and the policy of the defendant's union was that its members should not work with members of the plaintiff's union. While the plaintiff was working on a certain job the defendant, who was an official of his union, informed him that unless he joined the defendant's union, he (the defendant) would call the other men off the job and that that sort of trouble would occur on any job on which the plaintiff was employed. The plaintiff refused to join the defendant's union, and the defendant then communicated with the plaintiff's employers and told them that the men had come out on strike because the plaintiff had refused to become a member of his (the defendant's) union and that they would not return to work until the plaintiff had been removed. In an action by the plaintiff against the defendant for damages and an injunction restraining him from interfering with his employment and his right to dispose of his labour as he willed,

Held: (i) in the circumstances of the case the men were within their rights in striking, and, therefore, the defendant had not induced them to commit an actionable wrong; (ii) in the absence of any threat of violence, intimidation, obstruction, or other unlawful conduct, the statement by the defendant to the plaintiff's employers that the men would not return to work while the plaintiff was employed did not amount to coercion or other illegality; (iii) in the absence of any unlawful conspiracy or combination (or, possibly, emphatic statement by one person), a statement that, unless the person addressed consented to the adoption of a particular course which he could lawfully take, the speaker would do that which he was lawfully entitled to do, did not constitute a threat for which the speaker could be held liable at law; and, therefore the defendant was

entitled to the protection of s. 3 of the Trade Disputes Act, 1906, and the plaintiff's action failed. A

Trade Union—"Trade dispute"—Dispute between members of one trade union and members of another—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 5 (3).

Per PETERSON, J.: A dispute between a member or members of one trade union and a member or members of another trade union is a "dispute between workmen and workmen" within s. 5 (3) of the Trade Disputes Act, 1906, just as much as a dispute between members of a union and non-trade-unionists. B

Notes. Approved: *White* v. *Riley*, ante p. 371; *Ware and De Freville* v. *Motor Trade Association*, ante p. 387. Considered: *Sorrell* v. *Smith*, [1925] All E.R. Rep. 1. Applied: *Huntley* v. *Thornton*, [1957] 1 All E.R. 237. Referred to: *Hardie and Lane, Ltd.* v. *Chilton*, [1928] All E.R. Rep. 36; *D. C. Thomas & Co.* v. *Deakin*, [1952] 1 T.L.R. 1397. C

As to torts arising out of the operations of trade unions see 32 HALSBURY'S LAWS (2nd Edn.) 516–524, and for cases see 43 DIGEST 112 et seq. For Trade Disputes Act, 1906, see 25 HALSBURY'S STATUTES (2nd Edn.) 1267.

Cases referred to: D

(1) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, *1164*.

(2) *Conway* v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, *1237*.

(3) *Davies* v. *Thomas*, ante p. 438, [1920] 1 Ch. 217; 89 L.J.Ch. 1; 122 L.T. 340; 84 J.P. 9; 36 T.L.R. 39; 64 Sol. Jo. 115; 18 L.G.R. 57; 43 Digest 128, *1307*. E

(4) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179*.

(5) *Valentine* v. *Hyde*, [1919] 2 Ch. 129; 88 L.J.Ch. 326; 120 L.T. 653; 35 T.L.R. 301; 63 Sol. Jo. 390; 43 Digest 122, *1243*.

(6) *Santen* v. *Busnach* (1913), 29 T.L.R. 214; 57 Sol. Jo. 226, C.A.; 43 Digest 117, *1208*. F

(7) *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, *1226*.

(8) *Gaskell* v. *Lancashire and Cheshire Miners' Federation* (1912), 28 T.L.R. 518; 56 Sol. Jo. 719, C.A.; 43 Digest 122, *1248*.

(9) *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; 35 T.L.R. 14; 63 Sol. Jo. 84; 43 Digest 113, *1180*. G

Also referred to in argument:

Larkin v. *Long*, [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455, H.L.; 43 Digest 121, *1241*.

Mackenzie v. *Iron Trades Employers' Insurance Association*, 1910 S.C. 79; 34 Digest 189, *1553 ii*. H

South Wales Miners' Federation v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 43 Digest 114, *1186*.

Connor v. *Kent*, *Gibson* v. *Lawson*, *Curran* v. *Treleaven*, [1891] 2 Q.B. 545; 61 L.J.M.C. 9; 65 L.T. 573; 55 J.P. 485; 17 Cox, C.C. 354; sub nom. *Connor* v. *Ritson*, *Gibson* v. *Lawson*, *Curran* v. *Treleaven*, 7 T.L.R. 650, C.C.R.; 14 Digest (Repl.) 122, *854*. I

Dallimore v. *Williams and Jesson* (1912), 29 T.L.R. 67; 57 Sol. Jo. 77, C.A.; subsequent proceedings (1914), 30 T.L.R. 432, C.A.; 43 Digest 121, *1238*.

Witness Action for damages and injunction restraining the defendant from interfering with his employment and right to dispose of his labour as he willed.

The plaintiff, Sidney Dumas Hodges, was a foreman electrical engineer, and a member of the National Association of Supervising Electricians, and on Aug. 10,

1919, he was employed by Messrs. Tyler and Freeman, electrical and mechanical engineers, as foreman electrician to take charge of a contract for electrical wiring at "Delectaland," Watford, a factory belonging to the Watford Manufacturing Co. Of about a dozen men besides the plaintiff employed on this contract, all, with the exception of three, belonged to the Electrical Trades Union. In September a complaint that the plaintiff was not a member of the Electrical Trades Union was made by the Watford branch of that union to the defendant, the London district secretary of the union. On Oct. 13, 1919, the defendant, in consequence of this complaint, went down to "Delectaland," and after some non-union men had agreed to join the Electrical Trades Union, the defendant asked the plaintiff to join, but he refused to do so. Thereupon the defendant told him he should have to call the men off the job, and that they would not return unless he was off the job. The men ceased work, and the defendant then told the plaintiff that this sort of trouble would occur on any job on which he was employed. In answer to an inquiry by Messrs. Tyler and Freeman, the assistant London district secretary of the Electrical Trades Union informed them that the men came out together owing to the fact that the plaintiff was a member of the National Association of Supervising Electricians. After this Messrs. Tyler and Freeman referred the matter to the employers' association, of which they were members—the National Federated Electrical Association—and this latter association were informed by the Electrical Trades Union that, if the plaintiff was discharged and a member of the Electrical Trades Union put in charge of the job, it could proceed at once. The National Association of Supervising Electricians had not received recognition from the Trades Union Congress, but was registered in 1918 as a trade union. The Electrical Trades Union had always objected to their members working with members of this association, as the union considered that that association was sympathetic with and under the influence of employers, and the question whether members of the Electrical Trades Union should work with non-unionists or with members of the National Association of Supervising Electricians had been a cause of dispute between the National Federated Electrical Association (the employers' association) and the Electrical Trades Union for some years. On the evidence it was held, that the only effective reason for the strike was that the plaintiff, being a member of the National Association of Supervising Electricians, refused to join the Electrical Trades Union, and that what had passed between the plaintiff and the defendant did not amount to a threat by the defendant to the plaintiff, and also that there had not been coercion by the defendant of Messrs. Tyler and Freeman. Messrs. Tyler and Freeman dismissed the plaintiff, who brought this action, claiming damages and an injunction restraining the defendant from, and his agents from, wrongfully interfering with his employment and his right to dispose of his labour as he willed, and from continuing the wrongful acts complained of, and from the commission of the said or similar wrongful acts.

By the Trades Disputes Act, 1906:

"Section 3: An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.

"Section 5 (3): In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises . . ."

Hughes, *K.C.*, and *H. G. Purchase* for the plaintiff.
Cunliffe, *K.C.*, and *R. W. Hodge* for the defendant.

Cur. adv. vult. A

Feb. 20. **PETERSON, J.,** read the following judgment. In this case the plaintiff alleges that the defendant illegally induced, coerced, and procured his dismissal from his employment with Messrs. Tyler and Freeman, and, further and in the alternative, that by threatening the plaintiff's employers with loss, he illegally induced, coerced, and procured the dismissal of the plaintiff from his employment. He asks for damages and for an injunction restraining the defendant from wrongfully interfering with his employment and his right to dispose of his labour as he wills, and from continuing the wrongful acts of which he complains or committing other acts of a similar character. B

At the material dates the plaintiff was a charge hand or foreman electrician in the employment of Messrs. Tyler and Freeman. He was, and is, a member of the National Association of Supervising Electricians. The defendant is the London district secretary of the Electrical Trades Union. The National Association of Supervising Electricians, commonly known as the N.A.S.E., was formed in the year 1914, and at first was called the Association of Supervising Electricians. It was then in the main an educational institution, and by its rules was expressly prohibited from taking part in trade disputes. In 1918 it was registered as a trade union with new rules, which make provision for trade disputes and strikes, and the protection of its members in such cases. It has failed to obtain recognition by the Trade Union Congress, and it is apparent that, rightly or wrongly, the Electrical Trades Union, which is a workman's trade union, consider that there is ground for believing that the National Association of Supervising Electricians is under the influence of, or sympathetic with, the employers in that industry. The Electrical Trades Union, rightly or wrongly, objects to its own members working with members of the National Association of Supervising Electricians. At the beginning of the year 1919, the Electrical Trades Union had withdrawn all its members who were employed by one firm because the firm employed members of the National Association of Supervising Electricians, and the strike still remains unsettled. It is, I think, plain that this was an active and burning question between the employers and the workmen in the electrical industry for on Sept. 30, 1919, the London section of the National Federated Electrical Association (which is the employers' association) passed this resolution: "After considerable discussion it was decided, that, in view of the policy adopted by the E.T.U. objecting to members working with members of the N.A.S.E., the London section of the N.F.E.A. are unanimously opposed to yielding in any sort of way to such policy. To call upon all members on no account to discharge members of the N.A.S.E. when called upon to do so by the E.T.U. To take action when required in support of any of the members who may be attacked through their supervising electricians." Messrs. Tyler and Freeman were and are members of the London section of the employers' association, and Mr. Tyler, at least, took an active part in its deliberations. It seems to be clear that the Electrical Trades Union had adopted the policy of objecting to its members working with members of the National Association of Supervising Electricians, and that, rightly or wrongly, the workmen's union considered that the National Association of Supervising Electricians was not a genuine and independent workmen's union, and that its members were on the same footing as non-unionists, and that there were similar disputes on this subject between employers and the workmen's union. It is also a fact that the employment of non-unionist men with members of the Electrical Trades Union had for a long time been a subject of contention between that union and the employers' association. As Mr. Tyler said in his evidence, "Our association is out to come to some agreement on the question of non-unionists; we have made up our minds to fight unjustifiable strikes on the ground (among others) of non-unionists." C D E F G H I

In August, 1919, Messrs. Tyler and Freeman having a contract with a Watford manufacturing company for electrical work at that company's factory, which bears the name of "Delectaland," sent to the job various members of the Electrical Trades

Union and several non-unionist workmen, and also the plaintiff, who occupied the position of charge hand or foreman. No difficulties with the workmen in connection with this job seem to have arisen before September, 1919. In that month, however, complaints by the builder's labourers on the job, that non-unionists were being employed on electrician's work, were brought to the attention of the Watford branch of the Electrical Trades Union. Representations were also made to the branch that some of the electricians were not receiving outwork allowances, and that the men were working more than forty-seven hours a week without overtime pay, and were not receiving the standard rates of pay. In consequence of these complaints a deputation from the Watford branch, consisting of Messrs. Evans and Horton, was received by the London District Executive of the union, who thereupon instructed the defendant, who is the district secretary to go to Watford and, in conjunction with the two delegates, to clear up any grievances, as far as possible, and, as the defendant added, to prevent trouble. But in addition to the authority given to him by these instructions, the defendant had a general power to withdraw men from work "at Delectaland or any other job." On Oct. 13, 1919, the defendant, and with him Evans and Horton went to Delectaland. They entered the dispatch department and asked one of the men whom they found there to collect the other electricians who were employed at the works, and also to bring the foreman. Up to this time the defendant had not heard of the plaintiff, and did not know anything about him. The men were assembled, and those who were non-unionists at once consented to join the union, and in their case there is no evidence that any pressure was used or needed. Then the plaintiff arrived and a conversation took place between him and the defendant. There was a controversy as to this conversation. According to the plaintiff the defendant asked him if he had a E.T.U. ticket and he answered: "No, I am a member of the N.A.S.E." The defendant replied: "Well, you will have to leave the job," and thereupon the plaintiff thanked him and walked away. I do not think this is a complete account of the conversation. In my opinion, the defendant did ask the plaintiff to join the Electrical Trades Union, and the plaintiff refused to do so, and thereupon the defendant told him that he should have to call the men off the job, and that they would not return unless he was off the job. The defendant went to the men and told them that as the plaintiff had refused to join the Electrical Trades Union, he had no option but to ask them to cease work. The men, both those who were already members of the Electrical Trades Union and those who had agreed to join the union, ceased work and packed up their tools. On the evidence it seems clear that there were no high words at this interview. A few minutes afterwards the defendant and Messrs. Evans and Horton met the plaintiff in the yard, and another conversation took place. Here again there is some divergence of testimony. The evidence agrees that the defendant again asked the plaintiff what he was going to do or whether he was prepared to take up an E.T.U. ticket, and that the plaintiff answered that he had an old one at home, and when asked why he had joined the E.T.U. replied: "Compulsion, nothing more nor less." This part of the conversation referred to the fact that the plaintiff had at an earlier date, when he was on another job, joined the Electrical Trades Union in order to prevent a strike of the workmen. Up to this interview the defendant was wholly unaware of the fact that the plaintiff had once been a member of the union. The plaintiff, however, then stated that the defendant then shook his finger in the plaintiff's face, and said: "I will compel you to join again or take away your livelihood." As to the allegation that the defendant made a threatening gesture (which appears to be the threat of violence alleged the statement of claim), after hearing the witnesses I do not believe that it was made. Bennett, the gatekeeper, who was called for the plaintiff, said that the defendant moved his hand, but not in a threatening way, while the defendant, Mr. Evans, who was a good witness, and Mr. Horton, all agree that the defendant did not make any threatening gesture. As to the defendant's threat that, if the plaintiff did not join he would take away his livelihood, Bennett corroborates the plaintiff's evidence on this point, but, in my view, his memory of the words

actually used is not to be trusted. For instance, he says that he heard the defendant ask the plaintiff for his card, and that the plaintiff did not reply. No other witness suggests that this incident took place, and it may be either a confused recollection of the defendant's inquiry whether the plaintiff was not prepared to take up an E.T.U. ticket which was asked by the defendant at the first interview at which Bennett was not present. The defendant and Messrs. Evans and Horton deny that the defendant used the words in question. If I had to decide this question on the evidence of the defendant alone I might have had difficulty in arriving at the conclusion which I have reached. He declared that he was not in the habit of using threats to men of his own class, but he was confronted with a very objectionable letter written by him to a workman in which he threatened to placard his name and "hound him from the trade." I think, however, on the evidence of Messrs. Evans and Horton, of whom the former in particular impressed me favourably, and after seeing the witnesses, I have come to the conclusion that the words suggested by the plaintiff were not used, but that the defendant did say when the plaintiff intimated that he would not join the Electrical Trades Union that trouble, or this sort of trouble, would occur on any job on which he was employed. There was a suggestion that this conversation was carried on in loud and threatening tones, but I am not on the evidence prepared to accept this view. After this conversation, as appears from an interview with the defendant reported in the "Watford Post", which the defendant admitted was substantially accurate, the defendant informed Mr. Winter, the managing director of the Watford Manufacturing Co., that no electrical work could be done in the extension of the company's factory until the plaintiff had been removed. In this connection I have not referred to the question whether there was any discussion at "Delectaland" with reference to rates of pay, hours of work, or outworking allowances, as I am satisfied that the only effective reason for calling on the electricians to cease work was the refusal of the plaintiff to join the Electrical Trades Union.

The remaining facts, so far as they are material, appear from the correspondence. The defendant on Oct. 14, communicated by telephone with Mr. Tyler. Mr. Tyler's firm wrote on the same day inquiring whether the only grievance was that the plaintiff was not a member of the Electrical Trades Union. Mr. Wyatt, the assistant London district secretary, replied on Oct. 14, that the men, members of the Electrical Trades Union and non-members who had agreed to join the Electrical Trades Union, came out together owing to the fact that the plaintiff was a member of the National Association of Supervising Electricians and also as a result of the arrogant attitude he adopted to Mr. Webb upon being approached in the matter. If this was intended to represent that the men came out in resentment of the plaintiff's attitude to the defendant, it plainly is not correct. If it was meant to convey the impression that the defendant, owing to what he described as the arrogant attitude of the plaintiff, requested or directed the men to cease work, it is I think equally incorrect. It is true that the defendant in his evidence described the plaintiff's attitude towards him at both the conversations to which I have referred as "distinctly offensive." It was, perhaps, somewhat flippant, but I see no ground for saying that it was arrogant, nor, after seeing the witnesses, do I think that it would be fair to draw the inference that the men were withdrawn from their work because the defendant was annoyed by the plaintiff's observations. They were, in my opinion, withdrawn because the plaintiff refused to join the Electrical Trades Union. After receiving Mr. Wyatt's letter Messrs. Tyler and Freeman referred the matter to the employer's association the National Federated Electrical Association, and on Oct. 17, the secretary, Mr. Tate, inquired why the men had been withdrawn. On Oct. 30, the defendant replied that the particulars had been given to Mr. Tyler. On Oct. 31, Mr. Tate wrote that he had heard from Messrs. Tyler and Freeman that the trouble had been caused by the employment of the plaintiff and inquired whether the job would be allowed to proceed if the plaintiff was discharged. On Nov. 3 the defendant wrote: "This member of the E.T.U. ran out, being excluded for arrears.

He then joined the N.A.S.E. and, when approached by myself, refused to rejoin the E.T.U., although I approached him in a perfectly amicable manner. If this man is discharged and a member of the E.T.U. put in charge of the job the said job can proceed at once." Thereupon Messrs. Tyler and Freeman, who had received notice from the Watford Manufacturing Co. that the work must be pushed on, and had, as Mr. Tyler said, "no option but to discharge the plaintiff," on Nov. 13, dismissed the plaintiff. The plaintiff remained out of employment till Dec. 16 when he resumed work with Messrs. Tyler and Freeman on another job. It is clear that the men were not withdrawn because the plaintiff had once been a member of the Electrical Trades Union and had left that union. The men were called out before the defendant heard of this fact. The reason of this strike was that the plaintiff being a member of the National Association of Supervising Electricians, refused to join the Electrical Trades Union.

I ought also to add that in this case there is no suggestion that the defendant induced any breach of contract between the employers and their workmen, nor is it a case in which there is an allegation of conspiracy or unlawful combination. The plaintiff's case depends upon the following propositions: (i) That the defendant, before withdrawing the men, stated to the plaintiff that, as the plaintiff refused to join the Electrical Trades Union, he should have to call the men off the job and that they would not return so long as he remained; (ii) that after the men had ceased work, the defendant, when the plaintiff still refused to join the union, stated to him that similar trouble would occur on any job on which he was employed; (iii) that Messrs. Tyler and Freeman were coerced by the withdrawal of the men and by the statement that they would return as soon as the plaintiff was removed, into discharging the plaintiff. It is impossible for me to hold that Messrs. Tyler and Freeman were induced to dismiss the plaintiff by any statement which was made by the defendant to the plaintiff, for there is no evidence that any such statement was reported to them. So far as the plaintiff's claim to damages occasioned by his dismissal from Messrs. Tyler and Freeman's employment on Nov. 13, is concerned, it must rest on the proposition that the firm was, by the withdrawal of the men and the intimation that they would not return to work until the plaintiff had been removed, coerced into discharging the plaintiff. The plaintiff also contended that the defendant, by stating to him that there would be similar trouble on any other job on which he might be employed used threats which he ought to be restrained from carrying into effect. In all these cases it is of the utmost importance that the courts should keep in mind the fact that they are not to consider questions of policy or whether the conduct of employers, on the one hand, or workmen or their representatives, on the other hand, is considerate or wise, or expedient. The sole duty of a judge is to consider whether the act complained of is lawful or unlawful, and it is well to member the weighty words of LORD HERSCHELL in *Allen* v. *Flood* (1) ([1898] A.C. at p. 142):

> "I am not behind my noble and learned friends in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful."

I will deal first with the allegation that Messrs. Tyler and Freeman were coerced into discharging the plaintiff. This is not a case in which the act of the defendant in calling out the men or intimating that they would not return before the plaintiff had been dismissed can be described as that of an intermeddler or busybody or a mere mischief maker: see *Conway* v. *Wade* (2). He had full authority from the union of which he is secretary to call upon the members of the union to cease work, and there is no ground for suggesting that he was acting without authority in stating that the men would return to work as soon as the plaintiff was discharged. No one doubts that the men could have ceased work because they objected to working with the plaintiff or were entitled to refuse to return to work with the

plaintiff, whatever may have been said at a time when there was a tendency to regard trade unions as illegal associations and strikes as illegal acts or before the claim of workmen to be represented in disputes by the officials of their unions was generally admitted. It was recognised in 1898 that an authorised official of a trade union could not be sued merely for inducing or calling upon members of his union to cease work in support of what was believed to be in the interest of the union.

In *Allen* v. *Flood* (1) LORD WATSON expressed the view that there were only two grounds on which a person who procures the act of another can be made legally responsible for its consequences, viz., (i) if he knowingly and for his own ends induces the commission of an actionable wrong; and (ii) if, where the act induced is within the right of the immediate actor, and is, therefore, not wrongful so far as he is concerned, but may be to the detriment of a third party, the inducer procured his object by the use of illegal means directed against that third party; while LORD HERSCHELL, assuming, of course, no breach of contract, in terms stated that the officials of the union could not have been sued merely for calling out the members of the union any more than the men themselves could have been sued for ceasing to work as settled law: see further the observations of LORD MACNAGHTEN ([1898] A.C. at pp. 148–151), and of LORD JAMES OF HEREFORD (ibid. at p. 180). LORD WATSON'S statement has been adopted by P. O. LAWRENCE, J., in *Davies* v. *Thomas* (3) as an expression of well settled law. Nor do I find that either the decision or the obita dicta in *Quinn* v. *Leathem* (4) affect or assailed this part of *Allen* v. *Flood* (1). In any case after the passing of the Trade Disputes Act, 1906, it is impossible to argue that, if an authorised trades union official calls out the member of his union in furtherance of a trade dispute, he is liable to be sued merely on the ground that in doing so he interferes with the business of the employer or the employment of any person.

But it is said that in this case there was no trade dispute within the meaning of the Act, that this was a quarrel between two unions, and that the decision in *Valentine* v. *Hyde* (5) compels me to hold that the defendant is not protected by s. 3 of the Trade Disputes Act, 1906. A trade dispute is defined by s. 5 of the Act as "any dispute between employers and workmen, or between workmen and workmen, which is connected with (inter alia) the employment or non-employment of any person." In my view, there was a dispute between the employers represented by the London section of the National Federated Electrical Association, of which Messrs. Tyler and Freeman are members, and the Electrical Trades Union on the question whether non-unionist labour in general and members of the National Association of Supervising Electricians in particular should be employed in conjunction with members of the Electrical Trades Union. The workmen by their union objected to working with members of the National Association of Supervising Electricians, or to the employment of members of that association on jobs on which the members of the union were engaged. The dispute was one which was connected with the employment of members of the association, whom the union persisted in regarding as in all essentials non-unionists. Whether the union was right in this view appears to me to be immaterial for the purposes of this case. It is sufficient that it objected to members of the association being employed on jobs on which the members of the union were engaged. No doubt this attitude involves a contest between the National Association and the Electrical Trades Union, as it necessarily tends to draw men away from the association. But this contest does not convert a trade dispute into something which is not a trade dispute. If it did, non-unionists would only have to form themselves into an association in order to prevent the operation of s. 3 of the Act in cases in which the authorised officials of recognised trade unions had called out their members in consequence of non-unionists.

In *Valentine* v. *Hyde* (5) the learned judge had occasion to consider the meaning of the words, "a dispute between workmen and workmen which is connected

A with the employment or non-employment of any person." [He held that a demand that a workman should join a particular trades union was not necessarily a trade dispute within the Trade Disputes Act, 1906.] That was a case in which the great bulk of the workmen at a colliery belonged to four trade unions, and had come to the conclusion that all men at the colliery ought to belong to one or other of these four unions. The result was that they brought pressure to bear on the B plaintiff who belonged to a trade union which was not one of the four in question, to induce him to join one of the four unions, and intimated to the employers that, if the plaintiff persisted in his refusal, either he must be discharged or the other men would cease work. Whatever may be said as to the harshness of the particular case, and whatever may be the views entertained by some persons of the attitude of the majority of the workmen, the question on this part of the case, as the learned C judge had held that there was no dispute between employers and workmen, was whether there was a dispute between the majority of the workmen and the plaintiff, which was connected with the plaintiff's employment or non-employment. The majority objected to the continuation of the plaintiff's employment if he did not become a member of the union which they thought he ought to join. In principle this case does not seem to differ from the case of a dispute between unionists and D non-unionists in which the unionists object to the continued employment of non-unionists because they are not members of the particular union for there does not seem to be any difference in principle between an objection to the continued employment of a non-unionist who refuses to join the trades union of the particular trade and an objection to the employment of a member of one trades union because he is not a member of another. In either case the workmen object to his employ- E ment because he is not a member of the trades union to which they think that he ought to belong. The reasons for the objection may not be such as command general approval, but the objections to the employment of a man who, in the opinion of the workmen, does not possess certain qualifications remains. The learned judge put the case of workmen objecting to work with men who are not of a particular religious or political line. The case of workmen objecting to work or F be employed with enemy prisoners, or to the employment of coloured or foreign labour, might be added where the objection is one of nationality. If any of these cases arise for decision, it may become necessary to determine whether such disputes between workmen and workmen are disputes which are connected with the employment or non-employment of any person within the meaning of s. 5 of the Trade Disputes Act, 1906. There is, perhaps, also some difficulty in saying G what, on the reasoning of this portion of the judgment in *Valentine* v. *Hyde* (5) would be a dispute between workmen and workmen which was connected with the employment or non-employment of any person. If a dispute must be one "connected directly with employment or non-employment, and not one about some entirely different subject-matter, the non-settlement of which may result in employ- H ment or non-employment, the existence terms or conditions of which are not in contest," it would seem that the common difference between workmen and workmen on the subject of non-unionist labour is excluded from the operation of ss. 3 and 5 of the Act, for the objection is not to their employment simpliciter, but to their employment because or if they did not join the union. As I gather, the suggestion is that in that case the quarrel with the man is that he will not join the union, and I the quarrel with the employer is that he employs him although he will not join the union. It may be doubted whether the true view is not that both quarrels are disputes which are connected with employment. But, as I am of opinion that in this case there was a dispute between employers and workmen which was connected with the employment of the plaintiff and others who are in a similar position, I have not to decide what is the meaning of the Act in relation to disputes between workmen and workmen which are connected with employment.

But then it was contended that, if there was a trade dispute in this case, s. 3 of the Act does not afford any protection to the defendant, because by threats and

coercion he induced or compelled Messrs. Tyler and Freeman to dismiss the plaintiff: see *Conway* v. *Wade* (2). In support of this contention much reliance was placed on *Valentine* v. *Hyde* (5). I have, however, to consider the question whether there have in fact been any threats or coercion directed against Messrs. Tyler and Freeman for which the defendant can be held liable in an action. The men were called out and subsequently when the defendant was asked whether they would return if the plaintiff was discharged he answered in the affirmative. It appears to me impossible to treat this as a threat which is a sufficient basis for an action, even if it be construed as a statement that the men would not return if the plaintiff was not discharged. The defendant could only answer in this way, if he answered at all. He was asked for information and he gave it. Whatever be the threats for which an action will lie this, in my opinion, was not one for which the defendant could be sued by the plaintiff or by Messrs. Tyler and Freeman. I am also quite unable to hold that the defendant used such coercion against Messrs. Tyler and Freeman as to render him liable in damages to the plaintiff. "Coercion" is a word of ambiguous import. In one sense anyone is coerced who under pressure does that which he would prefer not to do. But a reluctant debtor who pays under stress of proceedings is not coerced in the legal meaning of the word. Messrs. Tyler and Freeman had to choose between carrying out this contract with the Watford Manufacturing Co. without the plaintiff or keeping the plaintiff and losing the contract, and they considered that their interest lay on the side of discharging the plaintiff. The pressure which resulted in the decision was not, in my opinion, coercion of the character which constitutes a ground of action: see observations of LORD WATSON and HERSCHELL in *Allen* v. *Flood* (1) ([1898] A.C. at pp. 99, 128 and 129). If it were, there would be few strikes and lock outs in which either employers or workmen or both could not say that they were coerced. I am not sure that the test whether the employer would have acted in the particular way of his own free will which seems to have been applied in *Valentine* v. *Hyde* (5) is altogether satisfactory. "Freewill" and its meaning have been much discussed in the region of metaphysics, and lawyers might be content that the discussion should not extend into the realms of law. The test may be equivalent to an inquiry whether the employer would have acted in the particular way if the particular motive or inducement had been absent. But the fact that he would have acted differently if the circumstances had been different does not show that in adopting the course in question he was acting under coercion or compulsion. Such a test would be inconsistent with the views expressed by several of the learned laws in *Allen* v. *Flood* (1) and would admit as coercion any act which induces a man to do something which he is reluctant to do. "Coercion" involves something in the nature of a negation of choice, and I respectfully adopt the view of LORD WATSON in *Allen* v. *Flood* (1) that an employer cannot properly be said to be coerced if, having two alternative courses presented to him, he adopts that course which he considers most conducive to his own interests. In my opinion, there was not in this case any coercion of Messrs. Tyler and Freeman for which either that firm or the plaintiff could sue the defendant.

There remains the question whether the defendant threatened the plaintiff in such a way as to entitle the plaintiff to relief in this action. There are two possible threats on which the plaintiff relies (i) that before withdrawing the men the defendant told the plaintiff that, as the plaintiff refused to join the Electrical Trades Union, he would have to call the men off the job, and that they would not return so long as he remained; (ii) that after the men had ceased work, the defendant, when the plaintiff refused to join the union, stated to him that similar trouble would arise on any job on which he was employed. Threats and coercion are not protected by s. 3 of the Trade Disputes Act, 1906: *Conway* v. *Wade* (2). But what is a threat and what kind of threat is actionable? We have been instructed on high authority to have regard to the difference between a threat and a warning: *Conway* v. *Wade* (2), *Santen* v. *Busnach* (6). We have been reminded that the

same words may according to circumstances constitute either a threat or a warning, and that, while nothing may be capable of being said against the wording of a notice, it may be given in such a manner and in such circumstances, as to constitute a threat: see *Santen* v. *Busnach* (6), per VAUGHAN WILLIAMS, L.J. In the argument in this last case it was suggested that a warning is an intimation that in certain circumstances a third party intends to do some act, and that a threat is an intimation that in certain circumstances the person who gives the intimation will do some act or procure it to be done, but this distinction does not appear to have been adopted, nor would it be of any great assistance, as it would leave in the class of threats many intimations to which no legal exception could be taken. I am not able to see that any great advantage is to be derived from the distinction between a threat and a warning. The question depends on what was said or written, and not on the favourable or unfavourable nature of the epithet by which the words may be described. The question is whether the defendant has used unlawful means, and that question is not, to my mind, to be solved by saying that the words amount to a threat. It appears sometimes to be thought that a mere threat in itself gives a cause of action. But this is not so. An indignant parent cannot be sued for threatening his son that he will be disinherited if he does not reform even though the intimation may lack nothing in force and angry vigour, the reason being that he is entitled to disinherit his son if he thinks fit, and he does not commit any legal wrong in informing his son of his intention with such emphasis as he may consider desirable. Workmen are admittedly entitled to cease work for any reason, good, bad, or indifferent, and employers are entitled to decline to continue certain workmen in their employment for any reason whether good or bad. To my mind, it would seem to be a very strange consequence that while the workmen can cease work without possibility of legal objection, they cannot in a body or by one or more of themselves or by one of the officials of their union inform the employers of the fact that they propose to cease work and of their reasons for doing so, without the risk to the communicant of being sued for using threats or coercion. No legal exception can be taken to the fact of the strike; yet it is sometimes contended that an action will lie for intimating to the employer that in certain circumstances that which the men are entitled to do will be done. If this be the law nothing could be more inconvenient both for employer and workman, as the tendency would be to call the strike first without waiting for negotiations which would give an opportunity to the employers to consider whether it was to their advantage to make the required concessions, and certainly those who objected to the so called threat would be the first to protest against a strike which was made without due intimation that it was about to take place.

If this were the law, it would seem that an employer who announced to his unionist workmen that, if they did not within a limited time leave the union, he would dispense with their services, would also be liable for an action for threatening them. A threat is only an intimation by one to another that, if either the latter does or does not do something, the former will do something which the latter will not like. But it is impossible to say whether such a threat is or is not unlawful until it has been ascertained what it is that is threatened to be done. If the threat is to use violence to persons or property, it is obviously an intimation that the threatener intends to use unlawful means for the purpose of attaining his end, and no one would doubt that a threat to do that which is unlawful cannot be defended. Where the threat is part and parcel of a conspiracy or unlawful combination, it may be affected by the illegality of the conspiracy. But, omitting cases of conspiracy or combination, I do not understand the legal basis for contending that it is unlawful for a man to threaten to do merely that which he is entitled to do. The act itself is immune from attack; yet an intimation that it will be done is to be a ground of liability. It may be that the idea is due to the belief that the threat is a menace or intimidation, and that it is unlawful because it puts unlawful pressure upon the person who is subjected to it. If the threat

amounts to intimidation or a menace of violence, it cannot be defended; but, assuming that it does not, the question remains whether it does in fact exercise pressure of an unlawful kind. Omitting cases of conspiracy or combination, I venture to doubt whether the presence of a mere statement that the speaker intends to do something which he is legally entitled to do, if the man to whom he is speaking does not adopt a particular course, can be unlawful pressure. If it is, then the case of the butler who obtained the dismissal of the cook by threatening to leave if she was not discharged is a more serious case than LORD HERSCHELL and LORD SHAND in *Allen* v. *Flood* (1) considered it to be.

In my opinion, if I may without presumption say so, the judgments of the majority of the learned Lords in *Allen* v. *Flood* (1) are both sound law and sound sense, and have not been seriously affected by *Quinn* v. *Leathem* (4) and later cases. It was pointed out in *Quinn* v. *Leathem* (4) that the actual decision in *Allen* v. *Flood* (1) was that an act lawful in itself is not converted by a bad or malicious motive into an unlawful act; and it was suggested that beyond this the judgments were obiter dicta, LORD HALSBURY pointing out that the hypothesis of fact upon which *Allen* v. *Flood* (1) was decided by a majority was that the defendant had neither uttered nor carried into effect any threat at all. But the consideration of the question of threats by the majority in *Allen* v. *Flood* (1) was not a gratuitous discussion of an irrelevant topic. The judges who were asked to advise the House of Lords had this question propounded to them: "Assuming the evidence given by the plaintiff's witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" Some of the learned judges, notably HAWKINS, J., in a passage which was exposed to very destructive criticism by LORD HERSCHELL, were of opinion that the defendant had used threats, intimidation, and coercion. The three learned Lords who formed the minority in *Allen* v. *Flood* (1) were of opinion that the defendant, by threats, had intimated and coerced the employers. In these circumstances it is not surprising that the majority of the learned Lords in *Allen* v. *Flood* (1) found it necessary, or thought it desirable, that the opinions which had been expressed on the subject of threats, intimidation, and coercion should not pass unchallenged. If, in the event, some of the observations made by them in the course of their judgments appear to be beyond the limits of strict necessity, the same remark may be made of their critics in *Quinn* v. *Leathem* (4). LORD WATSON ([1898] A.C. at p. 96), laid down that when the act is within the right of the immediate actor, and is, therefore, not wrongful in so far as he is concerned, then if it is to the detriment of a third party, the workman may be held liable if he has procured his object by the use of illegal means directed against that party. He went on (ibid. at p. 99), to express his view that the men were entitled to strike and to inform the employers that they proposed to strike, because they objected to the employment of the two plaintiffs, either by their own men or by their representatives, and that the supply of such information was not coercion. He obviously thought that if the men or the men's representatives truthfully told the employers that the men would strike, as they were entitled to do if the plaintiffs were not discharged, that was not a threat or coercion for which any action would lie. LORD HERSCHELL, in his very forceful speech, after saying that the words "threat," "coercion," "intimidation" were often applied in popular language to utterances which were quite lawful, and that they meant no more than that the so-called threat put pressure, perhaps extreme pressure, on the person to whom it was addressed, pointed out that everything depended on the nature of the statement by which pressure was exercised, that the law could not regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning. He then pointed out that it was perfectly lawful for the men to cease work and refuse to work in company with the plaintiffs; that Mr. Allen or the authorities of the union would have acted within his or their rights if he or they had called out the members of the union; that the plaintiffs would have had no cause of action because, if the men had ceased work of their

own motion or had been called out, the employers to secure their return had discharged the plaintiffs; and he added (ibid. at p. 130):

> "I am quite unable to conceive how the plaintiffs can have a cause of action because, instead of the men leaving, either of their own motion or because they were called out, there was an intimation beforehand that either the one or the other of those courses would be pursued."

The passage in LORD MACNAGHTEN's judgment (ibid. at p. 151), appears to point in the same direction; while LORD SHAND (ibid. at p. 165), in dealing with actionable threats, expressed the view that such threats could only be "threats of violence, intimidation, obstruction, and the like—threats which may be described as a menace which improperly affects freedom of action in the person who is induced to act or refrain from acting." He added these words:

> "There was no threat of the nature of menace so as to amount to the use of illegal means to induce the employers to act—no threat to do anything beyond the exercise of their legal right. A master who warns his servant that a repetition of certain faults will result in dismissal may be said to use a threat; but he is not only acting lawfully, but in most cases is to be commended for so doing in place of giving an instant dismissal."

In *Allen* v. *Flood* (1) there was not any case of conspiracy or combination, and the observations of the learned Lords are obviously directed to a case in which there was no suggestion of combination. *Quinn* v. *Leathem* (4) was a clear case of conspiracy or unlawful combination, and the case was decided on that ground. LORDS HALSBURY, MACNAGHTEN and SHAND held that there was a conspiracy or unlawful combination, and distinguished *Allen* v. *Flood* (1) on that ground, LORD SHAND also pointing out that in *Allen* v. *Flood* (1) the purpose of the defendant was to promote his own trade interests, which he was entitled to do, although injurious to his competitors; while in *Quinn* v. *Leathem* (4) the purpose of the defendants' combination was to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests. LORD BRAMPTON, who as HAWKINS, J., was one of the judges who were consulted in *Allen* v. *Flood* (1) pointed out that the distinction between *Allen* v. *Flood* (4) and *Quinn* v. *Leathem* (1) was that in the latter case the real and substantial cause of action was an unlawful conspiracy to molest the plaintiff in carrying on his business. LORD LINDLEY, it is true, is in apparent difference with LORD HERSCHELL as he states that, if in *Allen* v. *Flood* (1), LORD HERSCHELL (ibid. at p. 138) meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike or threatening to make them strike by calling them out when they do want to strike, he (LORD LINDLEY) was unable to concur with him. But, even here, it will be observed that LORD LINDLEY is postulating the case of a trade union official who compels members of his union to strike when they do not want to do so. The same case is apparently put again in the sentence in which his Lordship says ([1901] A.C. at p. 536):

> "a threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification."

Here again the hypothesis is that the members of the union are desirous of continuing to work for the employer and that they, as well as the employer are coerced, intimidated, molested, or annoyed by the trade union official, but, even in such a case, apparently, LORD LINDLEY recognised that there might be an adequate defence. He does not deal with the simple case of an authorised trade union official calling a strike of members of the union in pursuance of the accepted policy of the union in relation to a trade dispute, or with the case of the official informing the

employer in the case of such a dispute, that the members of the union would be called out if the dispute were not settled. A

My attention was called to the well-known observations of ROMER, L.J., in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (7), to the effect if a person, who, by virtue of his position or influence, has power to carry out his design, set himself to the task of preventing and succeeds in preventing a man from obtaining or holding employment in his calling, to his injury, by reason of threats to, or special influence upon, the man's employers or would-be employers, and the design was to carry out some spite against the man, or had for its objects the compelling him to pay a debt or any similar object not justifying the acts against him, then that person is liable to the man for the damage consequently suffered. Here the lord justice is dealing with the question of liability when there is conspiracy or unlawful combination, but it will be observed that this dictum as to liability in such a case assumes that the threat is employed for the purpose of giving effect to an unlawful or unjustifiable purpose. In *Santen* v. *Busnach* (6) two members of a trade union informed their employer that this union had instructed its members to leave his employment if the plaintiff refused to join the union. The Court of Appeal came to the conclusion that there was no threat but only a warning. In this case the defendants and other employees were entitled to cease work and the defendants informed the employers of their intention. In *Gaskell* v. *Lancashire and Cheshire Miners' Federation* (8) the Court of Appeal, without hearing argument for the respondent, came to the conclusion that there was no threat, and. consequently, the question whether, if there had been a threat, it was actionable was not considered. I respectfully agree that B C D E

> "a single person or a body of persons will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business":

see *Pratt* v. *British Medical Assocn.* (9) ([1919] 1 K.B. at p. 260). The question is whether unlawful means have been employed. It is not, as already pointed out, every statement which may be called a threat that is unlawful, and for myself, I find it impossible to hold that in a simple case where there is no question of conspiracy or unlawful combination a firm and, if you please, emphatic statement by one person that, unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is a threat for which the speaker can be held liable at law. Whether it be called a threat or a warning, it is a statement by the person who makes it of intention to act on his legal rights, made for the purpose of inducing the other to exercise his legal rights in a particular direction. F G

The first alleged threat made by the defendant to the plaintiff was that at the first interview after the plaintiff had refused to join the Electrical Trades Union the defendant said that he would have to call the men off the job and that they would not return so long as the plaintiff remained. As I have already said, if the defendant, without speaking to the plaintiff, had called out the men, he could not, in my opinion, have been sued either by Messrs. Tyler and Freeman or by the plaintiff as his act would not have been a legal wrong. I am not, for the reasons which I have given, prepared to hold that he could be made liable to the plaintiff for telling the latter that he intended to do that which he was lawfully entitled to do. It may be that some would call it a threat; others might say that it was only right that the plaintiff should have a full opportunity of appreciating the consequences before he made up his mind. But, whether it be called a threat or a warning, or whatever other description be given of it, it was in effect a statement that the defendant would adopt lawful means for the purpose of giving effect to his union's lawful policy, and I am not prepared to hold that the defendant can be made liable for doing so. It may be observed also that this threat, if it was a threat, was addressed to the plaintiff and not to the plaintiff's employers. It did H I

not cause the discharge of the plaintiff as it was not brought to the attention of his employers, Messrs. Tyler and Freeman, and it was not a statement amounting to a threat affecting the future employment of the plaintiff. For this reason also I am unable to see how this threat, if threat it be, can supply the plaintiff with a cause of action. This leaves for consideration the defendant's statement at the second interview that there would be similar trouble on any job on which the plaintiff was engaged. This statement had no part in the discharge of the plaintiff from Messrs. Tyler and Freeman's employment, but it is said that it is a threat that the plaintiff would be followed, tracked, and persecuted. The words are obviously capable of two interpretations. They may mean that the authorities of the union would see to it that the plaintiff should be the subject of persistent persecution, or they may be a statement, for the plaintiff's consideration, of what obviously might be expected to occur. This interview was not marked by angry or violent language. The employers' and the men's union had come to grips over the question of the employment of members of the National Association of Supervising Electricians. There had been at least one strike by the union men on this subject. This objection to the employment of members of the National Association was part of the settled policy of the trade union, and the London section of the employers' association had declined to yield on this question and had called upon its members to resist the union's endeavours to give effect to its policy. In these circumstances it seems obvious and must have been obvious to everybody concerned, that troubles were awaiting the plaintiff and other members of the National Association of Supervising Electricians and the employers who were determined to retain their services, and that, as the question had become active and burning, it was very probable that it would arise whenever the plaintiff was employed together with members of the Electrical Trades Union, if it became known to the members or officials of the union that he was not a member of the union. The facts may strike different minds in different ways; but the conclusion to which I have come is that the defendant endeavoured to persuade the plaintiff to become a member of the Electrical Trades Union, and in the course of doing so pointed out that, if the plaintiff persisted in refusing to do so, he would inevitably be exposed to similar difficulties in the future. I do not think that in making the observations in question the defendant did threaten the plaintiff. I do not consider the question, whether if it was a threat, the defendant is liable to be sued for threatening to give effect to the policy of his union in an existing trade dispute between employers and the union. That is a question which, in my view of the facts, it is not necessary to answer. The result, therefore, is that in my opinion this action fails.

Solicitors: *Turner & Co.; Walter J. Larkin.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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THOMAS *v.* JONES

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), July 21, 22, 1920]

[Reported [1921] 1 K.B. 22; 90 L.J.K.B. 49; 124 L.T. 179; 85 J.P. 38; 36 T.L.R. 872]

B

Bastardy—Evidence—Corroboration—Cumulative effect of evidence of number of facts—Bastardy Laws (Amendment) Act, 1872 (35 & 36 *Vict.*, *c.* 65), *s.* 4.

Corroboration may consist of the evidence of a number of facts of which each one, taken by itself, may be colourless, but which, regarded together, may be highly significant.

C

The respondent, a single woman, worked for about two years as a housekeeper to the appellant at his farmhouse, where men other than the appellant also lived and slept. After the respondent had been at the farmhouse about two years she was delivered of a female child. On the morning on which the child was born the respondent was ill and moaning, and the appellant made a fire and gave her some brandy and tea in the kitchen, a doctor was sent for, and a woman came to the house to help. The respondent remained with the child at the appellant's house for five or six weeks after its birth. A few days after leaving the house the respondent wrote to the appellant a letter stating that he knew the child to be his, and asking him what he intended to do in regard to it. No reply to the letter was received by the respondent. The respondent then took out a bastardy summons against the appellant, and at the hearing she stated that he had had connection with her on several occasions. She also called the appellant as a witness, and he denied that he had ever had connection with her, but he admitted having made a fire and given the respondent brandy on the morning of the birth. He stated that while the respondent remained in his house he did not ask her who the child's father was, that he did not reply to the letter because he thought it was blackmail, and that when the respondent had the child he told her she must go. A witness for the respondent proved that on the day of the birth the appellant asked him to go and see a doctor. The justices found that the evidence of the respondent had been corroborated in a material particular by the appellant's sending for the doctor, by his allowing the respondent and the child to remain in the house for some weeks, by his not asking the respondent as to the paternity and not answering the letter, and by the demeanour of the witnesses, and they made an order against the appellant.

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Held: by BANKES AND ATKIN, L.JJ. (SCRUTTON, L.J., dissenting) that there was no evidence of corroboration within s. 4 of the Bastardy Laws (Amendment) Act, 1872 [now Affiliation Proceedings Act, 1957], s. 4 (2).

H

Notes. Considered: *Jones* v. *Thomas*, [1933] All E.R. Rep. 535; *Holland* v. *Roberts* (1938), 158 L.T. 313. Distinguished: *Moore* v. *Hewitt*, [1947] 2 All E.R. 270. Referred to: *R.* v. *Atkinson* (1934), 24 Cr. App. Rep. 123.

As to evidence of paternity on a bastardy summons see 3 HALSBURY'S LAWS (3rd Edn.) 120, 121, and for cases see 3 DIGEST 394–397. For Affiliation Proceedings Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 36.

I

Cases referred to:

(1) *Burberry* v. *Jackson*, [1917] 1 K.B. 16; 86 L.J.K.B. 255; 115 L.T. 713; 80 J.P. 455; 25 Cox, C.C. 555, D.C.; 3 Digest 397, *323*.

(2) *Wiedemann* v. *Walpole*, [1891] 2 Q.B. 534; 60 L.J.Q.B. 762; 40 W.R. 114; 7 T.L.R. 722, C.A.; 22 Digest (Repl.) 132, *1157*.

(3) *Mash* v. *Darley*, [1914] 3 K.B. 1226; 83 L.J.K.B. 1740; 111 L.T. 744; 79 J.P. 33; 30 T.L.R. 585; 58 Sol. Jo. 652; 24 Cox, C.C. 414, C.A.; 3 Digest (Repl.) 397, *322*.

(4) *R.* v. *Baskerville*, [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 60 Sol. Jo. 696; 25 Cox, C.C. 524; 12 Cr. App. Rep. 81, C.C.A.; 14 Digest (Repl.) 539, *5232*.

Also referred to in argument:

Dawson v. *McKenzie* (1908), 45 Sc.L.R. 473; 15 S.L.T. 951; 3 Digest 396, *317 xliv*.

M'Whirter v. *Lynch*, 1909 S.C. 112; 46 Sc.L.R. 83; 16 S.L.T. 526; 3 Digest 396, *xxxii*.

Reffel v. *Morton* (1906), 70 J.P. 347; 50 Sol. Jo. 378, D.C.; 3 Digest 397, *321*.

Appeal from an order of the Divisional Court on a Case Stated by Radnorshire justices sitting at Rhayader, reported [1920] 2 K.B. 399.

A complaint was preferred by the respondent, Miriam Jones, under the Bastardy Laws (Amendment) Act, 1872 against the appellant, David Edwards Thomas, for that she had been delivered of a bastard child on May 11, 1919, and that the appellant was the father of such child. The justices adjudged the appellant to be the putative father of the child, and ordered him to pay to the respondent 10s. per week for the maintenance and education of the child until the child should attain the age of sixteen years, and the justices further ordered the appellant to pay to the respondent the sum of £4 4s. for expenses incidental to the birth of the child, and £2 14s. for costs. The following facts were proved by the evidence of the respondent. (a) The respondent was a single woman, aged twenty-five, and at the date of the hearing she was in service at Penyffynon, Nantmel, in the county of Radnor. (b) She was delivered of a female child on May 11, 1919. (c) The appellant lived at Llwynbeadd Farm, Nantmel, and was a bachelor, aged forty-three years. (d) The respondent went to work for the appellant as his servant and housekeeper in May, 1917, and was there until June 17, 1919, and during that time men other than the appellant lived and slept in the house. (e) The appellant had connection with the respondent, the first occasion being some time before the respondent had been at Llwynbeadd twelve months but the respondent could not give the date. On subsequent occasions the appellant had connection with the respondent, but the respondent could not say how often. (f) About July or August, 1918, the respondent went to a doctor and he told her something about herself, and when she returned to Llwynbeadd she told the appellant that the doctor had told her that she was in the family way. The respondent, on being asked, denied to everyone else that she was in the family way, because she did not want to tell her business to other people. (g) On the morning of May 11, 1919 when the respondent's child was born, the respondent was ill and moaning, and she did not remember everything that had happened that morning. Early that morning the appellant made a fire and gave the respondent some brandy and tea in the kitchen. A doctor was sent for and a Miss Evans came to the house. (h) The respondent remained in the appellant's house with the child until June 17, 1919. (j) On May 12, 1919, the respondent's time of service with the appellant at Llwynbeadd was finishing, and, before the child was born, on the previous day, she had packed her box. (k) The appellant, on being asked by the respondent what he was going to do about the child, said: "There is nothing for me to do but to pay you a lump of money." Later, on June 16, 1919, the appellant asked the respondent to take the child to be brought up by a Miss Mills, and said that he would pay the money on the quiet. (l) After the respondent left the appellant's house, she wrote to him a letter on June 21, 1919, another letter on July 14, 1919, and another on Aug. 16, 1919. The letter of July 14, 1919, was as follows:

"Mon. 14. Llangora, Pantydwr, Rhayader.—Mr. Thomas.—Dear Sir,—I just take the privilege of writing these few lines to you, hoping that you are well, as it leaves me at present. I should like to know what you intend doing in regard to the child. Do you intend paying or not? If not, I must see further about it, for it is useless waiting. It is not as if you were paying me for another man's child, as you know the child is yours and no one else's. I should be pleased to

know by return of post one thing or the other. I conclude.—Yours truly, (Signed) MIRIAM JONES." A

No reply to any of these letters was received by the respondent.

The appellant was called by the respondent as a witness and he denied the paternity of the child and all the respondent's allegations connecting him with the paternity, and he denied that he ever had connection with her. He said that B until the child was born he did not know she was in the family way. He also said that it was not he, but Miss Evans, that sent for the doctor. From the evidence of the appellant it was proved: (a) That the appellant knew that the respondent went to a doctor in August, 1918, because he saw some medicine in the kitchen and asked if she was not well, and she told him that the doctor had made some impudent remarks about her. The appellant did not ask her what they were. (b) That he C made a fire in the kitchen and there gave her brandy on the morning on which the child was born. (c) That he did not ask the respondent who was the father of her child during the time that she was in his house after her confinement, and that he had received only one letter from the respondent, namely, the letter above set out, and that he did not reply to it because he thought it was blackmail. (d) That when she had the child he told her that she must go. The respondent called John Price D of Tynwain, Cwmdanddwr, Rhayader, a farm servant, who proved the following facts: (a) That he lived at the appellant's house while the respondent was housekeeper there. (b) That on the day when the respondent was confined, the appellant asked him to go and see Dr. Gordon Richardson. No evidence other than that of the respondent, the appellant, and the said John Price was called on behalf of the respondent, and at the close of the respondent's case, the solicitor for the appellant sub- E mitted that the evidence of the respondent had not been corroborated in some material particular in accordance with the Bastardy Laws (Amendment) Act, 1872, and he contended that the complaint ought to be dismissed, and he quoted *Burbury* v. *Jackson* (1) and *Wiedemann* v. *Walpole* (2). The solicitor for the respondent contended that the evidence of the appellant and John Price was sufficient corroboration. On behalf of the appellant it was proved that the respondent had denied that F she was in the family way.

The justices were of opinion that the evidence of the respondent had been corroborated by the facts that the appellant sent the witness, John Price, for the doctor on the morning of the birth of the child and that he allowed the respondent and the child to remain in the house from the date of the birth of the child until June 17, G 1919, and did not during that time ask the respondent who the father of her child was, and did not answer the letter of July 14, 1919, which he stated he had received. and by the demeanour of the witnesses and by the way in which evidence was given by the respondent.

By the Bastardy Laws (Amendment) Act, 1872: H

"After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of I the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child, and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child, . . . of a sum of money weekly . . ."

The Divisional Court (EARL OF READING, C.J., and ROCHE, J., AVORY, J., dissenting) held that there was evidence of corroboration, and the applicant appealed to the Court of Appeal.

Artemus Jones, *K.C.*, and *H. D. Roome* for the appellant.
H. C. Davenport for the respondent.

BANKES, L.J.—This is a case which, to my mind, presents very considerable difficulty, but after giving it the most careful consideration I can, I am of opinion that the view taken by AVORY, J., in the court below is correct. The question which the court had to decide is raised upon a Special Case stated by magistrates in reference to an application made to them by the respondent asking for an order against the appellant on the ground that he was the father of her child, and the application was made under s. 3 of the Bastardy Laws (Amendment) Act, 1872. A material provision of that Act is that in s. 4—that, on such an application being made, the justices shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child. Therefore, it is essential before justices can make an order under this section that the evidence of the mother shall be corroborated in some material particular by other evidence to the satisfaction of the justices, and the question which was intended to be raised by the Special Case was whether there was before the justices evidence which they were entitled to take into consideration as corroborative evidence in some material particular of the woman's evidence.

A similar question came before the court in *Mash* v. *Darley* (3) where KENNEDY, L.J., in stating what the duty of the court upon such a Special Case was, says ([1914] 3 K.B. at p. 1235):

> "What we have to say is whether, in point of law, the justices must be held to be wrong because they acted upon it,"

i.e., the evidence which was tendered before them in that case in corroboration of the woman's evidence. The question here is whether, upon the Case as stated, the justices must be held to be wrong because they acted upon the evidence which was before them. The form in which the Case is stated does not make it perfectly clear what evidence the justices accepted as true, and what evidence was given before them upon which the Case is stated. They state that "the following facts were proved by the evidence of the respondent." In another paragraph they say that the appellant was called by the respondent as a witness, and that he made certain statements, with regard to which the justices do not say whether in their opinion, they were proved or not, but they go on to say: "Further from the evidence of the appellant it was proved," and then they set out certain facts. Some of the facts which they treat as proved by the appellant seem to me inconsistent with some of the facts which they treat as proved by the respondent, but it is not, in my opinion, necessary either to send the case back to the justices to have that point cleared up or to come to any definite decision as to what it was the justices meant to say in reference to those particular points. This I think is the question which the justices submit to the court for its decision and upon which the court has to express its view. They say: "We, the magistrates, were of opinion that the evidence of the respondent had been corroborated (i) by the fact that the appellant sent the witness John Price for the doctor on the morning of the birth of the child;" (ii) "that he allowed the respondent and the child to remain in his house from the birth of the child until June 17, 1919," [that is to say, from May 11, to June 17, which is some five weeks and two days]; (ii) that he did not during that time ask the respondent who was the father of the child"; (iv) that he did not answer the letter of July, 1919, which he

stated he had received''; and (v) ''by the demeanour of the witness and the way the evidence was given by the respondent.''

Those facts must necessarily be considered in relation to the story told by the respondent and the appellant; and the story in broad outline was that the respondent was a single woman who was acting as housekeeper for the appellant, a bachelor, aged forty-three years, she herself being twenty-five, that she was his housekeeper at a farm which the appellant occupied in Radnorshire, that she entered his service in May, 1917, and that the chid was born on May 11, 1919. It appeared that there was no other woman living in the house, but that there were men servants who from time to time lived and slept on the farm. It appeared that the woman had been to see a doctor in the autum of 1918. She had then, according to her account, learned that she was in the family way. It appeared that shortly before the child was born she was taken ill, and that the appellant attended to her to the extent that he gave her some tea and some brandy and later he told his servant to go and fetch the doctor. It was a matter in dispute, which the justices have not determined, whether the doctor was sent for on the initiative of the appellant or whether, as the appellant contended, the doctor was sent for on the initiative of a woman who was called in, and that he merely passed on the woman's request that a doctor should be sent for to his man servant. I think those are the main outlines of the case. The respondent herself was called, and she told her story at length. The appellant was called as her witness. The only other additional witness who was called was the farm servant who deposed to the fact that he received the instruction to fetch the doctor from the appellant himself. When that evidence had been given and the case completed, the appellant's solicitor contended that there was no evidence corroborating the respondent's story in any material particular. It was at that stage that these points were selected as matters which the justices might lawfully take into consideration as evidence in corroboration of the woman's story.

There is a case to which we were referred—*R.* v. *Baskerville* (4)—in which the question of what constituted corroboration was considered by a full court consisting of Lord Reading, C.J., Scrutton, Avory, Rowlatt, and Atkin, JJ. The Lord Chief Justice, in giving judgment, stated what, in the view of the court, amounted in corroboration. It is quite true that the language there used was in reference to a different statute, but I think it has just as much application to a case under the Bastardy Acts as it has to a case under the statute on which that decision proceeded. The Lord Chief Justice says:

> ''We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law, or within that class of offences for which corroboration is required by statute. The language of the statute, 'implicates the accused,' compendiously incorporates the test applicable of common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.''

I think with the necessary alterations to fit that language to this particular statute, it is entirely applicable to a case like the present, and I would only emphasise my view of what there is stated by the Lord Chief Justice—that it would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration or to attempt any general definition of what constitutes corroborative evidence. But I do think assistance in a matter of this kind and in this case can be derived by considering what is not and cannot be properly regarded as corroborative evidence. First of all, I would say that statements which are equally consistent with the story of the appellant as with the story of the respondent cannot be properly accepted as corroborative evidence. I think one might always say that evidence which obviously falls short of corroboration in a material particular cannot be accepted as corroborative evidence and under this second class I think one might put such cases as *Burbury* v. *Jackson* (1), where the court had to consider whether evidence of mere opportunity for connection was of itself corroborative evidence in support of a woman's story. The court held it was not, and RIDLEY, J., uses this language: "Opportunity raises no presumption here," and I think that might be properly classed as a case where the evidence obviously fell short of any corroboration in a material particular of the woman's story.

The view taken in the court below by the Lord Chief Justice is this:

> "In this case I come to the conclusion that there is, in law, evidence upon which the justices could decide that the respondent's testimony was corroborated in some material particular by other evidence. Each fact found by the justices as tending to corroborate the respondent's evidence may by itself be insufficient as corroboration; but the cumulative effect of the evidence regarded, not separately, but collectively, may be, and I think in this case is, sufficient. I am not unmindful of the argument that this evidence is equally consistent with action dictated by kind and humane consideration; but I think the circumstances proved, taken in conjunction with the omission to answer the letter, are sufficient to justify the magistrate's decision. The question is one rather of the right inference of fact than one of law."

That clearly indicates the Lord Chief Justice's view. He referred to *R.* v. *Baskerville* (4), and quoted part of the passage which I have read. It seems to me quite plain that he has not misdirected himself, but is directing his attention to the question what is the right inference to be drawn from the facts which the justices have set out in the Case as being the facts on which they relied.

Counsel for the appellant has complained of the Lord Chief Justice treating the cumulative effect of the evidence as being something which he was entitled to consider, and he has said that the notion that justices may add together a number of quite immaterial circumstances and in the result arrive at a conclusion that a number of immaterial circumstances added together may amount to sufficient corroboration is very dangerous. The Lord Chief Justice is not suggesting that anything of the kind is either possible or permissible. What I understand the Lord Chief Justice to be referring to is that a single fact taken by itself may be colourless, but that fact when looked at in connection with other facts in the case may be highly significant, and he says: "Taking each one of these facts by itself, I may have come to the conclusion it was colourless, yet taking all of these facts, one in relation to the other, in my opinion they bear the signification which they would not do if they were only single isolated facts without the other facts which, in my opinion, cover them." ROCHE, J., in his judgment says:

> "In the present case the corroborative evidence, which may be circumstantial, must be such as tends to show that the appellant was the father of the child in question."

Then he goes through the five facts which I have referred to, and he deals with each separately and comes to this conclusion:

"Accordingly, I hold the justices were justified in finding that there was corroborative evidence upon which they might act." A

He draws the inference that some if not all of these facts were not equally consistent with the two stories, but that they were inconsistent with the appellant's story and consistent only with the woman's story. AVORY, J., on the other hand, came to the conclusion which he expressed as follows: B

"In my opinion this case is of a class in which it is peculiarly necessary that the requirements of the statute as to corroboration should be strictly complied with, and in my view there was no evidence apart from that of the respondent herself which was not consistent with the innocence of the appellant, or which tended to prove that he was the father of the child."

Having given the matter as careful consideration as I can, the inference I draw C from the facts as stated by the justices is the one drawn by AVORY, J., and I think that there is no evidence apart from that of the respondent herself which was not consistent with the evidence of the appellant. I deal with the facts seriatim, and ask myself whether any one of these facts has a different complexion put upon it by any one of the other facts. The first is that the appellant sent for the doctor. I said during the argument of the appeal, and I say it with respect to anybody else who D takes a different view, that it does seem to me grotesque to suggest that the circumstance that a man, situated as this man was, a bachelor with a single woman in the house on a farm, should send for the doctor when the woman is apparently in great pain and seriously ill is in any way inconsistent with his story that he had had nothing to do with the woman and is more consistent than otherwise with her story that he was the father of her child. The next is this, that he allowed the respondent E and the child to remain in his house from the birth of the child till June 17, 1919. That is the only fact that has caused me any real trouble. It is the fact undoubtedly that this man, who was asserting that he was not the father of this woman's child, but the employer of a woman who had had a bastard child in his house, allowed her to remain in the house without apparently any attempt to turn her away for five F weeks and two days. Is there anything in the statement of the Case by the justices to add colour to that fact, or does it remain a mere uncoloured fact? There is one statement which might, I think, have afforded considerable colouring if it had been more explicit, and that is the statement in the Case by the justices that the respondent had charged the appellant with being the father of the child, and that she had done that after the birth of the child and before she left the house. She left on G June 17, and if that statement had been made the day the child was born, or the day after the child was born, or within a day or two of the child being born, and the appellant had allowed the respondent, who had made such a false charge against him to remain in his house longer than was absolutely necessary from the point of view of humanity, it might be said that there was material before the justices which they were entitled to take into consideration as matter of corroboration, but they H left that statement with regard to the charge made by the woman as it seems to me wholly colourless, because they made no statement in the Case as to the date when it was made except that it was made before June 16. All the magistrates say is that the appellant, on being asked by the respondent what he was going to do about the child, said: "There is nothing for me to do but pay you a lump of money," and the only suggestion with regard to the date at which that occurred is that it was before I June 16. With the matter left in that uncertain position, can one say that the fact that the woman remained in the house for this five weeks and two days is of itself corroboration of the woman's story in a material particular when all you know which may go to colour that statement is the fact that at some time before June 16—that is, the day before she left the house—she asked the man what provision he was going to make for the child? In my opinion, that remains a colourless fact which was equally consistent with either story, and ought not, therefore, to have been accepted by the justices as corroborative evidence. The next thing is: "He did not

during the time ask the respondent who was the father of the child." Again it seems to me almost grotesque to treat that as corroborative evidence. It seems to me almost unnatural that he should. Is it a natural thing to ask of a woman, if the man, being a bachelor, is not the father of the child, and his servant has had an illegitimate child in his house? Why should he ask the woman who was the father of the child? I cannot follow why he should. The next matter is that the appellant did not answer a letter of July 14 which was sent to him. If the only fact relied upon is merely that the letter was not answered without any surrounding circumstances which would make it natural that it should be answered, that is not in itself corroborative evidence. I do not find any facts here which would render it natural that that letter should be answered. The only other matter is the demeanour of the witnesses and the way the evidence was given by the respondent. An attempt was made to bring that part of the case within the authority of the Scottish decisions to which we have been referred, but in order to do that it was necessary to say that the appellant was telling a lie when he said that he had not sent for the doctor, and that he told that lie because he thought the statement that he had sent for the doctor might tell against him. When the evidence is looked into, it does not appear that he told a lie about this, and the manservant's evidence is quite consistent with the appellant's evidence that, although he gave the order to the man, it was Miss Evans who suggested calling in the doctor.

For these reasons I am unable to draw the same inferences as were drawn by the Lord Chief Justice and ROCHE, J., in reference to these particular facts. I think that the Lord Chief Justice thought that the question was one rather of the right inference of fact than one of law, but as the matter comes here to be dealt with as a question of law upon a Special Case, and was so dealt with in the Divisional Court, my opinion, as I have to express it, is in accordance with the view taken by AVORY, J., and not with the view taken by the other members of the court below. In my opinion, the appeal succeeds.

SCRUTTON, L.J.—This is a case of considerable difficulty, made more difficult by the unsatisfactory way in which it comes before the court. There is unfortunately a difference of opinion in this court, and the result is that three judges being of opinion that the magistrates were right, and three that they were wrong, their decision will be reversed.

There is no difference of opinion as I understand as to the law to be applied. The statute requires the evidence of the mother in a bastardy case to be corroborated in some material particular by other evidence to the satisfaction of the justices. The justices were satisfied, and they asked in the Special Case whether there was corroboration on which they could act. I take the law to be as stated in the decision, which is binding on the members of this court, in *Mash* v. *Darley* (3) by BUCKLEY, L.J., and KENNEDY, L.J. BUCKLEY, L.J., said:

> "It is not for us to say what weight ought to be given to that evidence. All that we have to look at is to see whether there was evidence. If there was evidence, it is not for us but for the justices to determine whether or not that was evidence which satisfied them. It appears to me that that was corroborative evidence, and that the justices were entitled to take into account [certain facts]."

KENNEDY, L.J., puts it in this way:

> "Whether, if I had had to deal with the case in the first instance, knowing the seriousness of the charge and the difficulty in many cases of disproving it, I should have thought this fact sufficient evidence of corroboration is another matter. All we have to consider is, might the justices acting judicially consider that conduct and act upon it? I will not differ from the conclusion to which my brethren have come. The statute says that it must be corroboration 'in some material particular,' and we must consider the particular in regard to

the charge which is made, which is here one of paternity. As I say, I am not sure that I should myself have acted upon it. What we have to say is whether, in point of law, the justices must be held to be wrong because they acted upon it."

Interpreting that in very much the same language as BANKES, L.J., has interpreted it, the question is not what opinion I or my brother should have come to if we had heard that evidence. That is quite immaterial. The question is whether there was any evidence on which reasonable magistrates could come to the conclusion there was corroboration? If there was such evidence, they are the persons to say whether they are satisfied, and the fact that we should not have been satisfied is quite immaterial because we are not the persons to be satisfied; it is the magistrates with their local knowledge who are to be satisfied. That being the law, and I do not think there is any dispute as to that being the law, the next question is: What is meant by "corroboration in a material particular," that is, in a material fact? The vital fact to be proved in a bastardy case is that a child has been born to the applicant as the result of sexual connection with the putative father. From the nature of the case it is almost inevitable that you will never have any corroboration of that fact directly. People who have illicit connection do not usually do it in the presence of witnesses, and if a witness were present he could not say that the child resulted from that connection. Consequently "corroboration" can never mean corroboration of the actual facts of sexual connection from which the child results. The corroboration must be external evidence of circumstances which form circumstantial evidence of the main fact, that is to say, which are facts from which there appears a probability that the main fact happened or from which it may be inferred that the main fact happened. For instance, you infer that the man has had connection with the woman and a child has resulted sometimes from evidence of previous affection, that is that the man and the woman had been seen about together showing affection to each other. You sometimes infer it from the fact of subsequent affection, that the man and woman are seen about together showing signs of affection. Sometimes you infer it from the fact that the man has done acts which may be treated as recognising responsibility for the child, statements that he will provide for the child, payments for the child, recognition of the child as his child, all facts from which as a matter of inference and probability it is more probable that the intercourse did take place than not. I quite agree with BANKES, L.J.'s, view that if the fact you have got is such that the probabilities are equal one way or the other, you cannot legitimately draw an inference from it one way or the other. It must be even slightly, and slightly will do, more probable one way that intercourse took place than the other, and if there is that balance of probability it is not for the court to say: "It is so slight we should not have acted on it." If there is evidence on which the magistrates could have come to that view, it does not matter that the court would have come to a different view. It is just the same question as when there is evidence for the jury; it is for the jury to decide it and not for the judge.

How does this case come before us? This is where the unsatisfactory character of the case comes in. The magistrates, having heard evidence and taken notes of it, have not submitted to this court the notes of the evidence, but what they have done is to say this: "The question upon which the opinion of the said court is desired is whether we, the said justices, upon the above statement of facts came to a correct determination." We look back to see what the "above statement of facts" is. We find that the magistrates have set out: "The following facts were proved by the evidence of the respondent." When you say a fact is proved, that looks uncommonly like a statement of fact. When they get to the evidence of the appellant, they say: "The appellant was called and stated certain things," "From the evidence of the appellant it was proved." So they apparently distinguish

between certain statements he made which they do not accept and certain statements he made which they do accept. "The respondent called John Price, who proved the following facts." Are those the facts which the court says are proved; are they the above facts on which we are to give an opinion? If they are not, then there is no statement whatever as to what the evidence of the respondent was and we have to decide corroboration without knowing what the statement was which the magistrates have accepted and acted upon. It is said that the magistrates cannot have meant to treat those facts as proved because some of the appellant's and respondent's evidence do not fit in very well. I have looked at them very carefully, and though I think it would have been better if the justices had been more exact, I cannot see that there is any clear inconsistency between the findings. One pair of findings which is suggested to be inconsistent is this: "About July or August, 1918, the respondent went to a doctor and he told her something about herself, and when she returned to the Welsh farm she told the appellant the doctor had told her she was in the family way." That is in the statement of the respondent's evidence. The appellant's statement is that he knew that the respondent went to a doctor in August, 1918, because he saw some medicine in the kitchen and asked if she was not well, and she told him the doctor had made some impudent remarks about her. He did not ask what they were. Looking at those two statements carefully, they can be perfectly well read together, it seems to me, and not be inconsistent. The respondent went to a doctor, and the appellant knew it, for he saw some medicine in the kitchen. He asked if she was not well, and she told him the doctor had made some impudent remarks about her. He did not ask what they were. She told him that the doctor had told her she was in the family way. There is no contradiction whatever in those two paragraphs. The other paragraphs suggested to be inconsistent are: "The appellant on being asked by the respondent what he was going to do about the child, said 'There is nothing for me to do but to pay you a lump sum of money.' Later, on June 16, 1919, the appellant asked the respondent to take the child to be brought up by a Miss Mills, and that he would pay the money on the quiet." That is compared with the paragraph that he did not ask the respondent who was the father of the child during the time she was in his house after the confinement. I cannot see, reading those two together, any inconsistency. The result is this: Feeling bound to read this Case in the ordinary meaning of language, it appears to me that when the magistrates have said that facts are proved and have asked our opinion on the "above statement of facts," they mean us to take the facts as proved, and I approach the case on the first point from that point of view.

That being so, what have we? That a single woman living in the house of a bachelor has had an illegitimate child, and he has allowed her to remain in the house for five weeks and two days after the birth of the child and while she was there he has said to her: "There is nothing for me to do but to pay you a lump of money," and asked her to make arrangements for the child. If those are the facts which I am to take, I find it absolutely impossible to say that that was not evidence which the magistrates could treat as corroboration of the applicant's story, and I rather gather if that is the true view of the facts, one of my brothers, at any rate, would not have disagreed with me. Perhaps I should deal with the other alternative. Supposing that the view taken by BANKES, L.J., of the case is correct, and that, though the magistrates say the facts were proved, they do not mean that the facts were proved, but merely that the respondent said so, and they do not express any opinion whether she said so truly or not, the fact still remains that for five weeks after the birth of a bastard child a bachelor allows the woman who has had the bastard child and has been in his service, to remain in the house. Whether or not I should have found that fact by itself is enough, is not a question I have to decide. Can I say that magistrates, knowing the locality and local habits, were wrong in thinking that was a corroboration of the

woman's story? On the best consideration I can give to the matter, I cannot say that they were wrong in taking that as a corroboration, that is to say, I cannot say that it is no evidence on which reasonable people might come to the conclusion that the man who allowed the woman to remain in his house in those circumstances was admitting some responsibility for the child who had been born in his house. That is a matter which influences me in thinking the decision of the Lord Chief Justice and ROCHE, J., was right.

Other matters which are mentioned, I think are not sufficient corroboration. I do not attach any importance to the fact, if it be that fact, that the appellant sent for a doctor on the morning when the woman was in pain. I do not know what else he could do. Whether he knew what was the matter with her or whether he did not know what was the matter with her, to send for a doctor does not seem to me to admit any responsibility for the suffering for which the doctor is being sent for. That he allowed the respondent and child to remain in the house, I have dealt with. I think myself that is sufficient. That he did not during that time ask the respondent who was the father of the child, I do not myself find sufficient. That he did not answer the letter of July 14, 1919, which he stated he had received. The question of not immediately repudiating an accusation made against you is one of very considerable difficulty, and is, in my view, entirely a question of degree. If a charge of outrageous conduct is made against you in public and you say nothing, I have always thought that any jury would be entitled to treat your silence as an admission, if it was the class of accusation and the people in the neighbourhood were the class of people that you would expect repudiation of an untrue charge to be made by, but I do not think the same principle applies to accusations made by private letter. All sorts of lunatics write all sorts of letters to all sorts of people and if you are bound the moment you get a letter from a lunatic making a charge to write and at once deny it, the time of judges, at any rate, would be fully taken up by answering their correspondence. I quite agree with what was said in *Wiedemann* v. *Walpole* (2), and what has been said in this court, that the mere fact of receiving a statement by letter with nothing more is not enough to justify magistrates or a jury in finding corroboration. Then the magistrates say "By the demeanour of the witnesses." That is so vague that I really do not feel able to decide on it. If they said: "By some particular circumstance in the demeanour of the appellant," then a serious question might easily have arisen. In my experience as a judge I have seen several cases of that sort. I have one in mind particularly where everybody in court was convinced by the demeanour of the person who denied the charge that he was absolutely guilty of it, when everybody in court who saw the demeanour and the way of denial would have said the same thing. But there is no definite allegation or anything I can check here. "By the demeanour of the witnesses," is so vague that it is quite impossible to know what the magistrates were thinking of which ought to have allowed them to put such a vague statement as that in the case. Then "By the way the evidence was given by the respondent." I agree you cannot treat the way in which the respondent gave evidence as corroboration of her own evidence.

The case comes back to this, that the question I have to ask myself is: Was there evidence which the magistrates could reasonably treat as corroboration? I think that this Case states that the man allowed the woman to remain in the house for five weeks during which time she was charging him with being the father of the child, and I think that is abundantly sufficient corroboration. If I am wrong in thinking that the right view is merely that he allowed her to live in the house for five weeks, I still think that is material which, whatever view I should take, the magistrates are entitled, if they think it right, knowing the circumstances and the locality, to treat as corroboration. It is on that ground that I agree with the result of the Lord Chief Justice and ROCHE, J., and I think this appeal should be dismissed.

ATKIN, L.J.—I agree that this case presents difficulties which are not diminished by the way in which the Case is stated, but I agree with my Lord that the appeal should be allowed, and in doing so it is a satisfaction to me to feel that all the members of this court are agreed that as to three, at any rate, out of the four bits of evidence accepted by the majority of the court below as corroborative evidence, their decision was erroneous. The only difference between us is upon one point of evidence with which I shall deal. The evidence of the mother of the child to be sufficient has got to be corroborated in some material particular by other evidence to the satisfaction of the justices. That appears to me to be a very important safeguard inserted by the legislature, and it appears to me of the greatest importance that it should not be whittled down, but should be maintained, as, in my experience, it is absolutely essential for the purpose of doing justice between the complainant and the respondent in matters of this kind, where charges are so easily brought and repudiated with such difficulty, and where there is often a strong temptation to conceal the identity of the real father and impose liability on the person who is best able to bear it. What is meant by corroborative evidence is, to my mind, established now by the decision in *R.* v. *Baskerville* (4) which I think must be treated as an authority generally upon the meaning of corroborative evidence. It must be evidence which tends to prove that the respondent is the father of the complainant's child; in other words, it must be evidence implicating the man, evidence which makes it more probable than not that the respondent to the summons is the father of the child.

It is not necessary to recapitulate all the facts which are relied upon by the majority of the judges in the Divisional Court when considering the conduct of the appellant both before and after the birth as material. The facts before the birth that are relied upon in their judgment are that when the woman was in child, the respondent, who was said to be the father of the child, gave her brandy and tea and sent for the doctor. He lit a fire and gave her brandy and tea. What else could he have done if he had been an innocent person in fact? What is the suggestion? Could he have sent for the second footman and have ordered him to make the fire and ordered the butler to take up the brandy? There was nobody else either to light the fire or make the tea or give her brandy and it appears to me, as it appeared to my Lord, grotesque to suggest that in any such circumstances as those any inference of paternity or admission of paternity is to be gathered from those facts. I think the same thing applies to sending for the doctor. Common humanity would suggest to a man in that position, a bachelor, with no other woman in the house except a neighbour just called in, that it was necessary, and in fact it was obviously necessary, to send for the doctor. The only other matter that is suggested in reference to sending for the doctor is whereas the act would be colourless and innocent in itself, the fact that the appellant denied that he sent for the doctor throws upon it a taint of guilt. I do not gather that he did in fact make that denial and on the Case as stated by the magistrates it appears to me that the woman who was called in thought it necessary the doctor should be fetched and that the appellant gave orders to his farm servant to go and fetch a doctor. Whether that is so or not, I myself certainly do not gather, from the mere fact that the appellant denied he sent for the doctor when the case came on for hearing, that an act which otherwise was an innocent one became an admission of guilt.

One of the other facts relied on was that the appellant did not ask the girl who was the father of the child. Assume an innocent man who is not the father, the master of the house, and the girl laid up in his house having a child, is it or is it not reasonable that he should refrain from asking who the father was? Would he expect to get an answer if he did ask? I should have thought he would not, but in any case it seems to me that the facts that he did not ask who the father was does not make it more probable he was the father, and, therefore, does not appear to me to afford corroborative evidence.

The other fact, and an important fact, because upon this part of it SCRUTTON, L.J., differs, is that the man kept the woman in the house for five weeks after the birth of the child. Regarding that as a mere statement without anything more, what is the proposition of law? It appears to me to be this, that if an unmarried woman gives birth to a child in a house and the owner of the house allows her to remain in the house for five weeks after the birth, that affords evidence that the owner of the house is the father of the unmarried woman's child. That is a proposition which I am certainly not prepared to accept, and there is, to my mind, no evidence here adduced, as I think it ought to have been adduced by the complainant if it was to be of any value, that she was able to leave the house in a shorter period than five weeks, and, which is most important, that the bachelor owner knew that she was able to leave the house in a shorter period than five weeks or that there was any place where she could go. It is perfectly consistent with the facts as found in this Case that either the woman had a bad labour, and everybody knows it is perfectly possible that a woman may be incapacitated for five weeks, especially when no preparation has been made in regard to her motherhood, or that she did not let the owner of the house know that she was able to resume work, or that she was not able in a shorter period to make the necessary arrangements for leaving the house and supporting herself and her child. In the circumstances it appears to me impossible to lay down that there is some period which affords no evidence and another period on the lapse of which there is evidence beyond which it can be found that permission to dwell in the house is an admission of guilt. It has been said that here the justices have found that the appellant had, been charged by the woman with the paternity of the child, and, therefore, to allow the woman to remain for five weeks was in itself evidence of an admission of guilt. I cannot take the view that the justices have so found. I cannot read these inconsistent statements as being anything other than uncontradicted statements made on oath by the witnesses. If the justices have found anything as a fact, it is where they say: "We were of opinion that the evidence of the complainant had been corroborated by the fact that, among other things, [the putative father] did not during that time ask the complainant who was the father of her child." It seems to me it is impossible that they could have relied upon that fact as corroboration and at the same time believed and meant to find that the girl had already charged the appellant with being the father of her child, for, if she had done that, then obviously the fact that he did not make the inquiry becomes irrelevant, and if, in fact, the justices had come to the finding which is suggested, I myself should have had very considerable doubt whether that finding was proper to be taken into account in considering the question whether or not the conduct of the appellant was corroboration, because if the evidential value of the independent evidence is non-existent the corroboration is not established. I doubt whether the justices should first of all make up their minds as to what is the truth of the story—that is to say, make up their minds that the mother's evidence is true—and then consider whether there is corroborative evidence so as to permit them to give effect to what they have already found. That, to my mind, is a very unsatisfactory mode of procedure, and, I think, one that is not contemplated. The question is whether or not the evidence of the mother is true, and one is not to arrive at that conclusion of fact until one has found whether or not there is other evidence corroborating that. I throw that out as a view. I do not wish to decide it at the present moment. The other point that was suggested was this. It was said that the letter which the woman wrote to the man alleging that he was the father of the child and if he did not make provision for it, she would have to take other proceedings, was not answered. I think it is sufficient in answer to that to say, according to *Wiedemann* v. *Walpole* (2), which is an authority, the failure to answer a letter in the circumstances of this case is not in law evidence of an admission of liability, and, therefore, is not corroborative evidence.

There was a suggestion in the court below that, although each one of these facts

in itself was insufficient, yet the accumulation of them might make them sufficient. If all that is meant by that is the explanation given by my Lord, one can accept that. It may be that light may be thrown upon something which in itself is innocent and irrelevant by some other circumstance which, though not itself conclusive, may yet be illuminating. But apart from that it appears to me impossible, when you are dealing with the question of corroboration, that the accumulation of bits of evidence, no piece of which, in fact, is admissible as corroborative evidence, can amount in the whole to corroboration. Ex nihilo nihil fit. That appears to me to have no relation to the question of circumstantial evidence where it is quite plain that evidence of independent facts, each of them in itself insufficient to prove the main fact, may yet, either by their cumulative weight, or still more by their connection one with the other as links in a chain, prove the principal fact to be established. For these reasons I think that this appeal should be allowed, and I must say that I arrive at this conclusion with much greater satisfaction, feeling that I am fortified by the weighty experience of AVORY, J., with whose judgment I agree.

Appeal allowed.

Solicitors: *T. D. Jones & Co.*, for *E. P. & A. L. Careless*, Llandrindod Wells; *Churchman, Smallman & Co.*, for *Richard E. George*, Newtown.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

R. *v.* ELLOR

[COURT OF CRIMINAL APPEAL (Earl of Reading, C.J., Bray and Sankey, JJ.), July 26, 1920]

[Reported 90 L.J.K.B. 218; 124 L.T. 287; 85 J.P. 107; 36 T.L.R. 840; 26 Cox, C.C. 680; 15 Cr. App. Cas. 41]

Criminal Law—Murder—Provocation—Statement by wife which accused interpreted as meaning that she was going to commit adultery.

Mere words do not constitute sufficient provocation to justify a jury returning a verdict of manslaughter instead of murder except in special circumstances.

A wife told her husband that she was "going to enjoy herself that night," and he, thinking that those words meant that she was going to commit adultery, killed her,

Held: a mere statement by a wife that she was going to commit adultery did not fall within the exceptions to the above rule so as to reduce the crime of killing from murder to manslaughter.

Notes. As to provocation by words see 10 HALSBURY'S LAWS (3rd Edn.) 712, and for cases see 15 DIGEST (Repl.) 94, 2,943.

Cases referred to:

(1) *R.* v. *Rothwell* (1871), 12 Cox, C.C. 145; 15 Digest (Repl.) 942, *9033*.

(2) *R.* v. *Palmer*, [1913] 2 K.B. 29; 82 L.J.K.B. 531; 108 L.T. 814; 77 J.P. 340; 29 T.L.R. 349; 23 Cox, C.C. 377; 8 Cr. App. Rep. 191, C.C.A.; 15 Digest (Repl.) 943, *9037*.

(3) *R.* v. *Jones* (1908), 72 J.P. 215; 15 Digest (Repl.) 942, *9035*.

(4) *R.* v. *Birchall* (1913), 109 L.T. 478; 29 T.L.R. 711; 23 Cox, C.C. 579; 9 Cr. App. Rep. 91, C.C.A.; 15 Digest (Repl.) 942, *9036*.

(5) *R.* v. *Greening*, [1913] 3 K.B. 846; 83 L.J.K.B. 195; 109 L.T. 720; 29 T.L.R. 732; 23 Cox, C.C. 601; 9 Cr. App. Rep. 105, C.C.A.; 15 Digest (Repl.) 944, *9065.* A

Appeal on a point of law against a conviction for murder before COLERIDGE, J., at the Chester Assizes.

The appellant was convicted of the murder of his wife, to whom he was married in 1907. He joined the army in August, 1914, but was discharged on account of ill-health. At a later period he rejoined and served until March, 1919. Up to August, 1919 the relations between the appellant and his wife were on the whole, good, although their married life had not been altogether happy before that date. On two occasions the appellant's wife had left him, but had returned under persuasion. In March, 1920 she again left the appellant because of his violence. The appellant suspected his wife of being unfaithful to him, though there was evidence at the trial that his suspicions were not well founded. On the day before the murder the appellant remarked to his stepson: "I suppose she has gone to live with another man." The next day, Mar. 27, 1920, the appellant saw his wife at the house where she was then living, and tried by every means to persuade her to return. On the same day the appellant gave himself up to the police and confessed that he had murdered his wife. In the evening he made a written statement that he had killed his wife with a hammer, and that at their interview his wife had told him to put his head under a train, and said that she was going to enjoy herself that night. In his statement the appellant said: "That did it."

W. N. Stable for the appellant.

Ralph Sutton for the Crown was not called upon to argue.

The judgment of the court was delivered by

EARL OF READING, C.J.—The appellant appeals to this court against a conviction for the murder of his wife and a sentence of death. The appeal is based on the ground of misdirection by the learned judge at the trial. Although the appellant was labouring under an impression that his wife was unfaithful to him it was proved at the trial that there was no ground for suspicion by the appellant. In a statement made by the appellant he said that his wife had told him to put his head under a train and that she said she was going to enjoy herself that night. The case rests upon the the supposition that the words used by the appellant's wife meant, or might be taken to mean, that she intended to commit adultery.

Counsel for the appellant has argued before us that the words used amounted to such provocation in law as would entitle the jury to return a verdict of manslaughter and not murder. A question of law is involved and is of some importance. The proposition has been put forward that if a wife tells her husband that she is going to commit adultery and he then kills her, it is open to a jury at the trial to reduce the crime from murder to manslaughter. There is no authority to support such a proposition, and it is not the law. A statement by a wife that she is going to live with another man and is about to commit adultery does not amount to provocation which would justify a verdict of manslaughter instead of murder. If a man discovers his wife in an act of adultery and kills the adulterer, the killing in such a case is looked upon in law as manslaughter, because from the effect it would have on the self-control of a husband, the law regards the act of adultery in the same light as a blow struck at the husband. This principle has been extended to the case of a sudden confession of adultery by the wife, as shown by *R.* v. *Rothwell* (1), cited to us in argument. But all cases subsequent to that decision have regarded that particular case as an exception to the general rule, which is that except under very special circumstances words do not constitute sufficient provocation to justify a jury in returning a verdict of manslaughter instead of murder. In the case of *R.* v. *Palmer* (2) CHANNELL, J., said ([1913] 2 K.B. at p. 30):

"We are of opinion that in this case there is no ground for giving leave to appeal.

A . . . The judge stated the rule in the old form, that words alone can never constitute sufficient provocation to reduce the crime of murder to manslaughter. It would perhaps have been more accurate, in view of modern decisions, if he had said that words cannot constitute sufficient provocation except in very special circumstances. . . It is well-established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of manslaughter only B and not of murder. That has been extended in *R.* v. *Rothwell* (1) and *R.* v. *Jones* (3) to a sudden confession by a wife of past adultery, and this extension no doubt creates an exception to the general rule that provocation by words is not sufficient. The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. . . ."

C In *Palmer's Case* (2) the language of BLACKBURN, J., in *R.* v. *Rothwell* (1) that "a man who discovers his wife in adultery and kills the adulterer is only guilty of manslaughter" was held to apply only in a limited sense. Two cases came before this court in the same year as *Palmer's Case* (2)—*R.* v. *Birchall* (4) and *R.* v. *Greening* (5)—and in both of these cases it was held that the rule laid down by BLACKBURN, J., in *R.* v. *Rothwell* (1) should not be extended. We are of opinion, therefore, that the D authorities do not support the proposition which has been put forward; in fact, the reported decision are against a wide extension of the recognised doctrine, such as is contended for in the present case.

On the facts of the case there is no evidence which will support the argument used by counsel for the appellant, and neither the summing up of the learned judge nor the verdict of the jury can in any way impunged. It will be noticed that neither E in his statements nor at the trial did the appellant state that he had killed his wife because he thought she was about to commit adultery. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

FROUD *v.* FROUD

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Coleridge and Hill, JJ.), May 19, 1919, March 30, 1920]

[Reported 123 L.T. 176; 36 T.L.R. 505; 26 Cox, C.C. 605]

Magistrates—Metropolitan magistrate—Limit of jurisdiction.

The jurisdiction of a metropolitan magistrate primâ facie extends to the whole of the metropolitan police district and is not limited to the district of the court in which he is sitting.

Husband and Wife—Summary proceedings—Desertion—Res judicata—Previous finding that no desertion existed at earlier date—No bar to subsequent finding of desertion at later date.

A previous finding by a competent court that desertion at an earlier date had not been proved is not a bar to a finding of desertion at a later date.

Stokes v. *Stokes* (1), [1911] P. 195 and *Blackledge* v. *Blackledge* (2), [1913] P. 9, distinguished.

Notes. Applied: *Edgware Trust, Ltd.* v. *St. George* (1954), 118 J.P. 519.

As to jurisdiction of metropolitan magistrates see 25 HALSBURY'S LAWS (3rd Edn.) 143, 144, and for cases see 33 DIGEST 309. As to summary jurisdiction in relation to desertion see 12 HALSBURY'S LAWS (3rd Edn.) 496, and for cases see 27 DIGEST (Repl.) 375, 376 and 712 et seq.

Cases referred to:

(1) *Stokes* v. *Stokes*, [1911] P. 195; 80 L.J.P. 142; 105 L.T. 416; 75 J.P. 502; 27 T.L.R. 553; 55 Sol. Jo. 690, D.C.; 27 Digest (Repl.) 712, *6796*.

(2) *Blackledge* v. *Blackledge*, [1913] P. 9; 82 L.J.P. 13; 107 L.T. 720; 77 J.P. 427; 29 T.L.R. 120; 57 Sol. Jo. 159; 23 Cox, C.C. 230, D.C.; 27 Digest (Repl.) 712, *6799*.

Appeal by the husband against an order by the police magistrate sitting at Marylebone Police Court, whereby the husband was adjudged to have deserted the wife, and ordered to pay her 35s. a week and costs.

The parties were married in 1903, and in July, 1908 the wife obtained a maintenance order against the husband at the Marylebone Police Court, but in 1909 they resumed cohabitation. In October, 1918 they again separated under circumstances as to which there was some controversy, and on Nov. 5, 1918 the wife took out a summons for desertion at the Clerkenwell Police Court (in which division of the Metropolitan Police district the parties were then resident). The husband appeared to the summons, denied desertion, and alleged that the separation had been by consent, and on Nov. 19, 1918 MR. BROS, after hearing evidence on both sides, dismissed the summons, holding the alleged desertion not proved. The wife then took out a summons at the Clerkenwell Police Court for arrears under the old order of July, 1908. The husband resisted this application on the ground that the order sought to be enforced had been avoided by renewal of cohabitation. The matter came before another magistrate, MR. SIMMONS, who held that the former order, being one of the Marylebone Police Court, could only be discharged by the court that had made it. The husband thereupon applied on Dec. 16, 1918 to the Marylebone Court for discharge of the order of July, 1908. The magistrate, MR. D'EYNCOURT, before making any order on this summons, directed the issue of a fresh summons to the husband for desertion; and such summons was at once issued, and served on the husband in court. It did not specify the date of the alleged desertion. Counsel for the husband objected to the issue of this summons as without jurisdiction on the grounds that the parties were resident in the Clerkenwell Division, and that the question of desertion was res judicata by reason of the Clerkenwell Police magistrate's finding of Nov. 19. The learned magistrate, however, overruled these objections, and adjourned both summonses to Dec. 31. At the adjourned hearing

A the same objections were again taken, and objection was also taken on husband's behalf to the omission of the date of the alleged desertion from the summons issued to him on Dec. 16.

All these objections were, however, overruled, and, after hearing evidence on both sides, the learned magistrate found that there had been continuing desertion since the date of the last proceedings. The main difference in the evidence on this B occasion as compared with that before the magistrate at Clerkenwell in November, was that, whereas at Clerkenwell the husband had only admitted that there had been trouble with his wife in regard to his relations with another woman, on Dec. 31 he admitted that this other woman was living with him as his wife.

The appeal was first argued on May, 19, 1919, and remained part heard.

C *E. H. Cannot*, for the husband.

H. B. Barnard (with him *T. Bucknill*), for the wife was not called on to argue.

COLERIDGE, J., stated the facts and continued: The order appealed against is attacked as without jurisdiction on two grounds—first, because it was made by the magistrate at Marylebone, and as the parties were living at Clerkenwell, it is said that the offence of desertion was committed there, and was outside the jurisdiction D of the magistrate sitting at Marylebone. But, primâ facie, the jurisdiction of a metropolitan magistrate is limited by his commission, and that extends to the whole metropolitan police district. Some clear statutory authority is required to limit it in the manner suggested, and no such authority has been shown to us. The custom, whereby the cases arising in a particular division of the metropolis are dealt with in the police court of that division, is no doubt a convenient one. But it requires more E than a custom of that sort to limit jurisdiction. Moreover, the parties have been referred to the Marylebone tribunal by the magistrate sitting at Clerkenwell. That point, therefore, fails.

Again, it is said that the question of desertion was res judicata, and had been decided in the husband's favour by the court at Clerkenwell, and we have been referred to the decisions in *Stokes* v. *Stokes* (1) and *Blackledge* v. *Blackledge* (2). F But the previous decision here was that the husband had not been guilty of desertion on Oct. 21, 1918. The summons now in question omitted to give the date of the desertion it alleged, but was issued on Dec. 16, 1918, and bore that date. It may, therefore, be regarded as having alleged desertion on that date. And there was an important difference in the evidence before the learned magistrate on the second occasion—viz., the husband's admission that another woman was living with him as G his wife. This was not merely further evidence of the desertion previously in question, but was evidence on which the court might well find that the appellant was guilty of desertion as from Dec. 16. The case is, therefore, distinguishable from those cited to us, and this point also fails.

HILL, J., concurred.

Solicitors: *Foster Grave & Co.; Close & Co.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

HOCKLEY AND PAPWORTH *v.* GOLDSTEIN

[KING'S BENCH DIVISION (BAILHACHE, J.), April 21, 1920]

[Reported 90 L.J.K.B. 111; 124 L.T. 277; 36 T.L.R. 539; 25 Com. Cas. 284]

Chose in Action—Assignment—Notice—Verbal notice given as debtor unable to read—Validity.

The plaintiffs bought the business and book debts of one S. who had prior to the sale supplied goods to the defendant for which the defendant had not paid. As the defendant, to the knowledge of the plaintiffs, was unable to read, the plaintiffs did not give him written notice of the assignment, but read the assignment over to him twice and explained the nature and effect of it to him. The defendant paid a sum on account of the debt to the plaintiffs, but later refused to pay the balance. In an action by the plaintiffs to recover the balance of the price for goods sold and delivered,

Held: although the defendant was unable to read, as the provisions of s. 25 (6) of the Supreme Court of Judicature Act, 1873 [now s. 136 (1) of the Law of Property Act, 1925], as to giving to a debtor express notice in writing of the assignment of the debt had not been complied with, there had not been any assignment of the debt effectual in law within s. 25 (6), and, therefore, the action failed.

Notes. As to notice of assignment of chose in action see 4 HALSBURY'S LAWS (3rd Edn.) 488, 489, and for cases see 8 DIGEST (Repl.) 597, 598. For the Law of Property Act, 1925, s. 136 (1) see 20 HALSBURY'S STATUTES (2nd Edn.) 715.

Action tried by BAILHACHE, J., without a jury.

The plaintiffs claimed to recover from the defendant the price of goods sold and delivered. In April, 1919, the plaintiffs bought the business and book debts of one Sullivan, who had, previous to the sale of his business to the plaintiffs, supplied goods to the defendant. The defendant had not paid for the goods. This action was brought for the price of those goods as part of the assets of the business which had been sold to the plaintiffs. No written notice of the assignment had been given to the defendant because he was a man of foreign origin and could neither read nor write, and it was considered useless in the circumstances, to give him a notice in writing. The assignment was read over to him twice and explained, and he understood its provisions. The plaintiffs requested payment, and the defendant on the first occasion paid them £20 on account, but he subsequently refused to pay the balance on the ground that he had not received a written notice of the assignment, within s. 25 (6) of the Judicature Act.

The Supreme Court of Judicature Act, 1873, provides, by s. 25 (6), that any absolute assignment of any debt of which

> "express notice in writing shall have been given to the debtor . . . shall be . . . effectual in law . . . to pass and transfer the legal right to such debt . . . from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. . . ."

Lancelot Fletcher for the plaintiffs.
Horace Fenton for the defendant.

BAILHACHE, J.—It has been contended on behalf of the plaintiffs that, as was well known to the parties, the debtor could not read, it would have been a useless formality to give him a written notice, as required by sub-s. (6) of s. 25 of the Judicature Act, 1873. It is said that the object of the subsection was attained in another way. The debtor was informed of the change of creditor. The plaintiffs said that they read over the assignment to the defendant and explained

its contents to him, and in that manner, it is said that everything which it was sought to secure by sub-s. (6) of s. 25 of the Judicature Act, 1873, was, in fact, gained. The plaintiffs, no doubt, did this to bring home to the defendant's mind the fact that there had been an assignment of the debt from Sullivan to themselves. But the words of the subsection are quite clear, and it is admitted that they have not been complied with. The subsection requires that a notice in writing of the assignment of any debt shall be given to the debtor. I cannot hold that a notice which is not given in writing, but in some other way, is sufficient.

Judgment for defendant.

Solicitors : *Kelseys & Knocker; Grover & Mills.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

R. *v.* RICHMOND CONFIRMING AUTHORITY. Ex parte HOWITT

[KING'S BENCH DIVISION (Earl of Reading, C.J., Darling and Salter, JJ.), October 27, 1920]

[Reported [1921] 1 K.B. 248; 90 L.J.K.B. 413; 124 L.T. 345; 85 J.P. 84; 37 T.L.R. 62]

Licensing—Confirmation of licence—Death of licensee before confirmation—Substitution of different person—Person aggrieved—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 13 (2).

The assistant secretary of a company, T., applied on their behalf to the licensing justices for the grant to him of a full licence for the sale of intoxicating liquor. The grant was opposed by H., a rival trader and licensee, but the justices granted the licence. Before the confirmation of the grant of the licence, T. died. On the company's application to the confirming authority to confirm the grant, the confirming authority were asked to substitute the name of B., the secretary of the company, for that of T. H. opposed this application on the ground that the confirming authority had no jurisdiction to grant a licence, but only jurisdiction to confirm grants made by the licensing justices, and no licence had been granted to B. The confirming authority confirmed the grant made to T. and substituted B.'s name for that of T. H. obtained a rule nisi for ceriorari to bring up and quash the confirming authority's order.

Held: the confirming authority had acted in excess of their jurisdiction; H. was a person substantially aggrieved beyond any ordinary member of the public; and so he was entitled to the writ ex debito justitiæ, and the rule must be made absolute.

Dicta of LORD ALVERSTON, C.J., in *R.* v. *Groom, Ex parte Cobbold* (1), [1901] 2 K.B. at p. 162, of A. L. SMITH, L.J., in *R.* v. *Nicholson* (2), [1899] 2 Q.B. at p. 470, and of BLACKBURN, J., in *R.* v. *Surrey Justices* (3) (1870), L.R. 5 Q.B. at p. 472, applied. Dictum of VAUGHAN WILLIAMS, L.J., in *R.* v. *Nicholson* (2), [1899] 2 Q.B. at p. 471, explained.

Notes. The Licensing (Consolidation) Act, 1910, has been repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. For s. 13 (2) of the 1910 Act, see now s. 9 (2), (3), of the 1953 Act.

Referred to : *R.* v. *Butt, Ex parte Brooke* (1922), 38 T.L.R. 537; *R.* v. *Manchester Legal Aid Committee, Ex parte R. A. Brand & Co.*, [1952] 1 All E.R. 480.

As to confirmation of licences see 22 HALSBURY'S LAWS (2nd Edn.) 592 et seq.,

and for cases see 30 DIGEST (Repl.) 51 et seq. As to prerogative orders in relation to justices licences see 22 HALSBURY'S LAWS (3rd Edn.) 612, 613. For the Licensing Act, 1953, s. 9, see 33 HALSBURY'S STATUTES (2nd Edn.) 155.

Cases referred to:

(1) *R.* v. *Groom, Ex parte Cobbold*, [1901] 2 K.B. 157; 70 L.J.K.B. 636; 84 L.T. 534; 65 J.P. 452; 49 W.R. 484; 17 T.L.R. 433; 45 Sol. Jo. 448, D.C.; 30 Digest (Repl.) 23, *147*.

(2) *R.* v. *Nicholson*, [1899] 2 Q.B. 455; 68 L.J.Q.B. 1034; 64 J.P. 388; 48 W.R. 52; 15 T.L.R. 509; 43 Sol. Jo. 744; sub nom. *R.* v. *Nicholson, etc., Bolton Justices, R.* v. *Greenhalgh, etc., Bolton Justices, Ex parte Bamber*, 81 L.T. 257, C.A.; 30 Digest (Repl.) 73, *561*.

(3) *R.* v. *Surrey Justices* (1870), L.R. 5 Q.B. 466; 39 L.J.M.C. 145; 34 J.P. 614; 16 Digest 422, *2822*.

(4) *Forster* v. *Forster and Berridge* (1863), 4 B. & S. 187; 8 L.T. 661; 122 E.R. 430; sub nom. *Foster* v. *Foster and Berridge, Ex parte Berridge*, 2 New Rep. 353; 32 L.J.Q.B. 312; 10 Jur. N.S. 254; 11 W.R. 799; 16 Digest 374, *2115*.

Also referred to in argument:

R. v. *Middlesex Justices* (1832), 3 B. & Ad. 938; 1 L.J.M.C. 68; 110 E.R. 345; 30 Digest (Repl.) 64, *471*.

R. v. *Rogers, etc., Somersetshire Justices* (1892), 56 J.P. 183; 8 T.L.R. 214, D.C.; affirmed 8 T.L.R. 348, C.A.; 30 Digest (Repl.) 49, *368*.

R. v. *Sheward* (1880), 9 Q.B.D. 741; 49 L.J.Q.B. 716, C.A.; 16 Digest 462, *3363*.

Rule nisi for certiorari.

On July 5, 1920, justices for the borough of Richmond, Surrey, being the confirming authority for the borough under the Licensing (Consolidation) Act, 1910, made an order confirming to George William Booth a licence granted to William George Taylor for the sale of intoxicating liquor to be consumed on and off premises in Richmond. A rule nisi was obtained on Oct. 12, 1920, by Arthur Howitt on the ground that, Taylor being then dead, the confirming authority had no jurisdiction to confirm the grant to any other person. The applicant was the licensee of the Castle Hotel at Richmond, and was also the proprietor of the Pagoda restaurant, a large unlicensed restaurant and tea-house in the borough, and both these premises were liable to be affected by the grant of a new full licence in the borough. On Mar. 2, 1920, an application was made on behalf of J. Lyons & Co., Ltd., to the justices at their general licensing meeting by Mr. Taylor, assistant-secretary to J. Lyons & Co., Ltd., for the grant of a full licence in respect of premises situate at No. 47, George Street, and No. 4, The Green, Richmond, and owned by J. Lyons & Co., Ltd. The application was opposed by Mr. Howitt. The justices granted the licence for two years, on conditions, including the payment of a monopoly value of £130, and subject to confirmation. On Mar. 25, 1920, an application for confirmation of the grant to Mr. Taylor was made on behalf of J. Lyons & Co., Ltd., to the confirming authority. This application was opposed by Mr. Howitt. The justices were equally divided and the grant was not confirmed. On May 6, 1920, application was made by Mr. Taylor on behalf of J. Lyons & Co., Ltd., for a rule nisi for a mandamus to the confirming authority to hear and determine whether the grant to him should be confirmed. A rule nisi was granted and made absolute on June 9, 1920. On June 11, 1920, Mr. Taylor died. On July 5, 1920, Mr. Taylor's widow and executrix executed a declaration of trust of all the interest that he had had in the licence in favour of J. Lyons & Co., Ltd. On July 5, 1920, the confirming authority were informed of Mr. Taylor's death, and were asked, on behalf of J. Lyons & Co., Ltd., to confirm the grant which had been made to Mr. Taylor, but to substitute for his name the name of Mr. Booth, the secretary of J. Lyons & Co., Ltd. Objection was taken on Mr. Howitt's behalf that the

confirming authority had no jurisdiction to grant a licence, but had only power to confirm grants which had been made by the justices at the general meeting. Mr. Booth had made no application at the general meeting, and had given none of the notices required by the Licensing Acts, and no licence had been granted to him at the general meeting or at any adjournment thereof. The confirming authority confirmed the grant made on Mar. 2, 1920, and substituted Booth's name for Taylor's. In August, 1920, an application by Mr. Howitt was made to the confirming authority for a copy of their order, but, owing to the absence of the clerk to the confirming authority, the copy was not obtained till September. On Sept. 20, 1920, the applicant's affidavit in support of the rule was sworn. By the Licensing (Consolidation) Act, 1910:

> "13 (2). Any person who has appeared before the licensing justices and opposed the grant of a new justices' licence, and no other person, may appear and oppose the confirmation of the grant by the confirming authority."

Sir John Simon, K.C. (*G. Cecil Whiteley* with him), showed cause.
Macmorran, K.C. (*E. C. Fulton* with him), in support of the rule.

EARL OF READING, C.J., stated the facts, and continued: It appears quite plain that the confirming authority did grant this licence in excess of their powers, and that they had no jurisdiction to grant the licence, and, therefore, their confirmation to Mr. Booth was an illegal act. Counsel showing cause has frankly admitted that, but he contends that, although there was excess of jurisdiction this court ought not to make the rule absolute (i) because the applicant does not apply ex debito justitiæ, and can only ask this court to exercise its discretion; and (ii) because, even if this court thinks that the writ would be ex debito justitiæ, nevertheless the delay since the making of the order by the confirming authority ought to induce this court to refuse the writ.

The first point turns entirely on whether the applicant can be said to be a person aggrieved. I do not propose to go into an exhaustive discussion of the principles which govern this court in granting writs of certiorari and prohibition. I intend to confine myself to the case before us. In this case, the applicant is not in the same category as a member of the public, who may be said to have only a general interest in seeing that the law is properly carried out, but he had a particular interest in this subject-matter. He went to expense in order to appear by counsel before the confirming authority and endeavour to obtain the refusal of the confirmation and his counsel took the point, which was a good point, as to jurisdiction, and the confirming authority decided it wrongly. Bearing in mind that the applicant was entitled to appear and object to the confirmation and had this interest, namely, that he was carrying on business in the neighbourhood as a licensee, I am of opinion that the case comes within *R.* v. *Groom, Ex parte Cobbold* (1). In that case, the very point was taken that the rule nisi for a certiorari to quash the order of the licensing justices had been obtained by rivals in trade, and that, therefore, they were not persons aggrieved. The argument on the other side was that they were persons aggrieved, as they were persons interested in the application for the licence. Lord Alverstone, C.J., although on the merits he would have been inclined not to grant the rule, said ([1901] 2 K.B. at p. 162):

> "As to the question whether the applicants for the rule are persons aggrieved, there can be no doubt that they have no real grievance arising from the omission to serve the notice in time. That, however, is not the sense in which persons applying for a certiorari are required to be persons aggrieved. It is sufficient if they have a real intereset in the decision of the justices, and they have in this case. They took the point now raised before the justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they had not a sufficient interest in the matter to enable them to apply for the rule."

Although it is admitted that that is a formidable decision in favour of the present applicant, yet it is said that LORD ALVERSTONE, C.J., had not before him all the authorities to which our attention has been called. But in that case the court had before it both *R.* v. *Surrey Justices* (3) and *R.* v. *Nicholson* (2). In the former of these two cases the judgment of the court, which was composed of COCKBURN, C.J., and BLACKBURN and MELLOR, JJ., was delivered by BLACKBURN, J. Dealing with the question whether certiorari should go as a writ of course, they held, as the head-note shows, that, although certiorari is not a writ of course, yet as the applicant had by reason of his local situation a peculiar grievance of his own, and was not merely applying as one of the public, he was entitled to the writ ex debito justitiæ. I find the following passage in the judgment where the court was discussing the question whether the writ was ex debito justitiæ or discretionary (L.R. 5 Q.B. at p. 472):

> "In the very analogous case of prohibition a distinction is taken, thus expressed by COCKBURN, C.J., in *Forster* v. *Forster and Berridge* (4) (4 B. & S. at p. 199): 'I entirely concur in the proposition that, although the court will listen to a person who is a stranger and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not ex debito justitiae, but a matter upon which the court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief ex debito justitiæ, if he suffers from the usurpation of jurisdiction by another court'."

Here the applicant has, it seems to me, "suffered from the usurpation of jurisdiction by another court," inasmuch as his objection was overruled by the confirming authority in the sense that they held that they had jurisdiction. The applicant was entitled to raise the point, and, therefore, he did suffer from the usurpation of jurisdiction when they put aside his objection, which was a good one. In *R.* v. *Nicholson* (2), I find nothing really to the contrary. A. L. SMITH, L.J., there put the case very shortly and clearly. He said ([1899] 2 Q.B. at p. 470):

> "assuming certiorari to be the fitting remedy, as a matter of discretion the certiorari ought not to go. First, on the ground of delay in making the application, in respect of a licence which runs out on the 10th Oct.; and, second, on the fact that the applicants have not shown, as it appears by *R.* v. *Surrey Justices* (3) they should have shown, that they have a peculiar grievance of their own beyond some inconvenience suffered by them in common with the rest of the public."

I believe that to be the true principle on which this court acts, and here there is clearly a particular interest in the applicant, something quite apart from the general inconvenience which may be suffered by the public by reason of the wrong administration of the law. Although, in *R.* v. *Nicholson* (2), VAUGHAN WILLIAMS, L.J., did use some language drawing a distinction and suggesting that a person may be aggrieved and may yet not be entitled to a certiorari ex debito justitiæ, I do not think that anything that was said in that case affects the case now before us. The whole question is whether the applicant is an aggrieved person in the sense explained by A. L. SMITH, L.J., in that case, and by LORD ALVERSTONE, C.J., in *R.* v. *Groom, Ex parte Cobbold* (1). The question is whether the applicant had a particular interest in the decision, as distinct from the general interest of the public which seems to be always a question of degree. It may be that the distinction is so slight that the court would not act on it. But where it is shown, as in this case, that it is substantial, the court is bound to issue the writ if the applicant is a person aggrieved and if, on the face of the order complained of, it is shown that there has been a wrongful exercise of jurisdiction in the sense of an excess of jurisdiction. Consequently, the first point raised by counsel showing cause fails.

Secondly, it is said that there has been delay. It is, however, enough to say

A that no case has been made out which would justify us in refusing on that ground to make the rule absolute. Whatever may be the true view as to the effect of delay where the writ is ex debito justitiæ, the facts are not sufficient to raise the point of law contended for by counsel showing cause.

On both points, the applicant is entitled to succeed, and in the result the rule must be made absolute.

B

DARLING, J.—I agree. I desire only to say that I think that, during the argument, a little confusion has been introduced owing to the words used by VAUGHAN WILLIAMS, L.J., in *R.* v. *Nicholson* (2), where he said ([1892] 2 Q.B. at p. 471):

> "This matter is dealt with by BLACKBURN, J., in *R.* v. *Surrey Justices* (3),
C where an illustration of a person entitled as of right to the writ is given in the case of a person who has been deprived of an office. But, besides the case of an aggrieved person who applies as of right for the writ, there is another case in which the court has regard to the question whether the applicant is an aggrieved person, and that is where the court has to exercise its discretion as to the issue of the writ. In such a case the court will consider whether
D the interest of the applicant is so small, or his grievance so like that of the rest of Her Majesty's subjects, as to leave no sufficient ground for the issue of the writ."

It has been argued that VAUGHAN WILLIAMS, L.J., there laid down that persons entitled to the writ as of right consist of two classes, (i) those deprived of an
E office, and (ii) aggrieved persons. But I do not think that he intended to draw any such distinction. It seems to me that the reason why a person deprived of an office is entitled to the writ is because he is an aggrieved person. But there are other aggrieved persons entitled to the writ on the same grounds. The matter has been made plain by BLACKBURN, J., in *R.* v. *Surrey Justices* (3) and by A. L. SMITH, L.J., in *R.* v. *Nicholson* (2). I think that the observations of VAUGHAN
F WILLIAMS, L.J., to which I have referred, have been misunderstood and misapplied.

SALTER, J.—I agree.

Rule absolute.

Solicitors: *Field, Roscoe & Co.*, for *Percy Umney & Scorer*, Richmond, Surrey; *Charles Robinson & Co.*, for *Charles Robinson*, Hounslow.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

SUN PERMANENT BENEFIT BUILDING SOCIETY *v.* WESTERN SUBURBAN AND HARROW ROAD PERMANENT BUILDING SOCIETY

[CHANCERY DIVISION (P. O. Lawrence, J.), March 24, 25, 26, 30, April 19, 1920]

[Reported [1920] 2 Ch. 144; 89 L.J.Ch. 492; 123 L.T. 423; 36 T.L.R. 536; 64 Sol. Jo. 549]

Building Society—Purchase of investments—Purchasing society at date of contract without surplus funds—Validity of contract—Building Societies Act, 1874 (37 & 38 *Vict.*, *c.* 42), *s.* 25.

By the Building Societies Act, s. 25, a building society may invest any portion of its funds "not immediately required for its purposes" on "real or leasehold securities, and other specified securities."

Held: a contract for the purchase of investments which were authorised by the section was intra vires the society even though at the date of the contract it had not sufficient surplus funds to pay for the investments, the question to what extent, if any, and in what manner, the contract should be enforced being left to the trial of the action.

Eastern Counties Rail. Co. v. *Hawkes* (1) (1855), 5 H.L. Cas. 331, applied.

Per P. O. LAWRENCE, J.: The result would be the same where a society at the date of entering into the contract had sufficient funds to pay for the investments, but before completion some event had happened, e.g., notices of withdrawal given by members, which caused the surplus to be immediately required for the purposes of the society.

Building Society—Dissolution—Resolution by prescribed majority of members—Appointment of liquidators—Need for order of court—Building Societies Act, 1874 (37 & 38 *Vict.*, *c.* 42), *s.* 32, *paras.* 2, 4.

By r. 81 of the rules of a building society the society could be dissolved if the dissolution were resolved on by a vote of three-fourths of the members present at a special general meeting of the society, and liquidators could be appointed to conduct the winding-up. By s. 9 of the Building Societies Act, 1894, in the event of such a dissolution the provisions of the Building Societies Acts shall continue to apply as if the liquidators were the directors of the society. The society having passed a resolution for dissolution under r. 81 and appointed liquidators,

Held: the resolution operated as a dissolution of the society within s. 32, para. 2, of the Building Societies Act, 1874, and not under s. 32, para. 4, which, to become effectual, required an order of the court.

Building Society—Transfer of mortgage—Need of consent of mortgagor—Deed providing that "society" should include successors and assigns of society.

By a clause in the form of mortgage used by a building society it was declared that the expression "the society" should extend to and include the successors and assigns of the society where the context should require it or permit of it.

Held: on construction of mortgages containing this clause, the society, and after its dissolution the liquidators, could sell and transfer the mortgages to a purchaser without the concurrence of the mortgagors.

Notes. As to transfer of mortgages, investment by a building society in authorised investments, and dissolution of societies see 3 HALSBURY'S LAWS (3rd Edn.) 591, 616–618, 632 et seq. For cases see 7 DIGEST 471, 492, 493, 502 et seq. For Building Societies Acts, 1874 and 1894, see 2 HALSBURY'S STATUTES (2nd Edn.) 623, 652.

A Cases referred to:

(1) *Eastern Counties Rail. Co.* v. *Hawkes* (1855), 5 H.L. Cas. 331; 24 L.J.Ch. 601; 25 L.T.O.S. 318; 3 W.R. 609; 10 E.R. 928, H.L.; 13 Digest (Repl.) 284, *1041.*

(2) *Chapleo* v. *Brunswick Building Society* (1881), 6 Q.B.D. 696; 50 L.J.Q.B. 372; 44 L.T. 449; 29 W.R. 529, C.A.; 7 Digest 491, *225.*

B

(3) *Re David Payne & Co., Ltd., Young* v. *David Payne & Co., Ltd.*, [1904] 2 Ch. 608; 73 L.J.Ch. 849; 91 L.T. 777; 20 T.L.R. 590; 48 Sol. Jo. 572; 11 Mans. 437, C.A.; 13 Digest (Repl.) 285, *1044.*

(4) *Ulster Building Society* v. *Glenton* (1888), 21 L.R.Ir. 124; 7 Digest 471, *109*, *i.*

(5) *Re Rumney and Smith*, [1897] 2 Ch. 351; 66 L.J.Ch. 641; 76 L.T. 800; 45 W.R. 678; 13 T.L.R. 479; 41 Sol. Jo. 607, C.A.; 7 Digest 471, *109.*

C

Special Case stated by the parties to the cause for the opinion of the court under Ord. 34, r. 1.

The agreed facts were that at a special general meeting of the plaintiff society held on Mar. 25, 1919, a resolution was passed

D "that the society be wound up voluntarily and that George Amos Eaton and William David Ellis be and they are hereby appointed liquidators for the purposes of the winding-up at a remuneration of £52 10s. each."

An agreement was entered into by the liquidators, dated May 28, 1919, for the sale and transfer by the plaintiff society and its liquidators to the defendant society for £6,4000 of certain mortgages, thirty-seven in number, held by the plaintiff society E from its advanced or borrowing members. This agreement was contained in certain letters which passed between the parties dated May 20, 26 and 28, 1919. In consequence of redemptions and payments of instalments by mortgagors, the amount of cash actually required for the completion of the purchase had on Jan. 26, 1920, become reduced to £3,385. The defendant society admitted the agreement set up by the plaintiff society. The defendant society had at the date of the agreement F £2,500 on deposit at its bankers, which the directors considered was not immediately required for the purposes of the society, and the society had at the same time unexhausted borrowing powers to the extent of £3,300 or thereabouts. At the date of the agreement the directors of the defendant society had received from members notices of withdrawal amounting to £2,121 or thereabouts, and on Jan. 26, 1920, owing to further notices this amount had risen to £3,256, which was unsatisfied. G On the same date the society had on deposit at its bankers £4,100, against which must be set applications for advances exceeding £2,500. The borrowing powers at that date amounted to £3,000. The defendant society contended that the contract with the plaintiffs was ultra vires, because neither at its date nor afterwards up to the time for completition had the defendant society sufficient funds "not immediately required" for the society's purposes, and, therefore, the directors had H no power to enter into such a contract. The plaintiff society and its liquidators thereupon issued a writ claiming specific performance, and after delivery of pleadings the parties agreed to state a Special Case for opinion of the court under Ord. 34, r. 1. Both the plaintiff and defendant societies were incorporated under the Building Societies Act, 1874.

I The questions of law submitted for the opinion of the court were as follows:— (i) Whether the above agreement was ultra vires the defendant society, and, if so, whether it was capable of being enforced by the plaintiffs against the defendant society. (ii) Whether the liquidators of the plaintiff society and the society itself had power under the Building Societies Acts and r. 81 of the plaintiff society's rules to sell and transfer the mortgages in pursuance of the agreement without obtaining a supervision order under the Companies (Consolidation) Act, 1908. (iii) Whether the plaintiff society and its liquidators could sell and transfer the mortgages pursuant to the agreement without the concurrence of the mortgagors.

By s. 25 of the Building Societies Act, 1874: A

"Any society under this Act may from time to time as the rules permit invest any portion of the funds of the society, not immediately required for its purposes, upon real or leasehold securities [or in other specified securities]."

Section 17 of the Building Societies Act, 1894 extended the above section so as to include B

"power to invest in or upon any security in which trustees are for the time being authorised by law to invest."

Section 32 of the Building Societies Act, 1874, provided that a society under that Act might terminate or be dissolved

"1. Upon the happening of any event declared by its rules to be the termination C of the society. 2. By dissolution in manner prescribed by its rules. . . . 4. By winding-up, either voluntarily under the supervision of the court or by the court, if the court shall so order. . . ."

By r. 15 of the defendant society's rules the board of directors were given power to employ any surplus funds in such manner authorised by s. 25 of the Building Societies Act, 1874, as they in their discretion might deem most beneficial to the D society. By r. 81 the society could be dissolved if the dissolution were resolved upon by a vote of three-fourths of the members present at a special general meeting of the society.

C. E. Jenkins, K.C., and *E. A. Wurtzburg* for the plaintiff society.
Owen Thompson, K.C., and *E. A. Jennings* for the defendant society. E
Cur. adv. vult.

April 19. **P. O. LAWRENCE, J.**—This action is brought to enforce an agreement for the purchase by the defendant society from the plaintiffs of certain mortgage securities belonging to the plaintiff society. The defendant society is resisting the action and has raised three preliminary points, the determination of any one of F which in its favour is fatal to the success of the action. In these circumstances the parties have by consent stated a Special Case for the opinion of the court under Ord. 34 of the Rules of the Supreme Court.

The first point taken by the defendant society is that the agreement is ultra vires the defendant society because at the date of the agreement the defendant society was not possessed of sufficient funds not immediately required for its purposes to G meet the purchase money payable under the agreement. At the hearing it was admitted that the date of the agreement (viz.: May 28, 1919) is the crucial date for determining whether or not it was ultra vires. The purchase money amounted in round figures to the sum of £6,400. On May 28, 1919, the defendant society had £2,500 on deposit at its bankers, it also had unexhausted borrowing powers to the extent of about £3,300, and it had received from its members notices of withdrawal H of funds amounting to about £2,121. There is no statement or admission as to any other funds belonging to the defendant society and I think that I am justified in drawing the inference that the defendant society had not at the date of the agreement funds not immediately required for its purposes sufficient to pay the agreed purchase money of £6,400. In these circumstances the defendant society contends that the agreement was ultra vires the defendant society on the ground that under I s. 25 of the Building Societies Act, 1874, the defendant society has no power to contract to pay a price for the purchase of investments exceeding its funds not then immediately required for its purposes. Section 25 of the Act of 1874 enacts that a society under the Act may from time to time, as the rules permit, invest any portion of the funds of the society not immediately required for its purposes upon (inter alia) real or leasehold securities. Rule 15 of the rules of the defendant society provides that the board of directors shall have power to employ any surplus funds in such manner authorised by s. 25 of the Building Societies Act, 1874, as they in

A their discretion may deem most beneficial to the society. It cannot be disputed that the mortgage securities comprised in the agreement are real or leasehold securities, and, therefore, that they are authorised investments under s. 25 of the Act of 1874. I have been informed by counsel and have no reason to doubt that the point now raised is a novel one. The point is of importance because if it is sound every person who agrees to sell any investments to a building society will have not B only to satisfy himself that the investment is one which falls within the class of authorised investments (which is a perfectly reasonable requirement), but will also have to satisfy himself that at the date of the contract for sale of the investment the society is possessed of funds not immediately required for its purposes sufficient to pay for the investments which it contracts to purchase. This would seriously hamper building societies in making investments, as it would cast a burden upon the C sellers of the investments which in most cases they would be advised not to undertake, and in those cases in which a willing seller could be found would compel the society to disclose its entire financial position to such seller. Moreover it would prevent building societies from entering into contracts for the purchase of investments in anticipation of the receipt of funds which they knew were about to come in.

D It is contended on behalf of the defendant society that the principle established by the case of *Chapleo* v. *Brunswick Building Society* (2) (which decides that where a society borrows money in excess of its borrowing powers such borrowing is ultra vires) is applicable to the present case. In my opinion, the principle laid down by that case rests upon an intelligible basis and is one which gives rise to little, if any, practical difficulty. Any person lending money to a statutory body must satisfy E himself as to the power of that body to borrow money, and if the power happens to be limited in amount must satisfy himself that the loan which he is about to make does not exceed that limit. Although this rule imposes upon the lender the obligation in cases where the borrowing power is limited of ascertaining whether the borrowing power has already been exercised to any and what extent, yet such an investigation is, in my opinion, quite different from the investigation which an F intending seller would have to make before agreeing to sell an investment to a building society if the contention put forward by the defendant society in the present case is right. In my judgment, the sole object of s. 25 is to limit the range of investments which the society is authorised to purchase, and the section does not purport nor is it intended to place any further or other limit upon the power of building societies to make investments. In my opinion, the expression "funds not G immediately required for its purposes" contained in this section is employed for the purposes of describing the moneys which would naturally be utilised by the society for making investments, and is used in the same sense as the expressions "moneys not immediately required," "moneys requiring investment," and "moneys not immediately payable" which are frequently used in powers of investment contained in memoranda of association of limited companies, in settlements, and in wills. If H this is the right view, I am further of opinion that the power of investment conferred by this section implies a general power to contract for the purchase of any investment coming within the range of investments authorised by that section, and I think that such a contract would be intra vires the society both in cases in which the society at the date of entering into it had not sufficient surplus funds to pay for the investments, and in cases in which the society at the date of entering into it had I sufficient surplus funds to pay for the investments, but before completion some event had happened (e.g., notices of withdrawal had been given by members) which had caused the surplus funds to be immediately required for the purposes of the society, and, therefore, to be no longer available for the completion of the purchase of the investments.

I am not now considering the question whether the court would exercise its extraordinary jurisdiction in granting specific performance of a contract by a building society to purchase an investment if it were shown at the trial that no surplus funds were available to complete the contract, whether such lack of available funds had

arisen by reason of there never having been any, or by reason of such available funds having been diminished or exhausted after the date of the contract. It may well be that the court in such circumstances would decline to make a decree for specific performance. Nor am I considering whether the court would in such circumstances grant anything more than nominal damages for a breach of the agreement. Those are matters which will no doubt require careful consideration when the case comes on for trial, and I express no opinion upon them. The sole point I am now considering is whether the mere fact that at the date of the contract to purchase authorised investments the society had not in hand sufficient surplus funds to pay for the investments in full, renders the contract ultra vires and void ab initio. It may be that the directors in the present case were wrong in entering into the agreement, and that they did so in wilful disregard of their duties, or carelessly, or through an error of judgment—all these are purely domestic matters which may or may not have to be gone into at the hearing, but, in my judgment, do not render the contract ultra vires.

I am inclined to agree with the plaintiffs' contention that the principle laid down in such cases as *Eastern Counties Rail. Co.* v. *Hawkes* (1), and in *Re David Payne & Co., Ltd.*, (3) bears a closer analogy to the principle which ought to be applied to the present case than the principle laid down in *Chapleo's Case* (2). In *Hawkes' Case* (1) the House of Lords held that where a railway company had power to purchase land required for extraordinary purposes only a vendor was entitled to enforce a contract for the sale of land, notwithstanding that it was proved that the land was not required for such purposes—a fact of which he had no notice at the date of the agreement. In *David Payne & Co.'s Case* (3), it was held by BUCKLEY, J., and the Court of Appeal that where a company had power to borrow money for its purposes, the lender was not bound to inquire into the purposes for which the money was required, and that the misapplication of the moneys did not render the loan void in the absence of notice that it was borrowed for an unauthorised purpose. It is true that these cases differ from the present, in that the real purpose for which the land was purchased in the one case and the loan obtained in the other was the crucial fact upon which the company in such cases relied to avoid the contract, whereas in the present case the fact upon which the society relies is that it had not at the date of the agreement sufficient surplus moneys to enable it to carry out the purchase, yet I think that from one point of view it may well be said that in substance s. 25 of the Act of 1874 amounts to a power to purchase certain specified classes of property for a particular purpose, viz., for the purpose of rendering profitable the funds of the society not immediately required for its purposes, and that, if that be the true view, then the principle established by *Hawkes' Case* (1) should be applied, and in the absence of any notice that the investments were not really required for such a purpose (which, of course, would be the case if there were no or not sufficient surplus funds), the agreement ought to be held to be valid. Although I consider that the question is not free from doubt, I have for the reasons stated come to the conclusion that the agreement in the present case was not ultra vires. I purposely abstain from answering the second part of the first question in the Special Case, as I consider that the question as to the manner in which and extent to which (if at all) the court will enforce the agreement is one to be decided at the trial after all the facts have been ascertained.

The second question raised in the Special Case is one which relates to the power of the plaintiffs to sell the mortgage securities. It is said on behalf of the defendant society that the liquidators of the plaintiff society have no power to sell its assets unless a supervision order under the Companies (Consolidation) Act, 1908, is first obtained. In my judgment, there is nothing in this contention. Under s. 32 (2) of the Building Societies Act, 1874, a society may be dissolved in manner prescribed by its rules. Rule 81 of the rules of the plaintiff society provides that the society shall be dissolved if the dissolution thereof be resolved upon by the votes of three-fourths of the members present at a special general meeting of the society convened

for that purpose, and such meeting by a resolution passed in like manner may also appoint liquidators to conduct the winding-up. On Mar. 25, 1919, at a special general meeting of the plaintiff society, duly convened for that purpose, a resolution was duly passed by the votes of three-fourths of the members present that the plaintiff society should be wound-up voluntarily, and the plaintiffs Eaton and Ellis should be appointed liquidators for the purposes of such winding-up. In my judgment this resolution operated as a dissolution of the plaintiff society in manner prescribed by its rules within the meaning of s. 32 (2) of the Act of 1874, and was not (as was contended on behalf of the defendant society) an attempt to wind-up the plaintiff society under s. 32 (4), which in order to become effectual requires an order of the court. Section 9 of the Building Societies Act, 1894, provides that when a society is being dissolved in manner prescribed by its rules, the provisions of the Building Societies Acts shall continue to apply in the case of the society as if the liquidators conducting the dissolution were the board of directors of the society. The effect of this section, in my opinion, is to enable the liquidators in the present case to sell and transfer the mortgage securities comprised in the agreement if such securities are in fact transferable by the plaintiff society.

The third and last question is whether the mortgage securities comprised in the agreement are transferable by the plaintiff society without the concurrence of the various mortgagors. In my judgment, this question is determined by the language of the mortgage securities themselves. All the mortgage securities comprised in the agreement are mortgages granted to the plaintiff society in respect of advances made by it to its members. A print of the form of mortgage used by the society in the case of freeholds forms part of the Special Case, and all the mortgages of freeholds comprised in the agreement are assumed to be in that form. By cl. 11 of the form of mortgage it is declared that the expression "the society" shall extend to and include the successors and assigns of the society where the context shall require it or admit of it. Now it cannot be said (and, indeed, it has not been seriously argued) that the context does not admit of the expression "the society" being extended to and including its successors and assigns in the habendum, in the proviso for redemption, in the covenant for payment of the moneys secured, in the power of entry into possession and receipt of the rents and profits of the mortgaged premises and in the attornment clause. Counsel for the defendant society have been driven to contend that I ought to ignore cl. 11 altogether, or, at all events, that I ought to confine the words "successors and assigns" to a society taking a transfer of the engagements of the plaintiff society under s. 33 of the Building Societies Act, 1874. In my judgment I am not at liberty to do the one or the other. I have been referred to a precedent of a building society's mortgage contained in Key and Elphinstone's Precedents in Conveyancing (10th Edn.), vol. 2, p. 137. This precedent contains a provision regulating the rights of the parties after a transfer of the mortgage by the building society. It is argued that, looking at this precedent, the parties in the present case could not have intended that the mortgages comprised in the agreement should be transferable as otherwise they would have inserted a similar provision to that contained in the precedent. I draw no such inference. In my opinion, the only legitimate inference to be drawn from the precedent is that the draftsman of the mortgages in question in the present case has not been as careful as, regard being had to the precedent, it appears that he might have been in defining the position of the parties after a transfer. In my judgment, the effect of cl. 11 is equivalent to a provision that the mortgage should be transferable by the plaintiff society without attempting to make any provision as to the position of the mortgagor and transferee after the transfer. It is possible that difficulties as to the rights of the parties after the transfer may occur in certain events, but none that has been suggested appears to me to be insuperable.

Taking the view I do of the true construction of the mortgages in the present case it is unnecessary for me to express my opinion upon the larger question whether a building society mortgage in the absence of an express provision in that behalf in the

mortgage deed is or is not transferable. In the Irish case of *Ulster Building Society* v. *Glenton* (4) it was held by MONROE, J., that a building society mortgage is transferable by assignment to a third person. From the judgments delivered in *Re Rumney and Smith* (5), however, it appears that none of the learned judges was prepared without further argument to accept the Irish decision as laying down the law correctly. The point has been fully argued in the present case, but I prefer not to express my opinion upon it as such an expression of opinion would in the circumstances be a mere obiter dictum.

In the result I hold that the defendant society has not established any of the three preliminary points it has taken and the action must proceed to trial.

The costs will be borne in accordance with the agreement contained in the special case.

Solicitors: *Naunton & Son; Graham Gordon.*

[*Reported by* F. PORTER FAUSSET, ESQ., *Barrister-at-Law.*]

Re A. GUNSBOURG & CO., LTD. Ex Parte COOK

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), January 30, February 6, March 30, 1920]

[Reported [1920] 2 K.B. 426; 89 L.J.K.B. 725; 123 L.T. 353; 36 T.L.R. 485; 64 Sol. Jo. 498; [1920] B. & C.R. 50]

Bankruptcy—Property available for distribution—Relation back of trustee's title —Transfer by transferee from bankrupt to subsequent transferee—Further transfer to appellants bonâ fide for value—Right of trustee to property.

Bankruptcy—Election—Estoppel—Order obtained by trustee against transferee for return of goods transferred by bankrupt—Effect on claim by trustee against subsequent purchaser for value.

On Sept. 20, 1917, the bankrupt transferred certain furniture to a company. On Sept. 20 he committed an act of bankruptcy. On Oct. 8 a bankruptcy petition was presented. On Oct. 24 a receiving order was made. On Dec. 12 he was adjudicated bankrupt. On Feb. 3, 1919, the transfer of Sept. 20, 1917, was declared to be fraudulent and void so as to be an act of bankruptcy under the Bankruptcy Act, 1914, s. 1 (1) (b), and it thus became an act of bankruptcy to which the trustee's title related back. At the same time the court ordered the transferee company to hand over the furniture to the trustee or pay the value, which was later ascertained by the registrar. Between September, 1917, and February, 1919, the furniture was sold and re-sold three times, on the last occasion to the present appellants. These purchases were found to be bonâ fide purchases for value without notice.

Held: by taking the order of Feb. 3, 1919, the trustee was not precluded from proceeding against the appellants for delivery up of the furniture or its value; (by LORD STERNDALE, M.R., and WARRINGTON, L.J., YOUNGER, L.J., dissenting) the effect of the relation back of the trustee's title was to put the appellants in the same position as if the bankrupt had transferred to the original transferee goods of another person to which he had no title and those goods had been re-sold eventually to the appellants; and, therefore, the claim of the trustee to the furniture or its value succeeded.

Notes. Applied: *Re Dombrowski, Ex parte Trustee* (1923), 92 L.J.Ch. 415. Referred to: *Re Simms*, [1930] All E.R. 528.

A As to relation back of title of trustee in bankruptcy see 2 Halsbury's Laws (3rd Edn.) 447–453. For cases see 5 Digest (Repl.) 688 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to :

(1) *Brinsmead* v. *Harrison* (1871), L.R. 6 C.P. 584; 40 L.J.C.P. 281; 24 L.T. 798; 19 W.R. 956; on appeal (1872), L.R. 7 C.P. 547; 41 L.J. 190; 27 L.T. 99 Ex.Ch.; 43 Digest 531, *668.*

(2) *Re Pollitt, Ex parte Minor*, [1893] 1 Q.B. 455; 62 L.J.Q.B. 236; 68 L.T. 366; 41 W.R. 276; 9 T.L.R. 195; 37 Sol. Jo. 217; 10 Morr. 35; 4 R. 253, C.A.; 5 Digest (Repl.) 691, *6071.*

(3) *Re Hirth, Ex parte Trustee*, [1899] 1 Q.B. 612; 68 L.J.Q.B. 287; 80 L.T. 63; 47 W.R. 243; 15 T.L.R. 153; 6 Mans. 10, C.A.; 5 Digest (Repl.) 695, *6094.*

(4) *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776; 66 L.J.Ch. 408; 76 L.T. 476; 45 W.R. 484; 13 T.L.R. 314; 41 Sol. Jo. 384; 4 Mans. 34, C.A.; 5 Digest (Repl.) 909, *7525.*

(5) *Re Hart, Ex parte Green*, [1912] 3 K.B. 6; 81 L.J.K.B. 1213; 107 L.T. 368; 19 Mans. 334, C.A.; 5 Digest (Repl.) 910, *7536.*

(6) *Re Slobodinsky, Ex parte Moore*, [1903] 2 K.B. 517; 72 L.J.K.B. 883; 89 L.T. 190; 52 W.R. 156; 19 T.L.R. 616; 47 Sol. Jo. 710; 10 Mans. 341; 5 Digest (Repl.) 975, *7864.*

(7) *Wilkes* v. *Bodington* (1707), 2 Vern. 599; 23 E.R. 991; 5 Digest (Repl.) 974, *7851.*

(8) *Re Holden, Ex parte Official Receiver* (1887), 20 Q.B.D. 43; 57 L.J.Q.B. 47; 58 L.T. 118; 36 W.R. 189, D.C.; 5 Digest (Repl.) 910, *7538.*

(9) *Shears* v. *Goddard*, [1896] 1 Q.B. 406; 65 L.J.Q.B. 344; 74 L.T. 128; 44 W.R. 402; 12 T.L.R. 234; sub nom. *Re Sills, Shears* v. *Goddard*, 3 Mans. 24, C.A.; 5 Digest (Repl.) 975, *7866.*

(10) *Re Vansittart, Ex parte Brown*, [1893] 2 Q.B. 377; 62 L.J.Q.B. 279; 68 L.T. 233; 41 W.R. 286; 9 T.L.R. 277; 37 Sol. Jo. 271; 10 Morr. 44; 5 R. 280; 5 Digest (Repl.) 909, *7529.*

(11) *Re Brall, Ex parte Norton*, [1893] 2 Q.B. 381; 62 L.J.Q.B. 457; 69 L.T. 323; 41 W.R. 623; 10 Morr. 166; 5 R. 440; 5 Digest (Repl.) 909, *7524.*

(12) *Re David and Adlard, Ex parte Whinney*, [1914] 2 K.B. 694; sub nom. *Re David and Johnson, Ex parte Whinney*, 83 L.J.K.B. 1173; 110 L.T. 942; 30 T.L.R. 366; 58 Sol. Jo. 340; 21 Mans. 148; 4 Digest (Repl.) 74, *632.*

(13) *Re Rogers, Ex parte Villars* (1874), 9 Ch. App. 432; 43 L.J.Bcy. 76; 30 L.T. 348; 38 J.P. 533; 22 W.R. 603, L.C. & L.JJ.; 5 Digest (Repl.) 693, *6082.*

(14) *Anderson* v. *Maltby* (1793), 2 Ves. 244; 4 Bro. C.C. 428; 30 E.R. 616; 5 Digest (Repl.) 1054, *8521.*

(15) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 4 Digest (Repl.) 486, *4275.*

Appeal by the Anglo-Hellenic Banking and Commercial Co., Ltd., from an order of Horridge, J.

The facts and the arguments of counsel, together with the material authorities cited in support, appear from the judgments.

Tindale Davis for the Anglo-Hellenic company.

Comyns Carr for the trustee in bankruptcy.

Cur. adv. vult.

Mar. 30. The following judgments were read.

LORD STERNDALE, M.R.—The facts of this appeal from the decision of Horridge, J., so far as they are relevant, are as follows. On Sept. 19, 1917, the bankrupt caused a company to be incorporated under the name of A. Gunsbourg & Co., Ltd., and on Sept. 20, 1917, he transferred assets, including the furniture now in question, to that company. On Sept. 27, 1917, he committed an act of

bankruptcy upon which he was adjudicated bankrupt. The bankruptcy petition was presented on Oct. 8, 1917, a receiving order made on Oct. 24, 1917, and the adjudication took place on Dec. 12, 1917. The transfer of Sept. 20, 1917, was, on Feb. 3, 1919, declared by HORRIDGE, J., to be fraudulent and void so as to be an act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914, but was not declared to be a fraudulent conveyance under 13 Eliz. c. 5. It was, therefore, an act of bankruptcy available for adjudication, though the adjudication was not made upon it, and the trustee's title related back to it. About the end of September, 1917, a company called the Croydon Aviation and Engineering Co., Ltd., took possession of part of the offices of A. Gunsbourg & Co., Ltd., and later purchased from that company furniture transferred to the company by the bankrupt. It was alleged that the agreement for this purchase was made before the receiving order, but the learned judge in the court below disbelieved this statement and found that it was after the order. On Dec. 11, 1918, the liquidator of the Croydon company sold this furniture to a Mr. Maschonas, who in February, 1919, sold it to the Anglo-Hellenic Banking and Commercial Co., Ltd. That company sold a portion of the furniture to the Dock, Wharf, Riverside and General Workers' Union, who paid for it a sum of £218 12s., which is now standing to the credit of the vendors at their bankers. The trustee now claims the furniture, which is still in the possession of the Anglo-Hellenic company as property of the bankrupt to which his (the trustee's) title relates back, and the sum of £218 12s. as the proceeds of that part of the property which has been sold by the Anglo-Hellenic company. Maschonas, and after him the Anglo-Hellenic company occupied the offices which had been taken by the Croydon company.

The first question is whether the purchase by the Anglo-Hellenic company was made in good faith. I have very serious doubt about the matter. Mr. Maschonas was the person on whose evidence the case on that point mainly rested. He was chairman of directors of the Croydon company and also of the Anglo-Hellenic company, and he was pronounced by HORRIDGE, J., after he had heard him cross-examined, to be an unreliable witness. The learned judge, however, found that the purchase was bonâ fide, and I do not see my way to differ from him. I have not the advantage of knowing the reasons which led him to that conclusion. But I think I ought to accept his finding, based as it was to a considerable extent on oral evidence. I, therefore, consider the matter on the footing of the purchase by the Anglo-Hellenic company being a bonâ fide purchase for value. The important question in the case is, whether in those circumstances the purchasers are protected by any principle of law and equity against the claim of the trustee whose title relates back to the first sale to A. Gunsbourg & Co., Ltd., through whom the title, if any, comes to them.

There is, however, a preliminary point which must be considered first. It arises in the following circumstances. On Feb. 3, 1919, HORRIDGE, J., made an order declaring the agreement for sale to A. Gunsbourg & Co., Ltd., fraudulent and void as against the trustee, and an act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914, and ordered A. Gunsbourg & Co., Ltd., to hand over to the trustee all the property contained in the said agreement or pay the value of any part not handed over. After some other proceedings HORRIDGE, J., on July 31, 1919, ordered that the registrar should report of what the property to be accounted for according to the order of Feb. 3, 1919, consisted, and what was the value of such property. On Aug. 22, 1919, the registrar reported that the value of the property was £808 1s. 6d., and on Sept. 24, 1919, GREER, J., ordered that A. Gunsbourg & Co., Ltd., should forthwith pay the sum of £808 1s. 6d. It was contended that by taking this order the trustee was precluded from taking proceedings against the Anglo-Hellenic company to recover the furniture in their possession, or the proceeds of what they had sold, because he had elected to take an order for payment against A. Gunsbourg & Co., Ltd. For the purposes of this point it must be assumed that the Anglo-Hellenic company has property of the trustee

A and are wrongfully detaining it from him. If this be so, I think it is clear that he has done nothing to prevent him from suing them in detinue or trover. The order obtained amounts to no more than judgment in detinue or trover for the value of the goods, and it has not been satisfied. It has been clear law since *Brinsmead* v. *Harrison* (1) that such a judgment unsatisfied does not operate to transfer the property to the person against whom the judgment was obtained or prevent the B true owner from suing a third person, not the original wrongdoer, for the return of the plaintiff's goods which that third person continues to detain from him. That was the exact point determined upon the new assignments in *Brinsmead* v. *Harrison* (1), and that decision is conclusive against the Anglo-Hellenic company on this point.

The other point is much more important and more difficult. Primâ facie these C goods, being the bankrupt's property, passed to the trustee at the moment of the transfer to A. Gunsbourg & Co., Ltd., as that transfer was an act of bankruptcy within three months of the receiving order, and the trustee's title related back to the moment of its taking place. It was argued on the part of Anglo-Hellenic company that, though there was a relation back of the trustee's title, that title did no accrue until he had obtained an order declaring the transfer to be an act D of bankruptcy, and, as I understood the argument, that, notwithstanding the relation back, the trustee's title must be taken to begin, at any rate against a purchaser for value, from that time, and not from the act of bankruptcy. It seems to me that the short and conclusive answer to that contention is that it is directly opposed to the terms of the Bankruptcy Act, 1914, and to the authorities on the subject: e.g., *Re Pollitt, Ex parte Minor* (2) ([1893] 1 Q.B. at p. 457) and *Re Hirth, Ex parte Trustee* (3) ([1899] 1 Q.B at p. 621), to which further reference will be made later. The position is this. The bankrupt by a transfer constituting a fraudulent conveyance and an act of bankruptcy transferred the furniture to A. Gunsbourg & Co., Ltd., who took it with knowledge of the nature of the transaction and are, therefore, not within the protection of s. 47 of the Bankruptcy Act, 1914. F That company sold it to the Croydon Aviation company, by whom it was sold again to the Anglo-Hellenic company, who again sold some of it to the Dock, Wharf &c., Union. These transfers after the first must be taken to be bonâ fide. A receiving order was made within three months of the original transfer, and by reason of it the trustee's title related back to the transfer. But the order of the court declaring it a fraudulent preference was not made till many months afterwards. G The trustee's title, however, accrues not by any order declaring the transactions an act of bankruptcy, but by the operation of the statute as soon as the receiving order is made. If the trustee sued the person in possession of the bankrupt's property in trover or detinue he could succeed if he proved in that litigation that the transaction was an act of bankruptcy within the period of relation back, although no previous declaration had been obtained from the court to that effect.

H The question is: What is the effect of the relation back on these transactions? In my opinion, this is determined for me by authority. In *Re Pollitt, Ex parte Minor* (1) Lord Esher, M.R., stated the effect of the relation back. If this be correct the position is exactly the same as if the bankrupt has been in possession of goods belonging to another person to which he had no title and had sold them to the original transferee, who had then re-sold them. For such a case neither the original I nor any of the subsequent transferees would take any title at all, and the true owner could recover the goods from any one in whose possession he found them. I know of no doctrine of law or equity which would relieve any of the transferees in these circumstances. It was, however, argued that that statement of Lord Esher cannot be taken to its full extent, and that it must be confined to avoiding dealings with his property by the bankrupt himself after the date of the relation back. This was founded on the argument that the original transfer was not void, but only voidable, and that, therefore, any bonâ fide purchaser from the original transferee was protected. I am not sure that void and voidable are quite apt expressions. But

clearly the transfer was not void at the moment it was made. For it might be that no circumstances would ever arise in which a trustee's title would accrue or the bankruptcy law apply. I will assume that voidable is a correct expression to describe the nature of the transaction and then it becomes necessary to ascertain the effect of the avoidance caused by the making of the receiving order. This seems to me to be quite different from the effect of avoidance in the ordinary case of a voidable transfer, where no principles of bankruptcy law apply. In this latter case the title of the person avoiding the transaction arises only from the time he elects to avoid, and, therefore, intervening bonâ fide transactions are protected, because the transferor up to the date of avoidance had and could confer a good title. In the case under consideration, so soon as the receiving order is made, the trustee at once gets a title which relates back to the earliest act of bankruptcy within three months of the receiving order, whether it be the one upon which the receiving order is made or not, and, therefore, his position and rights are entirely different from those of an ordinary person who elects to avoid a voidable transaction. I doubt if I should have any right to limit LORD ESHER'S words as suggested if they stood alone. But, in my opinion, the exact point is decided by LINDLEY, M.R., in *Re Hirth, Ex parte Trustee* (3), and it is, therefore, necessary to examine that case a little carefully. It will be noticed that LORD LINDLEY recognises that the transfer by the bankrupt is not void at once because no receiving order may ever be made, as in *Re Carter and Kenderdine's Contract* (4). But nevertheless he states clearly that no security could be obtained upon the bankrupt's property by any transaction after the date to which the trustee's title relates back. It is true that in that case the creditors had not obtained anything which in any circumstances could be a security. But LORD LINDLEY was giving his judgment in view of the argument of Mr. Herbert Reed, Q.C., that relation back could not have the effect claimed for it, because it would prevent the acquisition of a security by means of bonâ fide transactions between the original transfer and the receiving order. In answer to that argument, LORD LINDLEY points out that relation back has that effect for the reasons previously given by LORD ESHER.

I think, therefore, that I am bound by authority as well as by the words of the Bankruptcy Act to hold that the effect of the relation back of the trustee's title is to put the transferor and the transferees in the same position as they would be if the bankrupt had transferred to them goods of another person to which he had no title either absolute or voidable. This was said, and said truly, to be a great hardship upon the innocent sub-transferees, but the hardship would be just as great in a case where they had bought goods to which their vendor had no title and which might even be stolen, and yet in that case they could not obtain relief. The arguments for the Anglo-Hellenic company seem to me to ignore the fact that the doctrine of relation back puts the trustee in a position entirely different from that of any ordinary person who avoids a transfer and from that of the trustee himself when he avoids a transfer which is not an available act of bankruptcy, and to which therefore his title does not relate back. *Re Hart, Ex parte Green* (5) is a case of this last class. It has been spoken of as an extension of the equitable principles. But I do not understand why it is so described; it seems to me to follow the principles of the earlier cases. The bankrupt transferred some shares to his daughter, who re-transferred them after a receiving order had been made against the bankrupt. The transferee, who took them in good faith, was held entitled to retain them against the trustee. This is entirely in accordance with the other cases, because no question of relation back to the original transfer arose. That transfer was outside the three months before the receiving order, and, therefore, gave a good title to a bonâ fide transferee which could not be affected by the subsequent avoidance of the transfer. When the receiving order was made, therefore, the shares were not the property of the bankrupt, but of his daughter, and did not pass to the trustee. She could give a good title to a bonâ fide purchaser

A and the receiving order made before that purchase had no effect on it, because the original transfer was beyond the date to which it could operate, and, therefore, the shares did not form any part of the bankrupt's property, which passed to the trustee on the maturing of the receiving order. It remained an ordinary case of a voluntary settlement, and when the trustee avoided it his title accrued from the avoidance and there was no relation back so far as that transfer was concerned. B It is, no doubt, an anomaly that bonâ fide transferees from the bankrupt are protected by the Bankruptcy Act, 1914, and not bonâ fide transferees from a transferee from the bankrupt. But in the view which I take of the effect of relation back I think a transferee in the position of the Anglo-Hellenic company is not protected in the absence of some protective statutory provision.

I have examined the cases to which WRIGHT, J., referred in *Re Slobodinsky, Ex* C *parte Moore* (6), as possibly justifying the courts in giving protection on equitable grounds to persons in the position of the Anglo-Hellenic company. I think that *Wilkes* v. *Bodington* (7) is the only one that can have any bearing on the matter, and that, I think, does not support the suggestion. It is treated by HORRIDGE, J., as a case in which there was a relation back of the trustee's title to the transfer impeached. But he distinguishes it on the ground that the transaction there was D not an act of bankruptcy. With respect I do not think that this is the correct view of the case. It is true that seven years before the transaction the transferor had committed an act of bankruptcy and that the doctrine of relation back was in existence. But the doctrine at that date did not carry the trustee's title further back than the date of the petitioning creditors' debt upon which the adjudication was founded, and, therefore, it did not relate back to the transaction in that case: E see WILLIAMS ON BANKRUPTCY, (11th Edn.), p. 203. This view I think is confirmed by the fact that no mention of the question of relation back is to be found in the judgment. I do not think it necessary to consider whether, if this transaction had been held fraudulent under the statute of Elizabeth—in which case it would also have been an act of bankruptcy, and not bad as a fraudulent conveyance—the Anglo-Hellenic company would have been protected because it has in fact been F held bad as a fraudulent conveyance.

In my opinion, the judgment of HORRIDGE, J., was right, though he attached too much importance to the original transfer being an act of bankruptcy, while, in my opinion, the case depends, not only upon that point, but upon the point whether it is within the period to which the trustee's title relates back whether itself an act of bankruptcy or not. If it be within that period the property trans- G ferred must, in my opinion, be treated as property to which the bankrupt had and could confer no title upon any one, and, therefore, transferees from his transferee could not obtain any title. I think that this appeal fails and should be dismissed with costs.

H **WARRINGTON, L.J.**—The question in this case is as to the title to certain furniture which by relation back of bankruptcy vested in the trustee, but which was sold to a bonâ fide purchaser for value before the trustee actively asserted his title.

On Sept. 20, 1917, the bankrupt executed an assignment of property including the furniture which assignment was afterwards held to be a fraudulent conveyance or I transfer of his property or part thereof and was accordingly an act of bankruptcy (Bankruptcy Act, 1914, s. 1 (1) (b)). On Oct. 24, 1917, a receiving order was made, followed by an adjudication. The act of bankruptcy on which the receiving order was made was one committed on Sept. 27, but, owing to the operation of s. 37 of the Bankruptcy Act, 1914, the bankruptcy commenced on the date of the earlier act of bankruptcy, viz., on Sept. 20, and the furniture accordingly vested in the trustee as part of the bankrupt at the commencement of the bankruptcy: Bankruptcy Act, 1914, ss. 37 and 38. The assignees under the assignment of Sept. 20 were A. Gunsbourg & Co., Ltd., and on Feb. 3, 1919, an order was made on the

application of the trustee served on them by which order it was declared that the assignment was fraudulent and void as against the trustee and an act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914, and it was ordered that the company by their proper officer should within twenty-eight days account on oath for all property transferred to them by the bankrupt under the assignment, and should hand over to the trustee all such property or pay him the value of any part not handed over. On Aug. 22, 1919, the value of the furniture was by the report of the registrar found to be of the value of £808 1s. 6d., and on Sept. 24, 1919, an order was made that A. Gunsbourg & Co., Ltd., should pay forthwith to the trustee the sum of £808 1s. 6d., the value of the furniture by the order of Feb. 3, 1919, directed to be delivered over to the trustee. No payment has been made under that order. Meanwhile the furniture had been sold by A. Gunsbourg & Co., Ltd., and was ultimately purchased by the Anglo-Hellenic company. At the date of the application by the trustee next hereinafter mentioned, part remains in the company's possession. The remainder has been sold and the proceeds £216 2s. were standing to their credit at their bank. The learned judge in the court below has found as a fact that the several purchasers, including the Anglo-Hellenic company, purchased bonâ fide for valuable consideration and without notice of the act of bankruptcy to which the title of the trustee related back, and I accept that finding, though I share the doubt of the Master of the Rolls, whether I should have arrived at it myself. On Oct. 3, 1919, the trustee applied to the court by motion for a declaration that the furniture and effects in question formed part of the property of the bankrupt divisible among the creditors and for a declaration that the £216 12s. above mentioned also formed part of such property and for an order that the Anglo-Hellenic company should hand over to the trustee the whole of the said furniture and effects or pay to him £808 1s. 6d. their value or the value of any part not handed over and for incidental relief. By an order made by Horridge, J., on Dec. 19, 1919, it was held that the furniture then in possession of the Anglo-Hellenic company which formed part of the original sale by A. Gunsbourg & Co., Ltd., and that part of the sum of £216 12s. which represented furniture included in the assignment by A. Gunsbourg & Co., Ltd., formed part of the property of the bankrupt divisible among his creditors and the necessary enquiries were directed to be made. It is from this order that the present appeal is brought. The Anglo-Hellenic company do not dispute that the assignment to A. Gunsbourg & Co., Ltd., was a fraudulent assignment and an act of bankruptcy, but they contend that such assignment was not void but voidable, and that transactions with purchasers for value without notice prior to the interposition of the trustee are protected. They contend further that the order for payment by A. Gunsbourg & Co., Ltd., of the value of the furniture either had the effect of transferring the property in the furniture to the assignees or amounted to the restoration of an election on the part of the trustee to affirm the sale by A. Gunsbourg & Co., Ltd.

I will deal with these points in order. The first of the acts of bankruptcy, proved to have been committed by the bankrupt within three months next preceding the presentation of the bankruptcy petition, was the assignment to A. Gunsbourg & Co., Ltd., and this was, therefore, the foundation of the bankruptcy (s. 37) and the property purported to be thereby assigned was property of the bankrupt divisible among his creditors (s. 38) and vested in the trustee, whose title related back to the date of the assignment: *Re Hirth, Ex parte Trustee* (3). In that case Lindley, M.R., made the following remarks which are exceedingly pertinent to the question which we have to decide. He said ([1899] 1 Q.B. at p. 621):

> "The section which lies at the foundation of this application, which is s. 4 of the Bankruptcy Act, 1883, says nothing about void and voidable, but says that certain transactions shall be acts of bankruptcy. Pausing there for a moment, it is impossible to say that because a deed, or a sale, or a conveyance is by that section made an act of bankruptcy it is then and there void and

of no effect. That is obvious, because although a man may commit an act of bankruptcy he may never be adjudicated a bankrupt upon it; and, of course, if he is not, all this discussion as to acts of bankruptcy and as to void and voidable is beside the mark. You cannot say that because a man executes a deed which is declared to be an act of bankruptcy the deed is void as soon as he executes it, for the simple reason that you do not know whether circumstances will ever arise which will raise the question. I pass on to the sections which will have ultimately to be considered, namely, the sections which deal with the property of a man who has committed an act of bankruptcy. The first section which is of importance is the 43rd which embodies what is called the doctrine of relation back."

The assignees in *Re Hirth, Ex parte Trustee* (3) were a company which had since been wound-up. The Master of the Rolls, having said that if the company were an ordinary person the title of the trustee would be perfectly plain, examines the contention that the winding-up, by substituting its creditors for the company, placed them in a more favourable position concluded as follows (ibid. at p. 623):

"That would be all very well if the title of the trustee in bankruptcy could be treated as accruing when he gave notice to impeach the transaction; it would be all very well as against everybody except the trustee in bankruptcy, whose title relates back. That doctrine is peculiar to bankruptcy; and it is because the trustee says: 'This property, the moment I elect to avoid and do avoid, is mine from the anterior date under the special provision of s. 43 of the Bankruptcy Act, 1883, [s. 37 of Act of 1914] that he overrides all the transactions and dealings which have been relied upon as an answer to his claim. That is the only point which has prevented any difficulty; but I think that I have shown that, having regard to ss. 4, 43, and 44 of the Bankruptcy Act, 1883, [ss. 1, 37 and 38 of Act of 1914] there is no difficulty about it when the circumstances are understood."

In my opinion, the result of this decision and of the sections of the Act of Parliament referred to above is that in the events which happened there was on Sept. 20, 1917, a statutory transfer of the furniture and effects in question to the trustee, and that on his appointment they vested in him as from that date without the necessity of any assertion by him of his right thereto. It is not a case in which an assignment has been executed as to which (being voidable as against the trustee) he seeks the interposition of the court to declare it void. All that the trustee in the present case need ask the court to do is to hold that the assignment is fraudulent. The provisions of the Act as to the commencement of the bankruptcy and as to relation back then vest the property without any further order.

The question then arises: Does a purchaser for value without notice prior to the active assertion of the trustee of his title acquire a right to the property which he can maintain against the trustee? It is, of course, abundantly clear that where a person bonâ fide acquiring title under an assignment by the bankrupt which, though by the Act held void as against the trustee, is in fact voidable only at the option of the trustee, and while it remains voidable—such purchaser can maintain his title against the trustee. The commonest case is that of a voluntary "settlement" of property effected within two years prior to the bankruptcy, and a good example of the application of the rule is to be found in *Re Holden, Ex parte Official Receiver* (8), in which it was held that the trustees under a voluntary settlement were entitled to a lien for their costs properly incurred prior to the avoidance of the settlement on the ground that the settlement being originally valid they were entitled to such rights as their position as trustees hereunder would confer upon them. It is because the transaction is merely voidable that rights honestly acquired before it is avoided are protected.

Re Hart, Ex parte Green (5), which was relied upon before us, is a case of this nature. The commencement of the bankruptcy there was Mar. 31, 1910. Prior to

this date—viz., on Oct. 14, 1909—the bankrupt had voluntarily transferred certain shares to his daughter, who, on April 13, sold them to a Miss Lomas, a bonâ fide purchaser, for value. The adjudication took place on May 13, and the appointment of a trustee was subsequent to that date. The daughter and Miss Lomas were both duly registered as holders in the books of the company. The point was that, though the transfer to Miss Lomas was prior to the avoidance of the transfer to her of the shares, yet it was subsequent to the commencement of the bankruptcy, and it was contended that the title of the trustee, therefore, prevailed over the title of Miss Lomas. This contention was negatived by the court, and I think the gist of the decision is to be found in a short paragraph in the judgment of the Master of the Rolls ([1912] 3 K.B. at p. 10):

> "It seems to me to follow that the trustee is in the same position as any other litigant who seeks a declaration that a deed is voidable, whether on the ground of fraud or under influence or otherwise. It is settled law that, however good a claim may be as against the grantee, the plaintiff cannot succeed if there has been any subsequent transaction for value without notice."

The point decided in that case was that the relation back of the title of the trustee did not operate to vest in him property which, prior to his appointment, had been sold to a purchaser under a previous transfer, which was prior to the commencement of the bankruptcy, and which was to be regarded as valid at the date of the sale. This is, in effect, so stated by BUCKLEY, L.J., where he said (ibid. at p. 12):

> "The question is whether the transfer made and perfected by registration after the act of bankruptcy, but before the appointment of the trustee is by s. 47 [s. 42 of Act of 1914] rendered void as between the trustee and the bonâ fide purchaser for value without notice."

That seems to me to have no application to such a case as the present, in which the effect of the subsequent bankruptcy is without more to vest the property in the trustee as from a date anterior to the dealing impeached. It is not contended that there is any express provision in the statute which would protect a purchaser of property so circumstanced. Nor, I think, will the equitable doctrine under which a court of equity declined to deprive a purchaser for value of a legal right acquired bonâ fide, and without notice avail the purchaser in this case. The statutory transfer passes the legal property in the goods to the trustee as from the commencement of the bankruptcy, and subsequent sales thereof by any person other than the trustee can confer no property on the purchaser unless, indeed, they be sales in market overt or under conditions which, by common law, would render them good or against the true owner. It would, in my opinion, be a perversion of the equitable principle to take away the legal title and transfer it to one who by law has no title at all.

The consideration for the transfer included the issue to the bankrupt of certain shares in A. Gunsbourg & Co., Ltd. They were never, in fact, issued, but, if they had been, that circumstance would in any sense have made no difference. The restitution of the consideration when a voidable transaction is set aside in an application of the equitable principle that he who seeks equity must do equity. In the present case the trustee is, in my opinion, seeking to recover from a purchaser what by law belongs to the trustee, and is under no liability to repay to such purchaser who has, in fact, acquired no title the money paid by him. Though a long time has elapsed since the original sale by A. Gunsbourg & Co., Ltd., the claim of the trustee is not barred, and, being a legal claim, is not met by any equitable defence founded on laches. In my judgment, the title of the trustee ought to prevail over that of the Anglo-Hellenic company. I arrive at this conclusion with some regret, for I cannot but think that in some cases such an application of the provisions of the Act may cause hardship, but I think any such hardship should be removed by legislation and not by judicial decision.

As to the other point, I have little to say. I think it is settled that a judgment for the recovery of goods or their value, or for the value of the goods to be rendered if the goods are delivered, does not, of itself, transfer the property to the defendant, but only if and when it is satisfied by actual payment of the value: *Brinsmead* v. *Harrison* (1). The effect of the several orders against A. Gunsbourg & Co., Ltd., is, in my opinion, the same as the ordinary alternative judgment for the delivery of the goods or their value ascertained by the jury. Here the value was separately ascertained, and a separate order made for the payment, but this, in my opinion, makes no difference in point of substance. If I am right in this there is no case of election. The trustee has done nothing to affirm any of the sales by A. Gunsbourg & Co., Ltd., or the purchasers from them, except the sale by the appellants themselves, and this is recognised by the order appealed from. In my opinion, this appeal fails, and must be dismissed with costs.

YOUNGER, L.J.—On Sept. 20, 1917, the bankrupt agreed to sell to A. Gunsbourg & Co., Ltd., a company he had caused to be incorporated on the previous day, all the assets of the business which he was then carrying on excepting cash and bills. The agreement for sale was dated Sept. 20, 1917. It was made between the bankrupt as vendor, of the one part, and the company, of the other part. The consideration for the sale was expressed to be £5,000, to be satisfied as to £1,000 in cash or fully-paid shares, or partly in cash and partly in shares, at the option of the company, and as to £4,000 by the allotment to the vendor or his nominees of fully paid-up preference shares in the company, or that nominal amount. As appears from the judgment of the learned judge in the court below at a previous stage of the case, the consideration was never, in fact, satisfied by the company. The point, however, now important to be remembered, is that the company was, and remained, liable so as to satisfy it if the trustee in bankruptcy had thought it to the interest of the creditors in the bankruptcy that the company should be required so to do. Among the assets included in the sale was a quantity of furniture in six rooms at Effingham House, Strand, where the bankrupt had his offices. It is the title to a part of that furniture—the contents of four rooms—acquired in the interval and paid for by the appellants in good faith, as the learned judge has found, which is the subject of the present appeal. The receiving order against the bankrupt was made on Oct. 24, 1917. It was founded on an act of bankruptcy committed on Sept. 29, 1917—nine days after the sale to the company just mentioned. Adjudication followed on Dec. 12, 1917, and a trustee was appointed on Feb. 3, 1919, more than a year later, during which period the furniture in question passed through at least two hands. The trustee's motion, to which A. Gunsbourg & Co., Ltd., was the only respondent, obtained from HORRIDGE, J., a declaration that the agreement of sale of Sept. 20, 1917, was fraudulent and void as against the trustee, and was an act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914, and the company, by its proper officer, was ordered within twenty-eight days to account for all property transferred to it by the bankrupt under the agreement in question, and to hand over to the trustee all such property or to pay to him the value of any part not handed over.

Two things in connection with that application may here conveniently be noted. The first is, that the order then made was, of course, not binding on the present appellants, the Anglo-Hellenic company. They were not served with the notice of motion, although their rights in the furniture, whatever they may be, had then accrued and were known to have accrued. The appellants do not, however, now question either the correctness or sufficiency of the order, and the effect of it as against them is in these circumstances to antedate as from Feb. 3, 1919, the commencement of the bankruptcy, to Sept. 20, 1917, in place of Sept. 29, 1917, its commencement up to that time. The second thing is this. Although the trustee by his notice of motion in February, 1919, asked that the agreement of Sept. 20, 1917, should be set aside, not only as an act of bankruptcy, but also under

the statute of 13 Eliz., c. 5, the learned judge in the court below did not see his way to accede to the second and more serious part of the application. His view apparently was that all the conditions necessary to justify such a finding were not clearly proved, the presence of valuable consideration money from the company being apparently his main difficulty. That result, however, so far as the present appeal is concerned, carries with it strange consequences. Had the learned judge found himself able to set aside the agreement under the statute of Elizabeth, the execution of the agreement would still have remained an act of bankruptcy under s. 1 (1) (c) of the Act, a subsection which includes in its scope assurances void under the statute of Elizabeth as well as others more innocent in character. But in that case there would have been no doubt as to the appellants' title to the furniture. It would, on HORRIDGE, J.'s, present finding, under the terms of that statute itself have been completely protected: see MAY ON FRAUDULENT DISPOSITIONS (3rd Edn.), p. 133, and the cases there cited; and s. 5 of the statute. It follows that if the learned judge's decision now under appeal stands, the title of the appellants, safe if the trustee's original motion of February, 1919, had entirely succeeded, is now displaced as a result of the trustee's comparative failure on that occasion. I draw attention to this matter because there was strong reason for holding the transaction of Sept. 20, 1917, to be void under that statute of Elizabeth, and the present appellants might well have induced the learned judge to take that more serious view had they been there and seen that it was to their advantage to adopt that position. Indeed, there was, so far as I can see, no reason to prevent them taking it up even on the present application. But they did not do so either before the learned judge or before us, and having mentioned the point, I pass it by.

As I have indicated, part of the office furniture sold by the bankrupt to the company had been disposed of by it long before the launching of the trustee's motion of February, 1919. So far as it comprised the contents of four rooms, it had been sold first to a company called the Croydon Aviation and Engineering Co., Ltd. Thereafter it was with other furniture sold by the liquidator of that company to a Mr. Maschonas and was then re-sold to the appellants, the Anglo-Hellenic Banking and Commercial Co., Ltd. The learned judge in the court below has found as a fact that the Croydon company, Maschonas, and the Anglo-Hellenic bank, the appellants, were all bonâ fide purchasers without notice of any invalidity in the title of the Gunsbourg company. That finding was challenged by the trustee on the ground that in another part of his judgment the learned judge, with reference to Maschona's evidence as to the Croydon company's purchase, stated that he did not consider him to be a reliable witness, and there does seem at least room for suspicion that Maschonas in September, 1917, or very shortly afterwards may have known more of the bankrupt and his arrangements with his own company than he cared to admit. Indeed, at a later period and after his bankruptcy the bankrupt actually entered the service of the Croydon company. But there is, I think, more than sufficient evidence on the learned judge's note to justify his conclusion of bonâ fides arrived at by him after seeing the witness. And, in my judgment, his finding of fact must be accepted in this court, if without enthusiasm, as correct. That finding raises a serious and important question which must affect many other similar cases, viz:—whether a transfer for value from a seller of chattels taken by the transferee in good faith is to be subject to the danger of its being avoided by the ascertainment at a subsequent date indefinitely remote that, as between some trustee in bankruptcy and the purchaser's immediate or secondary or indefinitely more remote transferor, the title of that transferor was impeachable as a fraudulent assignment under s. 1 (1) (c) of the Bankruptcy Act, 1914. If this be so, and the learned judge holds that it is, then it cannot, I think, be denied that the result would be as anomalous as it would be unjust. For there can be no doubt that had the original transaction here been declared fraudulent up to the hilt under the statute of Elizabeth, the appellants, as I have already shown, would have been protected under that statute. Had it been void as a fraudulent preference,

they would have been protected under s. 44 of the Bankruptcy Act, 1914. Had it been declared void as a voluntary settlement, they would have been protected on equitable grounds: *Re Hart, Ex parte Green* (5). And even had they entered with good faith into this very transaction with the bankrupt himself, they would have been protected under s. 45 of the Bankruptcy Act, 1914, although the transaction would, nevertheless, have still remained an act of bankruptcy. As LORD ESHER, M.R., said in the case in which the last point was decided—namely, *Shears* v. *Goddard* (9) ([1896] 1 Q.B. at p. 408): "The result of so construing the section is to do justice; whereas the result of the contrary construction would be gross injustice." Indeed, if the order of the learned judge in the court below is to stand, so anomalous would be the predicament of bonâ fide purchasers in the position of the appellants that it has provoked the suggestion that theirs must be a casus omissus from the Act. And, in my judgment, this suggestion is none too strong a casus omissus which might well seem to those concerned sufficient to call for statutory remedy if such "gross injustice" as LORD ESHER referred to is not in many cases to result. But, for my own part, I find here no such casus omissus, because, but only because, the appellants' title is, I think, unimpeachable, the act in this, as in all other directions, sufficing, as I see it, to protect the bonâ fide purchaser, or, as WRIGHT, J., has put it, "the purchaser whose title is without stain."

The ground on which the learned judge in the court below has somewhat reluctantly, as I read his judgment, arrived at the contrary conclusion and found against the appellants' title is, first, that in his view no protection can be extended to a bonâ fide purchaser for value in a case where the original transaction is itself impeached as an act of bankruptcy and there is no protective provision in the statute applicable, and his second and supplementary ground is that such a transaction, being an act of bankruptcy, is, in the learned judge's view, therefore, "void," so that no subsequent purchaser for value can obtain any rights under it. The first ground of that judgment was based, I think, entirely upon certain data, and they are quoted by VAUGHAN WILLIAMS, J., in *Re Vansittart, Ex parte Brown* (10) ([1893] 2 Q.B. at p. 380), and in *Re Brall, Ex parte Norton* (11) ([1893] 2 Q.B. at p. 385), where, referring to the protective clause in favour of purchasers in the section of the Act dealing with fraudulent preference—s. 44 (2) of the statute of 1914—that learned judge observed that the necessity for the protective clause arose from the fact that fraudulent preference is an act of bankruptcy. It is true that there is no similar protective clause with reference to a fraudulent assignment, also an act of bankruptcy, and HORRIDGE, J., observing that fact, and applying VAUGHAN WILLIAMS, J.'s, words to the case in hand held, as I have said, that no protection to the appellants' title being expressly afforded by the statute, the title was not protected.

One is tempted at the very outset to be sceptical as to the soundness of reasoning which involves consequences so exceptional and so unfortunate as result from it when one remembers that, included in these so-called fraudulent assignments are assignments which are described in the cases as fraudulent in law only—whatever that may mean—and assignment so highly meritorious as that in question in *Re David and Adlard, Ex parte Whinney* (12), it would indeed be strange that bonâ fide purchasers from assignees under them should by the statute invariably be hit, while bonâ fide purchasers from assignees under a fraudulent preference by which the general estate must invariably lose should always be protected. The history of the fraudulent preference section of the Act confirms one's initial scepticism and make very questionable the correctness of VAUGHAN WILLIAMS, J.'s, explanation of its protective subsection. That history seems to show that whatever may, in the first instance, have been the reason for inserting the protective provision in the section that reason is not to be found from reference to the fact that fraudulent preference was an act of bankruptcy, and this for the simple reason that fraudulent preference per se was not then an act of bankruptcy at all. The fraudulent preference section—protective clause and all—first appeared, as will be

recalled, in the Bankruptcy Act, 1869. Fraudulent preference did not, however, become an act of bankruptcy until 1883. It became so for the first time in the Act of that year. Indeed, if the conjecture may be hazarded, it would appear more probable that the protective clause had always been inserted in the fraudulent preference section for a very different reason, not because fraudulent preference was an act of bankruptcy, but in order to make it clear that the protection always by bankruptcy law extended to bonâ fide purchasers was not withheld even in relation to a transaction which was by the section itself "deemed to be fraudulent and void as against the trustee," a transaction, too, which from its very nature it could never be to the interest of the trustee to affirm. The truth, I think, is that the significance of s. 44 in relation to the present question is not to be found in the fact that it contains a protective clause, while none is to be found in the Act in relation to a fraudulent assignment also an act of bankruptcy. Its true significance is to be found in this, that a fraudulent preference, although now an act of bankruptcy, is by that section still expressly declared to be fraudulent and void as against the trustee—an unnecessary redundancy if the view now under discussion is correct, while a fraudulent assignment always an act of bankruptcy is nowhere so described. In other words—and I now come to the second ground of the learned judge's judgment—no warrant is to be found in the Act, as I think for this view that thereunder a fraudulent assignment is necessarily void, by which the learned judge means clearly absolutely void because it is an act of bankruptcy. To read such a provision into the Act would have the effect of attributing apparently quite gratuitously to a fraudulent assignment for the purposes of the Act, a characteristic which it does not in any other relation possess. That such an assignment, particularly when it is one for value, is in other circumstances invariably voidable but not void, will not be questioned, and, in my view, the authorities on this point when properly understood really all show that fraudulent assignments are under the Bankruptcy Law also voidable only, and must necessarily be so if the creditors are in all cases to have secured to them their proper rights.

It is true that you do meet in the cases with expressions like that of MELLISH, L.J., in *Re Rogers, Ex parte Villars* (13). "Whatever is by the statute made an act of bankruptcy is entirely void as against the trustee in bankruptcy." That is the strongest I can find, and, pausing merely to observe that it was in the same case at a subsequent hearing disapproved by the full court including the lord justice himself, and is manifestly too general in its terms, I would point out that even such a statement means no more than that the Act is void "at the election of the trustee," that is to say, it is voidable at his option. With reference to a fraudulent assignment not being void as an act of bankruptcy that is, I think, made quite clear by the judgment of LINDLEY, M.R., in *Re Hirth, Ex parte Trustee* (3), when he, pointing out that the statute says nothing about the deed being void or voidable, remarks of such an assignment as we have here that it is not then and there void and of no effect. It is not void on execution; it is only void "as against the trustee" (and these are the critical words) "who elects to impeach." I shall have to refer again to this judgment for another purpose. But, in my opinion, on this point the Master of the Rolls is in no way at variance with WRIGHT, J., who, in the same case, said in so many words that such an assignment was a voidable contract only, and the same conclusion is reached if one approaches the question from another point of view. Such assignment may, of course, as an act of bankruptcy be the ground of a petition in bankruptcy, a receiving order thereon and a subsequent adjudication. But the assignment does not thereby become of no effect. Its validity, although still an act of bankruptcy, may be affirmed—as in *Shears* v. *Goddard* (9). Indeed, the trustee may always affirm it if in the interest of the creditors he deems it expedient so to do—not, it may be surmised, a rare occurrence when it is remembered that when he does elect to avoid the transaction he must hand back to the assignee all the consideration the bankrupt received under it. This obligation was denied in the argument. Myself, I can see no

A principle in support of the denial, and I do find in *Re Slobodinsky, Ex parte Moore* (6) that Mr. Herbert Reed for the trustee, with the apparent approval of WRIGHT, J., as subsequently appear said, as I think rightly:

> "If the trustee elects to avoid the debtor's contract, of course he must return the shares and the debentures the debtor received."

B Further, where the trustee elects to avoid the deed he must if his right be disputed, move the court under the Bankruptcy Rules, as in this case he did for a declaration that it is void as against him, with consequential relief. In short the position of the trustee is merely this. Such an assignment as that with which we have to deal here being voidable as against creditors in the event of a timeously supervening bankruptcy, the trustee has "all the equity the creditors have and may C impeach transactions which the bankrupt himself would be estopped from impeaching": see per LORD LOUGHBOROUGH, L.C., in *Anderson* v. *Maltby* (14) (2 Ves. at p. 255). But he must elect to impeach and he must impeach, and if he does so, his rights as against third parties are I should think, indubitably the same as those of any other plaintiff. He is entitled to impeach a voidable deed neither more D nor less. But it is said that, even if this is so, the doctrine of relation back under s. 37 alters the whole position and the observations of ESHER, M.R., in *Re Pollitt, Ex parte Minor* (2) were referred to. The force of these observations cannot be denied. But in making them the Master of the Rolls had, I think, immediately in mind only the subsequent dealings by the debtor, with his property. To these, except as protected by s. 45, every word of the judgment applies.

E But if the words are to be extended further—that is to say, if they are to extend to dealings by bonâ fide purchasers for value after the commencement of the bankruptcy with transferees holding under an impeached transaction property of the bankrupt which in their hands belongs to the trustee as from the commencement of the bankruptcy—then, in my judgment, these words cannot stand with the decision in this court in *Re Hart, Ex parte Green* (5), and with the principles F upon which that decision was rested. That case, which has already been discussed, was a case of a voluntary settlement void against the trustee in bankruptcy under s. 42 (1) of the Act. A. L. SMITH, L.J., in *Re Carter and Kenderdine's Contract* (4) ([1897] 1 Ch. at p. 782) asked:

> "Void from when? That is the point which has to be determined. On one side it is said void ab initio—void from the date of the settlement. Where G do you find that? The words are not there. There are other words which point in the contrary direction and those are the words 'void against the trustee in bankruptcy.' What do they mean? They mean void as against the trustee in bankruptcy from the date of the accruer of his title, or, in other words, void from the date of the act of bankruptcy to which the title of the trustee relates back."

H It is, I think, necessary to bear those words in mind if one would appreciate the close—I think, the complete—analogy of *Re Hart, Ex parte Green* (5) to the present case. Its facts I need not again refer to. For present purposes it is enough to point out that, as explained in *Re Carter and Kenderdine's Contract* (4), the title of the trustee to the shares there in question related back to the act of bankruptcy, I which was prior to the transfer by Miss Hart to Miss Lomas, and that, accordingly, in the hands of Miss Hart at the commencement of the bankruptcy the shares became by virtue of the doctrine of relation back the shares of the trustee and Miss Hart would have had no answer to a claim by him for their return. Moreover, although it is true under a different section of the Act—namely, s. 47—the original transfer of the shares by the bankrupt to Miss Hart was also as from the commencement of the bankruptcy "void as against the trustee"—the very expression used here in the order of Feb. 3, 1919, with reference to the assignment now in question.

And yet the Court of Appeal in that case held that the trustee had as against Miss Lomas—a bonâ fide transferee—no right to recover the shares even although there was no protective section of the Act in her favour.

The judgments of the court show as I think, that their reasoning was exactly applicable to the position of the appellants here. COZENS-HARDY, M.R., said ([1912] 3 K.B. at p. 10):

> "In my view, the true view is that a voluntary settlement is not void, but is only voidable by the trustee—who must apply to the court for a declaration to that effect, and consequential relief. It seems to me to follow, that the trustee is in the same position as any other litigant who seeks a declaration that a deed is voidable, whether on the ground of fraud or undue influence or otherwise. It is settled law that however good a claim might be as against the grantee, the plaintiff cannot succeed if there has been any subsequent transaction for value and without notice."

In that case, as in the present, the assignment was subsequent to the commencement of the bankruptcy. BUCKLEY, L.J., put it thus (ibid. at p. 14):

> "For the decision of the present case it is sufficient to say that the bonâ fide purchaser for value without notice whose title was complete before there came into existence a trustee who could seek to avoid the voluntary voidable settlement has a good title."

That is the case here. In the present instance there was no such trustee until Feb. 3, 1919, the date also upon which the trustee's election is on record. But there are said to be two grounds upon which that case is distinguishable from the present. The first is that the principle of *Re Hart, Ex parte Green* (5), which had a reference to a voluntary settlement, not an act of bankruptcy, cannot properly be extended to a fraudulent assignment which is not only an act of bankruptcy, but which has become, as here, the effective commencement of the bankruptcy. The sufficient answer to that view is, as I think, to be found in the earlier part of this judgment. If, as I have endeavoured there to show, the fraudulent assignment here was not void, but voidable only until the election by the trustee to avoid it in February, 1919, there can, I conceive, be no difference at the relevant date—that is to say, the commencement of the bankruptcy—between that assignment and any other voidable instrument as, for instance, a voluntary settlement voidable under s. 42 of the Act of 1914. An instrument voidable but innocent is neither better nor worse, so far as a bonâ fide purchaser is concerned, than an instrument voidable but fraudulent. I myself can see no difference between them. And this, be it noted was the view also of KENNEDY, L.J., in *Re Hart, Ex parte Green* (5). He there quoted with approval and applied to the case then in hand the observations of WRIGHT, J., in *Re Slobodinsky, Ex parte Moore* (6), cited by the learned judge here. These observations were made in a case of fraudulent assignment and were, if I may respectfully say so, in my judgment sound. KENNEDY, L.J., thought so, too, and applied them to a case of a voluntary settlement. He set no destruction in principle between the two. Neither, if I may say so, do I.

The other ground upon which it was said that *Re Hart, Ex parte Green* (5) may be distinguished from the present case is that there the transferee had acquired the legal interest in the shares in question. Miss Lomas had become the registered holder and COZENS-HARDY, M.R., and possibly BUCKLEY, L.J., referred to that fact, while here nothing equivalent to such registration has occurred. There has been no sale of this furniture in market overt. But, in my judgment, *Re Hart, Ex parte Green* (5) proceeded on no such special circumstances. Such an observation as this of the Master of the Rolls ([1912] 3 K.B. at p. 10) shows it:

> "The property was of such a value that no investigation of the title of the transferor was possible, and it would be almost shocking to deprive her of the property she acquired in good faith. I think I am entitled to do what was done by

A LINDLEY, L.J., in *Re Carter and Kenderdine's Contract* (4) namely, 'to consider what the consequences would be if the other conclusion were arrived at.' No purchaser of shares or stock on the Stock Exchange would be safe if Flora Lomas is to be deprived of the shares. If I may adopt the words of LINDLEY, L.J., 'to my mind good sense is shocked by such a startling construction as that'."

B But further. *Re Hart, Ex parte Green* (5) was really an extension of the principles already laid down by VAUGHAN WILLIAMS, J., in *Re Brall, Ex parte Norton* (11), and in *Re Vansittart, Ex parte Brown* (10), and in *Re Carter and Kenderdine's Contract* (4) by the Court of Appeal. In *Re Vansittart* (10) the subject-matter of the settlement was, as here, chattels—to wit jewellery—and there was no sale in market overt. Moreover, as I understand, the equitable principle where a plaintiff is seek-
C ing to set aside a voidable contract, the defence of the purchaser for value without notice is complete without any reference to the legal estate. The defence is applicable to every kind of property movable and immovable (personal as well as real); and I can find no authority, nor was any produced, to show that in relation to chattels such a defence had to include an allegation of purchase of the chattels in market overt. In other words, such a defence in such a case was in a court of equity so
D overwhelming when established that it could be maintained there without any assistance from the law. In my judgment, therefore, *Re Hart, Ex parte Green* (5), coupled with the application of the general principles already referred to, is decisive of the present..

I must say one word about *Re Hirth, Ex parte Trustee* (3), already referred to. There are in LINDLEY, M.R.'s, judgment in that case some observations which are
E difficult to reconcile with the previous decision of the Court of Appeal in *Shears* v. *Goddard* (9), but the actual decision does not touch the present case. The only relevant finding there was that unsecured creditors of a company—the assignee under a bankrupt's fraudulent assignment—are not bonâ fide purchasers for value of the property comprised in it in accordance with the principle here under discussion. It is difficult to see how it was contended that they were. But the title of such
F purchasers properly so-called was not in that case in fact questioned. For the liquidators had sold the property comprised in the assignment or some of it, and the purchasers' titles were apparently not sought to be impeached. Indeed, a careful perusal of the judgments shows, I think, clearly that the Master of the Rolls and the lords justices were dealing only with the position of the company—the original assignee. The company, said VAUGHAN WILLIAMS, L.J., ([1899] 1 Q.B. at p. 625),
G could not claim "the benefit of the position of a bonâ fide purchaser without notice." RIGBY, L.J., said (ibid. at p. 624): "I do not think that anything that has been done here converts this property into the property of the company." The trustee was entitled to recover its proceeds from the company—the property itself not being in existence. The statement of the Master of the Rolls in the same case that the trustee who elects to impeach the deed can recover the property from the person in whose
H possession it is, is certainly superficially more extensive, but it seems to me clear on his judgment that his observations were not directed further then than to the company itself and its liquidator.

I confess that it is with some satisfaction that I have arrived at the conclusion that the title of persons in the position of the present appellants is a title which they
I as one without stain can be protected by the application to the case of thoroughly well-understood equitable principles. In analogous cases the courts have protected the bonâ fide purchaser by a somewhat benevolent construction of possibly doubtful statutory phrases. Here, as I think, the bonâ fide purchaser can only be defeated by reading into the statute by implication provisions which are not there. And this, I conceive, the court will not do unless for some good reason it is so obliged. This can hardly be said to be the case where the result of doing so is, in A. L. SMITH, L.J.'s, words in *Re Carter and Kenderdine's* (4) ([1897] 1 Ch. at p. 783), to bring about something which is "contrary to all the provisions of bankruptcy law" that

"bonâ fide purchasers for value should have their title impeached by what they have done in good faith." A

I can now deal more briefly with the further contention put forward by the appellants in support of their appeal. I have already referred to the order of Feb. 3, 1919. The Gunsbourg company made default in complying with that order, and on July 30, 1919, the registrar made a report to the effect that the furniture comprised in the assignment had been valued by the debtor at £808 1s. 6d. In pursuance of a supplemental order of the judge on July 31, 1919, the registrar on Aug. 22, 1919 made a further report, particularising the furniture in all the several rooms, and reporting the value of the same figure of £808 1s. 6d. On Sept. 24, 1919, the trustee applied to the vacation judge for an order that, the respondent company having made default in complying with the order of Feb. 3, 1919, 'the said respondent company do pay to the trustee the sum of £808 1s. 6d. to the value (as found by Registrar Francke in his report dated Aug. 22, 1910) of the furniture, chattels and effects which by the said order of Feb. 3, 1919 were directed to be delivered over by the respondent company to the trustee." The respondent company did not appear. No one else was served with notice of the application and upon it GREER, J., ordered: B C

> "That the respondent company do pay forthwith to the applicant the sum of £808 1s. 6d., the value (as found by Registrar Francke, &c.) of the furniture, chattels, and effects which by the said order of HORRIDGE, J., were directed to be paid by the respondent company to the applicants." D

This order was followed on Oct. 3, 1919, by the notice of motion served upon the present appellants upon which the order now under appeal was made. On this it was contended that by the order of Sept. 24, 1919, the trustee declared his election to proceed against the company for the value of the chattels only, and took an order which once and for all deprived the company of the option hitherto open to it of satisfying the trustee's claim by returning the furniture. If that be the effect of the order of Sept. 24, 1919, it would appear that all claim to the furniture in specie in the hands of third parties must, ipso facto, be extinguished. I have felt great difficulty on this point, because I can think of no proper and sensible ground for the procedure of the trustee at that stage if such were not the effect of the order. He had a value placed upon the furniture as it was when new, and one can see a very good reason why, if he could obtain payment of such a price, he should prefer it to the return of the furniture which had become old. But my Lord and the lord justice do not attach that necessary meaning and effect to the order of Sept. 24, 1919, and I am not sorry to acquiesce in their better judgment. The trustee did not by that order intend to abandon his claim against the appellants. He notified it to them in a letter addressed to Maschonas on July 31, 1919. Nor were the appellants in fact prejudiced by the order of September made in their absence, whatever may have been the intention of the trustee in taking it. I would only add that to this point, as presented to us, *Scarf* v. *Jardine* (15), relied upon below, is no answer, but that, apart from the question of election and assuming as I do that no execution was issued on the order of Sept. 24, 1919, *Brinsmead* v. *Harrison* (1) is. If the decision rested with me, my opinion would be that this appeal should be allowed on the ground first dealt with in this judgment. E F G H

Appeal dismissed.

Solicitors: *Westbury Preston & Stavridi; Carter & Bell.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

DAVIES *v.* BRISTOW

[KING'S BENCH DIVISION (Lush and Shearman, JJ.), May 17, 18, 19, 1920]

[Reported [1920] 3 K.B. 428; 90 L.J.K.B. 164; 123 L.T. 655; 36 T.L.R. 753]

Landlord and Tenant—Notice to quit—Effect—Impossibility of waiver.

The expression "waiver" in connection with the service of a notice to quit, although in many cases it may be convenient as a mode of describing the position when landlord and tenant agree that a notice to quit should be inoperative and that they shall both proceed as if no notice had been given, is quite inaccurate as a statement of the legal position, and if an attempt is made to build a proposition of law on the strength of it, it is an expression calculated to lead one astray. When once a notice to quit has been given and received the term automatically comes to an end on the expiration of the notice, and the position is precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice to quit. There is no room for any election by the landlord. The landlord and tenant may agree that a new tenancy shall be created on the old terms, and that is what, in effect, they do when they agree to treat the notice to quit as inoperative, or, to use the expression so often used, to "waive" the notice. The agreement for the new tenancy must be proved in the way in which any agreement is proved.

Hunt v. *Bliss* (1) (1919), 89 L.J.K.B. 174, approved.

Hartell v. *Blackler* (2) [1920] 2 K.B. 16, disapproved.

Notes. The Increase of Rent &c. Acts, 1915, and 1919, were repealed by the Increase of Rent &c. Acts, 1920, but it will be seen that in this case it was held that the tenant could not avail himself of the protection afforded by the Acts, and so they have no application. The case is reported for the above observations of the court on the general law of landlord and tenant.

Considered: *Town Properties Development Co.* v. *Winter* (1921), 37 T.L.R. 979; *Shuter* v. *Hersh*, [1922] 1 K.B. 438; *Felce* v. *Hill* (1923), 92 L.J.K.B. 974. Applied: *Thompsons (Funeral Furnishers), Ltd.* v. *Phillips*, [1945] 2 All E.R. 49. Considered: *Morrison* v. *Jacobs*, [1945] 2 All E.R. 430. Approved: *Clarke* v. *Grant*, [1949] 1 All E.R. 768. Considered: *Rhyl U.D.C.* v. *Rhyl Amusements, Ltd.*, [1959] 1 All E.R. 257. Referred to: *Wilkins* v. *Carlton Shoe Co.* (1930), 94 J.P. 207. As to notices to quit see 23 HALSBURY'S LAWS (3rd Edn.) 516 et seq., and for cases see 31 DIGEST (Repl.) 478 et seq.

Cases referred to:

(1) *Hunt* v. *Bliss* (1919), 89 L.J.K.B. 174; 122 L.T. 351; 84 J.P. 37; 36 T.L.R. 74; 64 Sol. Jo. 116; 18 L.G.R. D.C.; 31 Digest (Repl.) 701, *7911.*

(2) *Hartell* v. *Blackler*, [1920] 2 K.B. 161; 89 L.J.K.B. 838; 123 L.T. 171, D.C.; 31 Digest (Repl.) 506, *6321.*

(3) *Croft* v. *Lumley* (1856), 5 E. & B. 648, 682, Ex.Ch.; affirmed (1858), 6 H.L. Cas. 672; 27 L.J.Q.B. 321; 31 L.T.D.S. 382; 22 J.P. 639; 4 Jur. N.S. 903; 6 W.R. 523; 10 E.R. 1459, H.L.; 12 Digest (Repl.) 536, *4066.*

(4) *Flanagan* v. *Shaw*, [1920] 3 K.B. 96; 89 L.J.K.B. 168; 122 L.T. 177; 84 J.P. 45; 36 T.L.R. 34; 64 Sol. Jo. 51; 18 L.G.R. 29, C.A.; 31 Digest (Repl.) 606, *7208.*

(5) *Davenport* v. *R.* (1877), 3 App. Cas. 115; 47 L.J.P.C. 8; 37 L.T. 727, P.C.; 31 Digest (Repl.) 525, *6480.*

Appeal by the tenant from an order of the learned judge of Bromley County Court. The facts appear from the judgment of LUSH, J.

Edgar Dale for the tenant.

J. R. Bell Hart for the landlord.

Cur. adv. vult.

May 19. **LUSH, J.**—By an agreement in writing dated July 24, 1916, the landlord let a certain house and premises to the tenant for a term of three years, from June 24, 1916, and so on from year to year at a yearly rent of £45, until the tenancy has been determined at the end of the third, or any subsequent year, by either of the parties giving to the other six calendar months' notice in writing. The tenant agreed "to keep the premises in good tenantable order and condition, and all eaves, gutters, and downpipes and drains cleansed, flushed, and free from obstruction." On Dec. 19, 1918, a notice to quit was given by the landlord. The notice expired at Midsummer, 1919. Before it expired correspondence passed between the parties and there were negotiations with a view to the tenant purchasing the house, but they fell through. The June rent was duly paid, but the tenant did not go out. Further correspondence passed, and I propose to read two letters which are of importance. The first of them is dated July 4, 1919, and was written by the landlord to the tenant. The landlord said this, after referring to a letter he had received, which is not material.

> "I gathered from you when here, that you wanted to get settled and would like to buy (of course at your own price) rather than have your rent raised or have to leave in Sept., 1920."

The meaning of that letter is plain enough. The landlord was contemplating making an increase of the rent payable in respect of these premises and he was telling the tenant, in substance, that if he would agree to pay the increased rent, the landlord might be willing that he should stop on, but he intimated that if he was not willing he would have to leave in September, that would be Michaelmas, and he asked the tenant to think it over and come and see him again before he served his notice to raise the rent. The other letter I wish to read is dated July 9, also from the landlord to the tenant:

> "Without prejudice to my notice terminating your tenancy at June 24, last, I inclose notice under the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1915 and 1919, of intention to increase the rent during such time as you remain in occupation and shall be glad to hear from you that you have made other arrangements, and are prepared to give possession."

Accompanying that letter there was a notice of increase of rent. By that notice the landlord purported to increase the rent by adding ten per cent. to the existing rent of £45. That notice was served with a footnote, as the Act of 1919 requires, telling the tenant that he might, if the premises were out of repair, get a certificate from the sanitary authority. That notice was served under an entire misapprehension by the landlord as to the position. As a matter of fact these premises came under the Increase of Rent &c. (Restrictions) Act, 1915, and the rateable value of the house was such as to bring it within that Act, and, further, there was no power at that time to increase the rent in the way in which the landlord desired to increase it. The Increase of Rent &c. (Restrictions) Act, 1919, contains provisions with regard to a landlord increasing the rent, but the time had not arrived at which that power could be exercised. However, the notice, as I say, was served. Then further correspondence passed. On Sept. 25, the tenant sent his cheque for the Michaelmas rent at the old figure at the rate of £45, and he sent the cheque for payment of what was specifically described by him as "rent." The landlord kept the cheque, but wrote a letter claiming payment of the balance, that is, the balance on the footing that he had validly increased the rent by adding on ten per cent. The tenant replied to that letter, saying that the increase did not apply to those premises, and then the landlord's firm (the landlord is a solicitor) wrote to the tenant saying: "Unless you pay the increase we are instructed to commence proceedings against you." After that letter the tenant sent a cheque for subsequent rent and the landlord returned it, refused to take it, and this action was brought. It was brought for possession and mesne profits, and the first ground

upon which the landlord put his claim for possession was that the term had been determined by the notice to quit. There was an alternative claim for forfeiture for non-payment of the balance of the rent, that is the excess, the ten per cent., and the landlord also claimed mesne profits. Nothing turns upon the claim for forfeiture for non-payment of the balance. What was contended before the learned county court judge, and before us, on behalf of the landlord, was that the term had been determined by the notice to quit and that the landlord accordingly was entitled to possession.

[His Lordship dealt with a point which does not now call for report and continued:] Upon the facts I have stated two contentions were raised on behalf of the tenant, first, that the notice to quit had been waived, waived by the acceptance by the landlord of rent after the notice to quit had expired and also waived by the service by the landlord on the tenant of the notice that he was increasing the rent which it was said could only be served upon the tenant on the footing that he was still the landlord's tenant. The other point taken was that the tenant could not be evicted because he had performed his obligations under the tenancy agreement. I would point out that both under the Act of 1915 and under the Increase of Rent &c. (Amendment) Act, 1919, it is made a condition precedent to the right of a tenant to claim the protection of the Act that he should have paid the rent and performed his obligations under his tenancy agreement. The learned judge deals with that point in this way. He says:

> "I, therefore, feel bound to find that the tenant deliberately refused to carry out the conditions of the tenancy, and had so refused for a considerable period with substantial injury to the landlord, and, in my view, he does not, therefore, come within the section which protects him from an order for recovery of possession."

That left, therefore, as the only point to be considered, the contention that I have already mentioned—namely, that the notice to quit had been waived. Of course if it had not been waived, the tenant not being entitled to the protection of the Act for the reason I have just mentioned, the landlord would be entitled to an order for possession. If it had been waived, of course the landlord's action must fail.

That is how the matter stands, and it is that question with regard to the waiver of the notice to quit with which we are now dealing. The contention for the tenant was that this question with regard to the waiver of the notice to quit had been concluded in his favour by the judgment of the Divisional Court in *Hartell* v. *Blackler* (2). The facts of that case were shortly these. A notice to quit had been served and had expired, and the tenant refused to give up possession of part of the demised premises. The tenant tendered rent to the landlord on several occasions which the landlord refused to accept, but later he sent the landlord a letter enclosing the sum of 8s. for rent, and her solicitors wrote a letter to the tenant saying:

> "Mrs. Hartell has sent us your registered letter, dated July 28, in which you inclose p.o. for 8s. rent. Mrs. Hartell does not recognise you as her tenant, and we will retain the p.o. for the time on account of use and occupation of her premises, but not as rent. Mrs. Hartell requires the lodge for the occupation of her own servants, and you must give up possession at the earliest possible moment."

The tenant still refused to go out, and the landlord brought an action in the county court to recover possession of the lodge. The learned county court judge held that the retention of the rent that had been paid, although accompanied by a protest, was an acknowledgment of a tenancy and a waiver of the notice to quit. He, therefore, gave judgment for the tenant. The landlord appealed. Apparently, no counsel appeared for the tenant, and the appeal was argued on behalf of the landlord whose counsel cited certain authorities and contended that the landlord was entitled to judgment. The Divisional Court, after considering the authorities

that had been cited, elected to follow the opinion of the eight judges who were consulted in *Croft* v. *Lumley* (3), and held that the notice to quit had been waived. They accordingly affirmed the decision of the county court judge. A

Our attention has been called to a case which was not cited to the Divisional Court in *Hartell* v. *Blacker* (2), the case of *Hunt* v. *Bliss* (1). That, again, was an appeal from a county court, and it came before the Divisional Court consisting of COLERIDGE and MCCARDIE, JJ. The headnote says this (36 T.L.R. 74): B

> "A tenant who holds over after the expiry of his tenancy is not debarred from availing himself of the protection given by s. 1 (3) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, by the fact that the expiry of his tenancy has been caused by his having given notice to quit."

In the course of his judgment, COLERIDGE, J., who considered what was the position of a tenant who holds over, claiming the protection of the Increase of Rent Act—whether he should be regarded as a trespasser, and, if not, whether he should be regarded as a tenant. COLERIDGE, J., says this: C

> "The decision in *Flannagan* v. *Shaw* (4) was of assistance in showing that, although a notice to quit had been given by the tenant, a statutory tenancy came into existence by reason of the Act on the expiration of the notice to quit." D

MCCARDIE, J., gave judgment to the same effect. I have not the advantage of knowing the terms of the learned judge's judgment. That case appears to me to be in direct conflict with the judgment of the Divisional Court in *Hartell* v. *Blackler* (2). I cannot myself reconcile the two authorities, because in *Hartell* v. *Blackler* (2) the Divisional Court appear to have treated the tenant as still tenant to the landlord and to have treated the fact that he had paid the rent, which was expected, as practically conclusive evidence that he was tenant to the landlord under some agreement between them. On the other hand, the view of the court in *Hunt* v. *Bliss* (1) was: "That is not so; there is a novel kind of tenancy created, which COLERIDGE, J., called 'a statutory tenancy'." E

The two cases, in my view, are not reconcilable, and we are, therefore, at liberty to express our own view as to the correctness of the decision in *Hartell* v. *Blackler* (2). With very great respect to the learned judges who decided *Hartell* v. *Blackler* (2) I cannot see my way to agree with their decision. I agree with the view taken by the court in *Hunt* v. *Bliss* (1), and for these reasons. The expression "waiver" in connection with the service of a notice to quit, although in many cases it may be convenient as a mode of describing the position when both landlord and tenant agree that a notice to quit shall be treated as inoperative and that they shall both proceed as if no notice had been given, it is quite inaccurate as a statement of the legal position, and if one attempts to build a proposition of law on the strength of it, it is an expression which is calculated to lead one astray. When a forfeiture has been incurred owing to the tenant committing a breach of his covenant, it is right enough to say that a landlord can waive the forfeiture in this sense—it is correct to say that he can waive his right to rely upon it, and to re-enter in consequence of it. That is because where there has been a forfeiture the term is not avoided; it is not brought to an end by reason of the breach of covenant. The forfeiture makes the term voidable at the option of the landlord, and the landlord can elect whether to affirm or disaffirm the tenancy. He has that choice, and it is perfectly clear that, if a landlord once evinces an unequivocal intention to affirm the continuance of the tenancy, he cannot afterwards avail himself of his right to treat the term as at an end and re-enter. If a landlord with notice of a forfeiture accepts rent from the tenant he cannot afterwards evict the tenant for that breach, and it is equally clear that no statement by the landlord when he accepts the rent —that he accepts it without prejudice to his right to re-enter for the forfeiture; no statement that he does not recognise the tenant as still his tenant—can preserve his right, if once he has given it up by evincing a clear intention to affirm the F G H I

continuance of the tenancy. Once he unequivocally treats the tenant as still his tenant, after he has had notice of the forfeiture, he has elected, and it matters not whether he says that he is preserving his right or not recognising the tenant as his tenant. It is his election that affirms the tenancy, and the words he uses with a view to not affirming it are of no effect. That is the position where there is a waiver of a forfeiture.

When one looks at *Hartell* v. *Blackler* (2) one sees that the authorities that were cited to the court—namely, *Croft* v. *Lumley* (3), and *Davenport* v. *R.* (5), were cases of forfeiture. They were not cases where the term had been brought to an end by the service of a notice to quit, and in delivering the judgment in the Privy Council in *Davenport* v. *R.* (5), SIR MONTAGUE SMITH expressly points out that it is because the term was voidable that this principle which the Privy Council was applying had been laid down. But that principle, in my opinion, has no relation to a case where the term itself has been brought to an end by a notice to quit. When once the notice is given and received the term automatically comes to an end upon the expiration of the notice, and the position is then precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice to quit. There is no room for any election by the landlord. The landlord and the tenant may agree that a new tenancy shall be created on the old terms as to rent, &c., and that is what, in effect, they do when they agree to treat the notice to quit as inoperative, or, to use the expression which is used so often—that they agree to waive the service of the notice to quit. The agreement for the new tenancy must be proved. It must be shown that the parties were ad idem as to the terms.

Applying that principle to the facts of this case, it is clear, in my opinion, there never was any agreement to create a fresh tenancy on the old terms or on any terms. The landlord demanded one sum by way of rent and the tenant offered another; they never were agreed as to the amount of the rent, and there could not, therefore, be any agreement. The acceptance of the rent in this way did not affect the position of the parties. The landlord was entitled to take the money which the tenant was bound to pay if he was to resist a demand for possession. In taking it, a landlord in circumstances like these, does not prejudice his position or lose the right which he would otherwise have, of insisting that the term has come to an end. For these reasons, I am of opinion that the learned judge was right in holding that the defence failed. I add that the other point that was raised—namely, that the landlord had elected to treat the defendant as his tenant, by serving the notice of increase of rent, is equally immaterial. If the acceptance of rent did not prejudice the position, still less would the landlord's notice that he required more rent to be paid. The result is, therefore, that, as the learned judge held that the tenant was not entitled to the protection of the statute, he was right in making the order for possession.

SHEARMAN, J.—I am of the same opinion. I agree that *Hunt* v. *Bliss* (1) is irreconcilable in principle with *Hartell* v. *Blackler* (2). The result is, that this court is at liberty to form its own opinion as to the correct principles to be applied to this case. I have come to the conclusion that the reasoning in *Hunt* v. *Bliss* (1) is the sounder. As long as s. 1 (2) of the Rent Restriction Act, 1915, and s. 1 of the Amendment Act of 1919 are in force, and a landlord is prevented from getting recovery of possession of premises after the expiration of a notice to quit, I think it is correct to say that the former tenant no longer becomes a trespasser. He is in lawful statutory occupation of the premises, unless there is proved any other lawful agreement subject to the provisions of the Act, which the landlord and tenant choose to make. I am more ready to agree with *Hunt* v. *Bliss* (1) in preference to *Hartell* v. *Blackler* (2), because I notice in the latter case as it is at present reported, the expression is used: "Waiver of notice to quit." Perhaps that is all right as a loose expression, if it be intended to refer to the new arrangement, but

obviously it is an unscientific expression. A notice to quit can be withdrawn or abandoned before the time fixed for the termination of the tenancy. After the time has expired the lease has come to an end, and a landlord can no more waive his notice to quit than he can waive the expiration of time. In my judgment, the "waiver of notice to quit" merely means that the parties have arrived at a new agreement, and that, like any other new agreement, must be proved either by conduct or by express writing in the usual way in which any agreement is proved. I think the principle laid down in *Hunt* v. *Bliss* (1) roughly means that, after the expiration of the notice to quit, regularly given, the tenant is entitled to continue in lawful occupation until those conditions exist which entitle the judge, in his discretion, to order recovery of possession, and, if the parties have not arrived at an agreement, that is the relation between the parties. In the present case, after the notice to quit had been served, the parties began to negotiate, but they clearly arrived at no agreement. They were each contending for an entirely different agreement. The result is that the tenant was holding under his statutory occupation, and there was nothing to prevent the landlord when he required the premises for his own occupation applying for possession, and the learned judge was right in making an order for possession. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Harry Watkins; H. P. Davies & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

COLTNESS IRON CO., LTD. *v.* DOBBIE

[House of Lords (Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Atkinson and Lord Moulton), March 18, 19, May 11, 1920]

[Reported [1920] A.C. 916; 89 L.J.P.C. 143; 123 L.T. 504; 84 J.P. 241; 36 T.L.R. 622; 64 Sol. Jo. 547]

Coal Mine—Wages—Payment on actual weight of coal gotten—Deductions for "dirt" sent up from mine—Failure of weigher and checkweigher to agree—Burden on miner to prove weight of clean coal gotten—Powers of weigher and checkweigher—"Difference" referable to arbiter—Coal Mines Regulation Act, 1887 (50 *& 51 Vict., c.* 58), *s.* 12 (1).

By s. 12 (1) of the Coal Mines Regulation Act, 1887: "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten . . ." The proviso to the subsection provides for three methods by which deductions from the total weight of mineral gotten can be made to ascertain "the actual weight . . . of the mineral contracted to be gotten."

The wages of the respondent, a coal miner employed by the appellants, depended on the amount of coal gotten by him. A checkweigher had been appointed by the miners, and so, under the proviso to s. 12 (1), the applicable method of determining the amount of deductions from the total weight of mineral sent up from the mine in respect of stones and other "dirt" sent up was by the agreement of the weigher, as representing the appellants, and the checkweigher, as representing the miners. The weigher and checkweigher, however, failed to agree on this matter, and also on a third person to decide the dispute. The respondent then brought an action claiming payment for all

the mineral sent out of the mine by him without any deduction for "dirt."

Held: the machinery for ascertaining the amount of deductions prescribed by the proviso to s. 12 (1) having broken down, the parties were remitted to the position they would have been in if the proviso had not been inserted in the Act; in those circumstances the appellants were bound to pay, not for a mixture of coal and "dirt" sent up from the mine, but, under the first part of s. 12 (1), according to the actual weight of coal gotten; therefore, the burden was on the respondent to prove the weight of clean coal gotten by him during the period covered by his claim, on the evidence he had failed to do so, and his claim failed.

Decision of Second Division of Court of Session (1919), 56 Sc.L.R. 144, reversed.

Per LORD DUNEDIN: Any method of deduction, even though amounting to a "special mode" within the proviso, was open to the determination of the appellants' weigher and the checkweigher, if they agreed, or of that of an arbiter if they did not.

Per LORD ATKINSON and LORD MOULTON: The "difference" between weigher and checkweigher, which, under the proviso, can be referred to a third person, is not confined to a difference regarding the application of an agreed test, but extends to a difference as to the nature or method of a test, as regards which the representatives of the parties have the widest powers.

Notes. Referred to: *Re Midland (Amalgamated) District (Coal Mines) Scheme, 1930, Robert Holliday & Sons, Ltd.* v. *Executive Board* (1934), 152 L.T. 212.

As to payment of miner's wages according to weight see 26 HALSBURY'S LAWS (3rd Edn.) 611–613, and for cases see 34 DIGEST 730 et seq. For Coal Mines Regulation Act, 1887, see 16 HALSBURY'S STATUTES (2nd Edn.) 60.

Cases referred to:

(1) *Atkinson* v. *Hastie* (1894), 21 R. (Ct. of Sess.) (J.) 62; 31 Sc.L.R. 892; 2 S.L.T. 159; 34 Digest 731, *r.*

(2) *Bourne* v. *The Netherseal Colliery Co.* (1887), 19 Q.B.D. 357; 56 L.J.Q.B. 599; 57 L.T. 566; 52 J.P. 102; affirmed (1888), 20 Q.B.D. 606; 57 L.J.Q.B. 306; 59 L.T. 751; 52 J.P. 453, C.A.; affirmed sub nom. *Netherseal Colliery Co.* v. *Bourne* (1889), 14 App. Cas. 228; 59 L.J.Q.B. 66; 61 L.T. 125; 54 J.P. 84, H.L.; 34 Digest 730, *1107.*

(3) *Brace* v. *Abercarn Colliery Co.*, *Huggins* v. *London and South Wales Colliery Co.*, [1891] 1 Q.B. 496; 64 L.T. 419; 7 T.L.R. 244; affirmed [1891] 2 Q.B. 699; 60 L.J.Q.B. 706; 65 L.T. 694; 56 J.P. 20; 40 W.R. 3; 7 T.L.R. 634, C.A.; 34 Digest 731, *1108.*

(4) *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q.B. 700; 62 L.J.M.C. 129; 68 L.T. 690; 57 J.P. 645; 41 W.R. 594; 9 T.L.R. 402; 4 R. 388, C.A.; 34 Digest 731, *1109.*

(5) *Ronaldson* v. *Mowat* (1894), 21 R. (Ct. of Sess.) (J.) 55; 34 Digest 731, *1109i.*

Also referred to in argument:

Mackay v. *Dick* (1881), 6 App. Cas. 251; 29 W.R. 541, H.L.; 12 Digest (Repl.) 489, *3676.*

Appeal by mineowners from an order of the Second Division of the Court of Session, reversing an interlocutor in an action raised by the respondent in the Sheriff Court at Dunfermline against the appellants. The respondent was a miner in the employ of the appellants at their Blairhall Colliery, Fife. By the Coal Mines Regulation Act, 1887, s. 12 (1):

> "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place

as near to the pit mouth as is reasonably practicable. Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any checkweigher is stationed for this purpose as hereinafter mentioned) by such person and such checkweigher, or in case of difference by a third person to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or in default of agreement appointed by a chairman of a court of quarter sessions within the jurisdiction of which any shaft of the mine is situate."

The facts appear in their Lordships' opinions.

Sir John Simon, K.C., and *Alex Moncrieff, K.C.*, and *W. T. Watson* (both of the Scottish Bar) for the appellants.

Constable, K.C., *W. Watson, K.C.*, and *Macquisten, K.C.* (all of the Scottish Bar) for the respondent.

Mullins held a watching brief for the Coal Owners' Association.

The House took time for consideration.

May 11. The following opinions were read.

VISCOUNT FINLAY.—This case raises an important question with reference to the ascertainment under s. 12 of the Coal Mines Regulation Act, 1887, of the amount which the miner is entitled to be paid.

The respondent is a miner in the employment of the appellant company at their Blairhall Colliery in Fife. He was employed to win coal, his wages being dependent on the weight of mineral gotten, by him, and he brought this action to recover £6 18s. 10d. alleged to have been improperly deducted by the appellants. It is common ground that a term of his service was that deduction should be made from the gross weight of the mineral sent up the pit by the pursuer in respect of stones or substances other than the mineral contracted to be gotten, and that this deduction should be ascertained as provided by s. 12 of the Act of 1887. No special mode of ascertaining the deductions had been agreed upon between the owners of the colliery and the miners. The checkweigher appointed on behalf of the men contended that the amount of deduction for "dirt" must be arrived at by actual weighing in the case of each hutch, and that failing ascertainment in this way the miner must be paid on the gross weight sent up, including stones and material other than coal. On the other hand, the banskman or weigher as representing the company contended that the deduction should be ascertained by calculation of the average amount of "dirt." No agreement was arrived at, and the action was brought to recover the balance which the company had refused to pay on the ground that it represented the "dirt" which had been brought up along with the coal.

The case must turn upon the interpretation to be put upon the provisions of s. 12 (1) of the Act of 1887. It is to be observed that in virtue of the first paragraph of this subsection the miners are to be paid "according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them" is to be weighed at a place as near to the pit mouth as is reasonably practicable. The provision of the Act of 1872, s. 17, had been that the miners were to be paid "according to the weight of the mineral gotten by them and such mineral shall

A be truly weighed accordingly," and then followed the proviso with regard to deduction of stones, &c., by agreement. The change from payment on "the weight of the mineral gotten by them" in the 1872 Act to payment on the "actual weight gotten by them of the mineral contracted to be gotten" is marked, and cannot have been accidental. It denotes that under the Act of 1887 payment is to be made on the amount of coal, if that be the mineral contracted to be gotten, and B for that purpose it is necessary that in some way the amount of coal as distinguished from stones and other material brought up with it should be ascertained. This seems to me to be clear on the words of the Act, and indeed it was admitted by counsel for the respondent that the mineral contracted to be gotten must denote coal apart from stones and other extraneous material. On the other hand, the provision for the compulsory weighing is in different terms. What is to be weighed C is "the mineral gotten by them," not "the weight gotten by them of the mineral contracted to be gotten." I agree with what was said by LORD ADAM, differing on this point from the other judges in *Atkinson* v. *Hastie* (1) (21 R. (Ct. of Sess.) (J.) at p. 68):

> "The Act takes a very sharp distinction between the minerals gotten by the D miner and the minerals contracted to be gotten. The duty imposed upon the owner is to truly weigh the former, that is, the whole contents of the hutch, and not the latter, which is the coal."

To weigh the coal would involve a separation from it of the stone and other extraneous material. Such separation would be a troublesome and lengthy process, and it is not disputed that, if it were pursued, the working of the colliery would be E brought to a standstill. This accounts for the fact that in s. 12 (1), while payment is to be on the mineral contracted to be gotten, what is to be weighed is the material gotten, which will include stones, &c., as well as coal.

It is, of course, necessary that to ascertain the amount due to the miner the proper deduction should be ascertained. There is no compulsory provision for this purpose in the Act; it is left to agreement, but it is manifest that both parties have the F strongest reason for agreeing for the making of such deduction. Until the deductions have been made the amount on which the miner is entitle to be paid has not been ascertained inasmuch as the section provides he is to be paid according to the coal he has gotten. The provision for ascertaining the deductions is in form permissive, but when its terms are rightly understood there appears to me to be no difficulty in its working. This provision in the Act of 1887 takes the form G of a proviso, as in the Act of 1872, from which it has to a great extent been taken. The most material portion is in effect as follows:

> "Provided that nothing in this section shall preclude the owner . . . from agreeing with the persons employed in the mine that deductions shall be made in respect of stone or substances other than the mineral contracted to be H gotten"

—sent out with the mineral contracted to be gotten. It was natural enough to put this in the form of a proviso in the Act of 1872 under which the miners were to be paid "according to the weight of the mineral gotten by them." It would not naturally be put in the form of a proviso in the Act of 1887, where the antecedent enactment was that the miners were to be paid "according to the actual weight I gotten by them of the mineral contracted to be gotten," as this involves the necessity of ascertaining the net amount. The form adopted is really a survival from the Act of 1872, and it may have been some sense of its incongruity in the new Act which led the draughtsman to substitute the word "provided" simply for the words "provided always" in the 1872 Act. The proviso in the Act of 1887 is really a substantive enactment in a permissive form for determining the deductions which the terms of the earlier part of the section show must be made.

After providing that agreement for deductions may be made this proviso goes on

to define the methods by which such deductions are determined. The first method is by agreement on some special mode, A

> "such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mines on the one hand and the persons employed in the mine on the other."

These words mean merely that the owners and the miners may agree on any particular method of determining the deductions, and that if such an agreement has been arrived at the method so agreed on shall be pursued so long as the agreement remains in force. The words do not mean, as has been supposed, that any methods which can be labelled as "special modes" can be adopted only if there has been an agreement for them between the owners and the miners. It is always open to those who, under the latter part of the sub-section, are intrusted with the determination to adopt any method whatever of ascertaining the true amount unless their hands are tied by the agreement of the owners and miners that a particular method must be pursued. Any special mode means merely any particular mode which the parties may have agreed on. No methods can be defined as special in themselves, and to read the clause as prohibiting the weigher and checkweigher from adopting on their own motion certain methods which may be considered special would be to render their task impossible. No one could say whether they had selected a method which was not open to the disqualification of being "special." In the present case there was no agreement between owners and miners for any special mode. The matter was, therefore, left at large for the determination of the person appointed in that behalf by the owners (the banksman or weigher) together with the checkweigher who had been appointed by the men. The person so appointed by the owners proposed to determine the deductions by applying a system of averages based on the proportion of dirt which had been found in other cases. The checkweigher refused to be a party to any mode of determination except by actual weighing of each hutch, which would have involved the separation by craw-picking from the coal of the stones and other extraneous materials. It was admitted that this would have meant the stoppage of the mine owing to the time which the process would take and the consequent accumulation of trucks. It appears to me that in these circumstances there was a "difference" within the meaning of the concluding part of the sub-section, and that the matter would fall to be determined by a third person to be agreed on by the parties. There was no mutual agreement on such third person, and according to the sub-section he was in that case to be appointed by a chairman of a court of quarter sessions. Section 76 of the Act of 1887 provided that in Scotland such appointment should be made by a sheriff instead of the chairman of quarter sessions. This section, however, has been repealed by the Coal Mines Act, 1911, so that there might be some difficulty in applying this provision in Scotland. It has been suggested that this difficulty might be met by invoking the nobile officium of the Court of Session, but for the purposes of the present case it is not necessary to determine this point. B C D E F G H

As I have stated, the miner brought this action to recover the balance which would be due to him on the gross weight of the coal and other materials in the hutch. The case was sent to proof after there had been some debate on the amended record. The proof was taken before Lord Salvesen, and in his judgment there is given a summary of the facts. Omitting the fourth and sixth findings, to which the respondent's counsel took exception at the Bar of your Lordships' House, this summary is as follows : I

> "The important facts are as follows: (i) That the attitude taken up by the checkweigher, Tuke, from the first was that he could agree to no deduction unless in the case of a particular hutch that was craw-picked. (ii) That he was instructed to maintain, and did maintain, this attitude by the miners' union, of which he was an official. (iii) That the cost of craw-picking every hutch in order to ascertain the amount of dirt in it is prohibitive and such craw-picking

A is impracticable, as it would involve the stoppage of working in the seam in question. . . . (v) That the defenders' deduction of half a hundredweight per hutch was on an average far below the amount of dirt immixed with the coal which the pursuer and his fellow miners sent to the surface. . . . (vii) That no method of estimating the dirt in the hutches of coal sent up from a particular seam has been suggested except by systematic craw-picking of sample hutches B and collating the results. (viii) That this method was in fact followed by the weigher, and that the checkweigher was invited to co-operate with him, but refused to do so. And (ix) that the checkweigher and those instructing him refused to agree to the appointment of an arbiter as provided for by the Act."

LORD SALVESEN'S summary of the facts as given above appears to contain sub- C stantially what is necessary for the decision of the case so far as facts are concerned. A great many authorities were referred to during the argument. *Netherseal Colliery Co.* v. *Bourne* (2) (before the House of Lords) arose under the Act of 1872. In that case the owners claimed to deduct the slack or small coal from the amount of coal on which they were to pay in pursuance of their contract with the miners to this effect. It was held that this deduction was illegal as by the terms of the Act miners D must be paid according to the weight of the mineral gotten, and as the slack was coal, though small coal, it was not by the statute permissible to contract for this deduction. None of the judgments throws much light upon the points in the Act of 1887, which now fall to be decided. In *Brace* v. *Abercarn Colliery Co.* (3) the decision in the *Netherseal Case* (2) was followed in a case arising under the 1887 Act. The decision of the Divisional Court was affirmed by the Court of Appeal E where it was held that the small coal was part of "the mineral contracted to be gotten" within the meaning of the Act of 1887, and that the variation in the wording as compared with that of the 1872 Act was for that purpose immaterial. In *Kearney* v. *Whitehaven Colliery* (4) the arrangement was that one tub out of twenty should be selected, and if it were found to contain more than a certain amount of dirt the man who sent it up was to be paid nothing for the coal, while the other nineteen were F paid in full on the total weight of the contents of each tub as if it contained coal only. It was held that such an arrangement was not a method of ascertaining the deduction within the terms of the Act. The correctness of this decision is not in question in the present case, but some of the dicta as to the meaning of particular words in the 1887 Act may be open to question. This case falls really to be decided on the words of the statute, and previous decisions give little or no assistance.

G The majority of the Second Division (the Lord Justice-Clerk, LORD DUNDAS, and LORD GUTHRIE) concur in thinking that the pursuer was entitled to judgment for the £6 18s. 10d. claimed. LORD SALVESEN dissented. The Lord Justice-Clerk said that he did not think it necessary to consider the main enacting part of s. 12. But it appears to me that it is vital to ascertain what is the true meaning of the words which define the right to payment. If they mean that the miner is to be paid H according to the amount of coal gotten by him it is impossible to sustain an interlocutor which gives to a miner, who has been paid, according to the evidence, the value of all the coal that he got, an additional amount which must represent not coal but stones or other extraneous matter. The decision proceeds on the view that if the deductions are not made in the manner prescribed by the statute, the miner is entitled to be paid on the gross weight of what he has got, including stone, &c., and I as the clause provides that he is to be paid on the weight of the mineral contracted to be gotten, i.e., the coal, such a decision must be erroneous. LORD DUNDAS says that there had been no resort to any one of the three methods laid down in the section for determining the amount of deductions, that there had been no agreement between the owners and the miners as to any special mode, that, as there was a checkweigher, the weigher had no jurisdiction to decide except with his concurrence, that there had been no agreement between the weigher and the checkweigher, and that this made an end of the defenders' case. LORD DUNDAS added that a method based

on averages could be validly adopted only by antecedent agreement between the owners and men as a special mode. LORD GUTHRIE held that the mode of taking an average deduction and thus avoiding the necessity of individual weighing is a special mode and was allowable only if the owners and men had so agreed. LORD SALVESEN differed, and he points out in his judgment that the effect of the conclusion reached by his colleagues is that the statute provides no means of adjusting differences as to the amount of deductions, and so makes the provisions of s. 12 binding on the owners only. The construction of s. 12 adopted by the majority in the Court of Session would make it utterly unworkable. If the determination of deductions on the basis of averages is a special mode which can be adopted only with the consent of both owners and men, and the checkweigher will agree to no method but that of weighing the coal in each hutch separate from the stones, no determination of deductions is possible. The result would be that the amount on which the miners are entitled to be paid cannot be ascertained except by a method which would stop the working of the colliery. In the interests of the men themselves the amount which they are entitled to be paid must be ascertained, and if it is not so ascertained they could not recover their wages. I can see no warrant for the view adopted in the court below, that in such a case they are entitled to be paid on the whole contents of the hutch, including what is admittedly not coal. In my opinion, the interlocutor pronounced should be reversed and the action dismissed with costs here and below.

VISCOUNT CAVE.—In this case the respondent, a miner employed at the Blairhall Colliery in the county of Fife, sued his employers, the present appellants, for a sum of £6 18s. 10d., which he alleged to be due to him for wages earned between Jan. 1, 1915, and Mar. 6, 1916. The pursuer's case was that he was employed to win coal, his wages being dependent on the weight of mineral gotten by him, and that the defenders had, during the period mentioned, made illegal deductions from the weight of the mineral sent up by him from the mine and has made corresponding deductions from the wages due to him. The amount sued for was, accordingly, the amount of the deductions so made. The amount claimed is small, but this is a test case, and it is said that claims amounting to about £5,000 depend upon the decision.

The decision must turn upon the construction and effect of the unrepealed sections of the Coal Mines Regulation Act, 1887, and particularly on s. 12 (1) of that Act. The first paragraph of s. 12 (1) provides that where (as in this case) the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them

> "those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable."

This enactment is compulsory, and takes effect notwithstanding any agreement to the contrary; and any contravention of it is punishable as an offence against the Act. Upon this paragraph an important question of construction arises. Each hutch or tub of mineral sent out of a coal mine contains with the coal a certain amount of foreign matter, such as stones and dirt, the quantity varying with the seam which is being worked and the care exercised by the miner who fills the hutch. The question is whether the "mineral contracted to be gotten," upon the weight of which the miner is entitled under the section to be paid, means the gross contents of the hutch or those contents less the foreign matter—that is to say, the clean coal. In my opinion, the latter is the true meaning of the expression. It is plainly used in this sense in the second paragraph of the sub-section, where it is contrasted with the stones or other substances sent with it out of the mine; and there is no reason why a different construction should be put upon it in the first paragraph. Further, there is a significant difference between this section and the corresponding section (s. 17) of the Coal Mines Regulation Act, 1872; for, whereas the earlier enactment prescribes payment according to the weight of the "mineral gotten," the later statute compels payment according to "the actual weight gotten

A by them of the mineral contracted to be gotten." It appears to me that the change of language is not due, as has been suggested in some cases, to a desire for uniformity on the part of the draftsman, but is intended to define and govern the meaning of the section. In this respect I agree with the opinions expressed by LORD WELLWOOD in *Ronaldson* v. *Mowat* (5) (21 R. (Ct. of Sess.) (J.) at p. 58) and *Atkinson* v. *Hastie* (1) (21 R. (Ct. of Sess.) (J.) at p. 66).

B It is obvious that, if the first paragraph of s. 12 (1) stood alone, the difficulty of complying with it would be very great and in some cases insuperable. In order to ascertain the actual weight of clean coal in any hutch it would be necessary either to empty the hutch and craw-pick the contents, or to devise some other means of ascertaining the weight of stones and dirt mixed with the coal. The time and money expended in this process would be very great, disputes would be likely to arise, and C the payment of the miners' wages would be proportionately delayed. Accordingly, there is added to the sub-section a second paragraph or proviso by which (if the parties choose to put it into operation) machinery is provided for ascertaining the actual weight of coal gotten. If this proviso is agreed to by employer and employee, then deductions are to be made from the matter "sent out of the mine" (that is to say, from the gross contents of the hutches) in respect of stones or substances other D than coal; and these deductions are to be ascertained in one of three ways, i.e., either (a) in such special mode as may be agreed upon between the employer or his agent or manager and the employee; or (b) by some person appointed in this behalf by the owner, agent or manager—that is to say (speaking generally), by the weigher or banksman; or (c) if a checkweigher appointed by the employees is stationed for this purpose at the proper place, then by the weigher and checkweigher jointly, or in E case of difference by a third person to be agreed on by the employer and employee or in default of agreement to be appointed by the chairman of quarter sessions. In the present case it was agreed between the employers and employees that deductions should be made in accordance with the proviso, but no "special mode" was agreed upon for ascertaining such deductions. A checkweigher was appointed by the men, F and I think it clear (though on this point a question was raised by the appellants) that he was duly "stationed for the purpose" of ascertaining the deductions. It follows that in this case the deductions fell to be ascertained by the method marked (c) in the above statement, that is to say, by the weigher and checkweigher jointly, or in case of difference by a third person to be chosen in the manner prescribed by the section.

G Each of the hutches sent out of the Blairhall Mine contained about half a ton of mineral; and it had for some time been the practice of the owners to deduct from the weight in each hutch sent out from the "five foot" seam (where the pursuer was employed) a half hundredweight in respect of stones and dirt, and to pay wages on the balance of the weight in the hutch. This figure of a half hundredweight was arrived at by craw-picking a certain number of sample hutches and ascertaining the H average amount of stones and dirt in the hutches so dealt with, the result so obtained being checked by periodical craw-picking and otherwise. It is not disputed that the amount so deducted, sometimes referred to as the "standard deduction," was well within the average weight of stones and dirt found in the hutches, though no doubt some hutches contained more and some less than the average amount. At or about the beginning of the year 1915 the checkweigher, acting on a resolution passed by I a show of hands at a meeting of the employees, took objection to this standard deduction and claimed that every hutch should be separately craw-picked in order to ascertain the actual amount of clean coal which it contained. It is clear that at the Blairhall Colliery, where the hutches were sent up in rapid succession, sometimes (as your Lordships were told) at the rate of three or four in a minute, such a procedure could not be adopted without stopping the mine. The checkweigher, Charles Tuke, in his cross-examination stated as follows:

"If every hutch had been craw-picked the colliery would have been stopped.

One reason for this is that after the first batch of hutches came up there would be no hutches available for filling; they would block up the whole place. The labour required, also, would be prohibitive."

In these circumstances the weigher not unnaturally objected to the checkweigher's proposal, and contended that the standard deduction should be continued. In so doing he was not, I think, proposing that this method should be agreed upon as a "special mode" of ascertaining the deductions within the meaning of the section. Such an agreement could, no doubt, have been made between the employers and employees, and, indeed, this was precisely the "special mode" which had been so agreed upon in *Ronaldson* v. *Mowat* (5), and was there held to be lawful. But no such agreement could be made between the weigher and the checkweigher; and obviously, what the weigher desired was, that having regard to the experiments made, a standard deduction of half a hundredweight per hutch should be recognised as a fair allowance in estimating the actual weight of coal in each hutch. The checkweigher, however, still acting on instructions, declined to give way, and no agreement was arrived at between the two men. It appears to me that at this point a "difference" had arisen which was capable of being referred to a "third person" as arbitrator, in accordance with the statute. It has been suggested that there was no such "difference" as the checkweigher was contending for a principle and did not apply his mind to the question of amount; but I think that the proper inference from this fact is not that there was no difference, but that the difference was fundamental. At all events, the employers proceeded on the footing that a difference had arisen, for they proposed, both orally and in writing, that a third person should be agreed upon in accordance with the section; but the men refused to concur in any such appointment, and the proposal dropped. No application for the appointment of a "third person" was made by either party to the court. Possibly no such application could have been effectively made, for there is no chairman of quarter sessions in Scotland, and s. 76 of the Act of 1887, by which it was provided that the expression "chairman of the quarter sessions" when applied to Scotland should mean the sheriff of the county, was repealed (doubtless by inadvertence) by the Coal Mines Act, 1911. In any case, no further step was taken for procuring the appointment of an arbiter, and accordingly the weight of clean coal gotten by the pursuer was never in fact ascertained in accordance with the proviso. The employers continued to deduct a half hundredweight from the weight in each hutch, and to pay wages on that footing. The wages were accepted under protest, and this action was brought for the amount claimed as payable in respect of the amounts deducted—that is to say, for the difference between the wages actually paid and the wages calculated on the gross weight in the hutches.

What, then, is the legal position? It cannot be that the appellants, who were under contract to pay wages calculated on the weight of clean coal gotten by the respondent, and who have made every endeavour to get that weight ascertained in accordance with the Act, though without success, are now bound to pay on the gross weight in the hutches, that is to say, on stones and dirt as well as coal. I think the true view is that, the machinery provided by the Act for ascertaining the proper deduction having broken down, the parties were remitted to the position in which they would have stood if the proviso had not been inserted in the Act or had not been adopted. In other words, the employers were bound to pay on the actual weight of clean coal gotten by the respondent, and this amount had to be ascertained before the amount due for wages could be fixed. It was, therefore, for the respondent, if he disputed the wages offered to him, to prove that weight of clean coal was, in fact, gotten by him during the period in question. This involved no hardship upon him, for he might have concurred in the appointment of an arbiter and thereby determined the dispute. In fact, he has failed to prove that he got coal to an amount represented by the wages sued for in this action. On the contrary, the evidence shows clearly that the deduction of a half hundredweight from each hutch

filled by the respondent does not exceed the average weight of stones and dirt in the hutch, and, accordingly, that the respondent's claim in this action is for a wage calculated on the weight of stones and dirt and not on the weight of coal. If so, his claim must fail. This decision is entirely consistent with the decision of this house in *Netherseal Colliery Co.* v. *Bourne* (2), where the decision was that slack or small coal was coal, and must, therefore (notwithstanding any agreement to the contrary), be taken into account in ascertaining the weight upon which the wages should be paid. It is also quite consistent with the decisions (apart from dicta) in *Brace* v. *Abercarn Colliery Co.* (3) and *Kearney* v. *Whitehaven Colliery Co.* (4) as well as with the decisions of the Court of Justiciary above referred to. I am of opinion that this appeal should be allowed and the action dismissed with costs here and below.

LORD DUNEDIN.—The coal in the Blairhall Colliery is in some of the seams so associated with foreign substances that it is impossible in the course of ordinary working to send up filled trucks or hutches in which there is not a certain admixture of foreign substances with the coal. The colliers being engaged at a certain rate of wage dependent on the amount of clean coal sent up by them, the matter was arranged prior to November 1914, by a fixed deduction being made from the gross weight of each hutch of coal weighed at the pit-head. This arrangement, if not the subject of actual agreement, was acquiesced in by the men, and no question can now be raised as regards it. Up to this time there was no checkweigher appointed at the colliery, but in November 1914, a checkweigher by the name of Tuke was appointed. Acting upon instructions received from the union he took exception to this method, and correspondence ensued between him and the managers of the colliery. On Mar. 4, 1915, a meeting of the men was held at which it was agreed "that deductions be made." This was communicated to the colliery owners by the following letter from Mr. Macbeth, the law agent who was acting for the men :

> "Dear Sir,—Along with Mr. Lee of the Miners' Union I had a meeting at Blairhall today with the men. After discussion, the men agreed to adopt the provisional agreement which was entered into when Mr. Adamson, Mr. A. Robertson, and and I met you, Mr. France and the Messrs. Russell on 25th ult.—the weigher and checkweigher to decide what deductions, if any, should be made for foreign material in the hutches, in accordance with s. 12 of the Coal Mines Regulation Act, 1887, which is incorporated in the Coal Mines Act of 1911. Mr. Russell, senior, you will remember, said that he was willing that this method should be given a trial for a month, and we hope that the experience, both of the men and of the company, will be satisfactory under this arrangement. The men asked me to-day what proceedings I proposed to adopt for recovery of the deductions illegally made, and I shall be glad to know what suggestion you have to make for a settlement. Yours, faithfully.—Sgd.) JAS. CURRIE MACBETH."

When, however, the weigher and the checkweigher came together it became apparent that a serious difference of view existed between them. The weigher, on behalf of the owners, proposed the old deduction of a half hundredweight per head, based on the average obtained from actual weighing after craw-picking of sample hutches. The checkweigher, on the other hand, refused to consider any such method. He had been advised that inasmuch as this method had not been agreed to by the men as a special method there was no legal mode left except to take actual weight, which could only be obtained by craw-picking each hutch. He, therefore, refused to do anything except co-operate in such an operation, and eventually as the owners would not consent to do this he relinquished his attendance at the pit. To craw-pick each hutch was a practical impossibility, as it would mean the stopping of the colliery, as the checkweigher was well aware; but he only followed his instructions. Nothing more was done in view of the attitude of the checkweigher. The owners in paying the men continued to make the half hundredweight deduction. In view of the critical period of the war, both parties had the patriotism and good sense to continue the work.

The present action was raised for the purpose of recovering from the owners the sum which was due on the assumption that payment had to be made for the total weight of the contents of the hutches. Originally it was laid for a random sum of £5, but, the action being dismissed as irrelevant by the sheriff-substitute, the pleadings were by the sheriff allowed to be amended, and the conclusions were altered to the exact sum which, on the above-mentioned hypothesis, was due to the individual pursuer, a miner. The Second Division of the Court of Session, to whom the case was taken by appeal, affirmed the view of the sheriff, and allowed a proof. The proof was taken by one of themselves and reported; and judgment was then given for the pursuer by a majority, LORD SALVESEN dissenting. Appeal has now been taken to your Lordships' House. The determination of the case depends on the interpretation of s. 12 of the Coal Mines Regulation Act, 1887.

The view of the majority of the learned judges comes to this. The mineral, they say, was weighed. An agreement was come to that deductions should be made, but the deductions could only be made in the way provided for by the statute. No agreement had been made by the men for deductions by way of the special mode of making an average deduction. The weigher could not make the deductions at his own hands, because of the existence of a checkweigher. The checkweigher and the weigher together had never made a deduction because the checkweigher would not agree to the proposition of the weigher, and the weigher did not act in accordance with the proposition of the checkweigher, consequently no deductions had been made according to statute. The result was that owners were bound to pay on the total weight taken. It is this last step which is, in my opinion, fatal to the judgment. I have little doubt how the learned judges came to this conclusion. I think they proceeded upon what they considered had been the opinion of the House in the *Netherseal Case* (2). In that case the deduction made from the total weight was such coal as by the passage through a sieve came to be denominated as slack. The judgment was that the only deduction allowable was for foreign matter, and, the slack being coal, which was the mineral according to the weight of which the wage was to be paid, it could not form the subject of a legal deduction. This does not touch the point, but undoubtedly in his opinion LORD HALSBURY pointed out that the weight to be taken was the weight of all that filled the tub, and that that weight must be paid for with deduction only of such amounts as were lawfuly arrived at in the methods allowed by the Act. I cannot help thinking that sufficient attention was not paid to the fact that the *Netherseal Case* (2) was decided upon the Act of 1872, which is materially different in its terms from the Act of 1887. In the earlier Act the statutory injunction as to payment is that the work is to be paid according to the weight of the mineral gotten. In the Act of 1887 the payment is to be made, not of the mineral gotten, but of the mineral contracted to be gotten. Now here the mineral contracted to be gotten was clean coal. There was no obligation to pay except for clean coal. Accordingly, the inference which the learned judges drew, namely, that if deduction was not lawfully made payment must be made according to the full contents of the hutch, is an inference which could be made under the Act of 1872, but could not be made under the Act of 1887 if it is admitted, as it is, that the full contents of the hutch contained matter other than mineral contracted to be gotten.

This consideration is sufficient to dispose of this appeal. As the judgment stands, it is a decree for payment for something which the statute says is not to be paid for, viz., something which is not mineral contracted to be gotten, but the case has been brought as a test case, and we have had full arguments as to the effect of the statute, and I think, therefore, it is only right that I should say more as to the statute in general. The leading enactment is that contained in s. 12 (1), that where the bargain is for payment by results of mineral extracted, the miners shall be paid by the weight of the mineral contracted to be gotten. Then follows the instruction that the mineral shall be duly weighed; not, observe, the mineral contracted to be gotten, but the mineral. In some seams no trouble would arise, for in such seams it would

be possible to send up clean coal, but there are other seams where a certain admixture of blaes or stones is a necessary concomitant of the coal. The proviso which follows is put in to meet such cases, though doubtless it would have been better expressed if not put in the form of a proviso, the proviso form being appropriate indeed to the scheme of the Act of 1872, but not to the scheme of the Act of 1887. The proviso meets the practical difficulty and provides for an agreement between owners and men to make a deduction from the only weight to be weighed, to wit, the gross weight. An agreement being come to that deduction should be made, the deductions then are only to be made in certain statutory ways. First, an agreement as to any special mode arrived at between owners and men. This, if made, would bind all men in the colliery and no individual could quarrel with it. Undoubtedly an average deduction would fall within the terms "special mode." Failing this agreement, the deduction was to be settled, first, by a person appointed by the owners if there is no checkweigher in existence, or, second, if there is a checkweigher in existence then by agreement between the two, with an arbiter called in if they cannot agree. On this there is a remark to be made. It seems to have been thought that a deduction per average was such a special mode as to be available only by an agreement by the men as a whole, and not available to be fixed by the owners' representative and the checkweigher, and failing agreement by the arbiter. In my opinion, that was wrong. I am clearly of opinion that any method of deduction, including deduction per average, was open to the determination of the owners' representative and the checkweigher if they agree, or to the arbiter if they do not. The erroneous belief as to this is the seat of the whole trouble. It is quite clear that the checkweigher in this case, instructed by his union on the supposed legal point, thought that he could force the owners to pay for dirt by the simple process of getting the men to agree to a deduction per average as a special mode, and then refusing upon the plea of illegality to concur in fixing any mode except weighing each hutch, a practical impossibility, as he frankly admitted in the witness-box. I refer to the evidence of Tuke where he said: "If every hutch had been craw-picked the colliery would have been stopped." If this were right, then the Act would have been made to contradict itself, for the men, as here, would only have to refuse to adopt a special mode in order to compel the owners to pay for what the statute particularly says they shall not pay, viz., the whole contents sent up as opposed to the mineral contracted to be gotten.

Counsel for the owners, strenuously argued that in this case, the checkweigher having renounced his functions, there was no checkweigher, and, accordingly, the owners' representative at his own hand was entitled to make the deduction of the half hundredweight per hutch. I do not think so. I think that as soon as the weigher said he proposed to take half a hundredweight as a fair deduction, and the checkweigher said he proposed that each hutch should be weighed, there arose a difference between them, and that, if either side wished a binding decision, they ought to have called in the arbiter. It has been pointed out to us that the arbiter is a person appointed by the chairman of the court of quarter sessions, a term inapplicable to Scotland, and that the interpretation clause of the Act of 1887, which provides that in application to Scotland this should mean the sheriff of the county, has been no doubt, per incuriam, repealed by the Act of 1911. This is a case where the nobile officium of the Court of Session may by petition be invoked to get out of the difficulty. Let me again point out that whereas a settlement of average as a special mode arrived at by arrangement with the men would bind all, the determination of the weigher and checkweigher, and on difference by the arbiter, would only bind the individual. No doubt, such a judgment would doubtless be repeated, and further it is clear that the whole question whether a sufficiency of test had been taken to strike a true average would be a question for discussion, and, failing agreement, for arbitration. The result is that, the Act standing as it is, there is, in a dirty seam, only one practical way of working it out, namely, to agree, as has been done, to make deduction, and then to allow the deduction to be fixed in any way that

the owners' representative and the checkweigher may fix, and failing their doing so by arbitration. As the case stands the owners it is true have not fixed the deduction, but the man has not proved his case, and the judgment of the House, in my opinion, ought to be to reverse the interlocutor appealed against and to remit the case to the Court of Session with instruction to dismiss the action, with expenses to the defenders.

LORD ATKINSON.—I concur. As has been stated, the pursuer was a miner in the employment of the defenders at their Blairhall Colliery in the county of Fife. It is stated in the third condescendence of the pursuer that when he entered the service of the defenders it was understood and agreed between them that deductions should be made from the gross weight of the minerals sent up the pit by the pursuer in respect of stones or substances other than the minerals contracted to be gotten. From Jan. 1, 1895, to Mar. 6, 1915, deductions were, in fact, made from the minerals so sent up by the pursuer at the rate of a half hundredweight from each hutchful, a rate which, according to the evidence of James Horne, a deputy of Tuke the checkweigher, was not unfair to the miners, and the pursuer was paid his wages on the assumption that all material which remained in the hutch after this deduction was coal. He now sues, and has obtained judgment for, £6 18s. 10d., the difference between the amount of wages he, on this assumption, received and what he would have been entitled to receive had no deductions been made. This demand necessarily involves a claim to be paid for all he sends up as if it were coal, no matter how much or how little coal may, in fact, be contained in each hutch. The claim is entirely inconsistent with the agreement set forth in condescendence No. 3. It would appear to me to be unjust in fact, because it is proved by the witness Horne, who has worked for many years in these mines, that "he could not fill a hutch with perfectly clean coal—that there is always necessarily a quantity of dirt in every hutch as it goes up from the bottom of the pit." At common law, if a workman be employed to do a certain piece of work at so much per yard or per ton or per any other unit of measurement, he must, primâ facie, before he is entitled to be paid at the stipulated rate per unit, prove the number of units of the particular work he has executed. The burden is on him. In this case that principle would seem to have been reversed, and the compound of coal and dirt sent up in each hutch was to be assumed to be all coal, unless, and until, the employer proves what precise proportion of the compound is coal and what dirt. In condescendence 3 it is further stated that it was part of the agreement there set out that the deductions which it was agreed should be made from the gross weight of mineral sent up should be ascertained as provided by s. 12 of the Coal Mines Regulation Act, 1887.

This statute received the Royal Assent on Sept. 16, 1887. It was preceded by an earlier statute, the Coal Mines Regulation Act, 1872, which it repeals. Section 17 of the Act of 1872 is, with the exception of the pregnant addition hereinafter mentioned, practically identical with s. 12 of the Act of 1887. The two last lines of the first paragraph of s. 17 run, 'to be paid according to the weight of the minerals gotten, and such minerals shall be truly weighed accordingly,' whereas the last four lines of the first paragraph of s. 12 of the Act of 1887 run,

> "be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near the pit's mouth as is reasonably practicable."

By this addition it is, in my view, made perfectly clear that by this first paragraph of s. 12 all obscurity is removed. "The mineral gotten" is treated as the whole, of which the mineral "contracted to be gotten" is but a part. The proviso to each of the ss. 17 and 12 respectively shows that what it was desired to get at for the purpose of payment was "the mineral contracted to be gotten." The deductions about which the owner, agent or manager, and the persons employed in the mine were free to agree were the deductions which should be made in respect of stones or

material "other than the mineral contracted to be gotten." In s. 12 the above-mentioned addition is introduced to make the object of the proviso all the more clear. Before deductions can be made it is but natural that the weight of the whole from which they are to be made should be ascertained. This is secured by the provision that the mineral gotten (which may include shale or ironstone minerals) should be weighed. There is no obligation whatever imposed upon the owner to weigh that portion of it described as the "mineral contracted to be gotten." The words introduced into the Act of 1887 naming the place where the weighing is to take place would seem to indicate this, namely, the words "at a place as near to the pit's mouth as is reasonably practicable" which are not found in the Act of 1872. *Netherseal Colliery Co.* v. *Bourne* (2), much relied upon on behalf of the respondent, was decided on the Act of 1872 in the Queen's Bench Division. The plaintiff there claimed to recover a sum of £20 8s. wages earned by him in getting coal for the defendant. He claimed the same amounts also as having been illegally and improperly deducted from his wages without the assent of the checkweigher at the colliery, and against the provisions of the Act of 1872. The plaintiffs were there employed under an agreement whereby they agreed to serve the defendant company from the date of the agreement and to obey the general and special rules and regulations of the colliery, and also that the mineral contracted to be gotten referred to in the Coal Regulation Act, 1872, should, in all cases, mean and include only such pieces of coal as could not fairly be passed through an ordinary loading rake, the clear spaces between the prongs of which are two and a half inches wide. After a strike the men returned to work on the terms that coal should be paid for at 16d. per ton, with a premium of 2d. per ton in certain cases, and, further, that no slack whatever should be paid for except that sent out as heading slack, all other kinds of slack being deducted from the different hutches in proportion to their loading. The practice was that the tubs or hutches containing the material won were raised and weighed by a weigher and checkweigher, and the weights taken down. The coal was then moved in trucks to a place where it was sorted into classes, and after being sorted was taken to a place forty yards away and shot down six feet on to a screen part of a machine called Billy Fairplay, and a boy who was in the employ of the company noted from a dial the weight of the slack that had gone through the screen. The men were paid upon the weights handed in by the checkweighers. The case came before the county court judge, who gave judgment in favour of the defendant company. The plaintiffs appealed to the Queen's Bench Division, when STEPHEN and WILLS, JJ., decided in favour of the plaintiffs solely on the ground that the deductions for slack were not determined by the persons named in s. 17 of the Act, namely, the "banksman or weigher and checkweigher (if there should be one)," but by a boy who managed a machine called Billy Fairplay. The defendants appealed to the Court of Appeal, when it was held by LORD ESHER, M.R., and LOPES, L.J., FRY, L.J., dissenting, that the mineral contracted to be gotten was, within the meaning of the statute, coal, and that slack, being a part of such coal, deductions in respect of it were unauthorised, and that so much of the contract as related to it was, therefore, void and that the plaintiff was entitled to recover. On appeal to this House the decision of the Court of Appeal was affirmed by LORDS HALSBURY, HERSCHELL, and MACNAUGHTEN on the ground that by the contract the amount of the wages paid depended on the amount of mineral gotten within the meaning of s. 17, but the miners were not paid according to the weight of the mineral gotten, nor was such mineral truly weighed accordingly, within the meaning of the section, for the mineral contracted to be gotten was coal, including slack, and slack was not material other than mineral contracted to be gotten and was, therefore, not one of the things allowed by that section to be deducted. Though the special agreement entered into in that case differs from that entered into in the present case, the decision supports the case of the defendants rather than that of the plaintiff, inasmuch as it establishes that where the matters deducted are such as cannot be legally deducted the miner is entitled to be paid for the full amount of that which the statute fixes as the measure of his wages. In the

statute of 1872 the measure is "the weight of the mineral gotten." In the Act of 1887 the measure is different, it is the actual weight gotten of the "mineral contracted to be gotten," which is coal. I have dealt with this case at some length because I think it has been misapplied in argument on behalf of the respondent. In my view, it lends no support to the contention that, if no deductions be legally made, the employer is bound to pay for a mixture of coal and dirt sent up from the pit, as if it were all coal.

The whole object and design of the proviso to s. 12 of the Act of 1887 is to set up machinery by which the amount of the mineral contracted to be gotten can, by the deduction of stones and substance other than this mineral, be ascertained. The practice adopted in the colliery for ascertaining the amount of coal won was by taking at random some of the hutches sent up, as fair specimens of all the others, having those craw-picked, ascertaining thus the weight of the average amounts of dirt (other than that removable by washing) contained in them, and deducting that average weight from all the other hutches. The proprietors show pretty clearly that the amount deducted under this system was in fact insufficient. No case is made out that it was unfair to the men as a body. By s. 12 of the Act of 1887 it is enacted that the deductions to be made may be determined by three different modes or methods. (i) By such a "special mode" as may be agreed upon between the owner, agent, or manager of the mine, on the one hand, and the persons employed in the mine, on the other. This obviously means a mode which is to be decisive according to its terms, and to be applied as long as the agreement in reference to it remains in force. (ii) By some person employed by the owner, agent or manger; and (iii) if any checkweigher is stationed for such purpose, as thereinafter mentioned by such person and such checkweigher. It was suggested that Charles Tuke, who was appointed checkweigher by the men, was not appointed for the purpose of determining the deductions to be made. I think the evidence establishes the contrary. It is obvious that if this last mode or method is to work, provision must be made for the case where the two persons thus selected are unable to agree; and accordingly it is provided in s. 12 that in case of a difference between them the deductions to be made should be determined by a third person to be mutually agreed on by the owner, agent, or manager of the mine, on the one hand, and the persons employed in the mine, on the other, or in default of agreement the person appointed by a chairman of quarter session within the jurisdiction of which any shaft of the mine is situate. By s. 76 of this same statute the chairman of quarter sessions is, in the application of the Act to Scotland, defined to mean the sheriff of the county. But this section of the Act of 1887 is, together with all the others save those numbered 1, 3, 12 and 13, repealed by s. 126 and sched. 4 of the Coal Mines Act, 1911. So this last provision of s. 12 of the Act of 1887 cannot be taken advantage of. It is still open, however, to the persons employed in the mine to withdraw their checkweigher or to retain him and give him and the representative of the owners an opportunity of agreeing to a third person to be brought in as an umpire.

The weigher appointed on behalf of the owners of the mine was of opinion that the established practice of craw-picking the contents of some of the hutches selected at random, finding thereby the average weight of dirt found in them, and deducting this average in all cases, was fair and ought to be adhered to. Mr. Tuke, the checkweigher, insisted that every hutch should be craw-picked and the weight of dirt found deducted from the weight of the full hutch. It is not disputed that such a method as this is absolutely impracticable. The letters of Charles Tuke show the nature of the demand made by the writer, its genesis and object; while the letter written on Mar. 16, 1915, on behalf of the company shows, I think, that they were ready to act reasonably. Mr. Tuke states in both his letters that he was willing to agree that the actual amount of dirt found in any tub should be deducted from that tub only, and Mr. Robert Russell, writing on behalf of the company, states that at a meeting to which he refers both parties agreed that crawing each hutch

was impracticable. But I am quite unable to see how it can be said that when two persons are appointed to do a certain thing, and one insists on doing it in one way which is practical, and proved to be reasonable and fair, and the other insists upon doing it in another and a different way which happens to be impracticable, there is not a difference between them within the meaning of this proviso to s. 12 of the Act of 1887. The difference referred to is not confined to a difference as to the mode of applying or the result of applying an agreed test or an agreed mode of measurements. It, in my view, clearly extends to a difference as to the nature of the test or mode of measurement itself which is to be applied for the purpose named. It is also, in my view, perfectly clear that there is nothing whatever to prevent the weigher and checkweigher agreeing to a mode in which the deductions may be determined. That is not the "special mode" referred to in the first part of the proviso. Indeed, it is difficult to see how, where no special mode, properly so-called, has been agreed upon, they could ever arrive at any result unless they did so agree. In my opinion, therefore, pursuer has wholly failed to show that he is entitled to recover the sum for which he has obtained judgment. I think the decision appealed was erroneous and should be reversed and this appeal be allowed with costs.

LORD MOULTON.—The present appeal is from an interlocutor decreeing payment to the pursuer of the sum of £6 18s. 10d. The amount to which our decision relates, therefore, is in itself trifling, but the case is one of great importance, not only because it is a test case governing many others, but also because it involves the interpretation of s. 12 of the Coal Mines Regulation Act, 1887, which governs the payment of wages to all coal miners who are paid according to the coal they raise.

The claim is for wages unpaid. The pursuer, who is a miner in the employ of the defenders, avers that he has raised some eighty odd tons of coal in excess of that for which the defendants have paid him. The courts below have found that he is entitled to his full claim. There is no dispute as to the rate of payment, so that the interlocutor is equivalent to a finding that the pursuer has proved that he has in fact raised the whole of the coal for which he claims. The peculiarity of the case is that everyone concerned—pursuer, defenders and judges—knows that such a finding is contrary to the facts of the case. There can be no dispute as to this, for the claim is based upon the gross weight of mineral sent up by the pursuer during the period in question, and it is common ground that such mineral did not consist entirely of coal but contained substantial amounts of stones, rubbish and dirt. Nay, further, I do not think that it is seriously contested on the evidence as it stands that the total amount of such extraneous material was at a fair estimate at least equal to the weight claimed for by the pursuer in this action.

The dispute between the parties turns, therefore, rather upon a question of the respective rights of the pursuer and defenders under the relevant provisions of the statute regulating the payment due to the pursuer than upon any genuine difference of opinion between the parties as to the facts of the case. I shall, therefore, proceed at once to examine s. 12 of the Coal Mines Regulation Act, 1887, which is the section in question. The enacting portion of this clause reads as follows:

> "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten and the minerals gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable."

The drafting of this clause is, in my opinion, very careful and accurate, and shows that in the mind of the draftsman there was a clear perception of the subject-matter to which it relates and of the legislative provisions which were to be made respecting

it. A clear distinction is drawn throughout between "mineral gotten" and "mineral contracted to be gotten." By "mineral contracted to be gotten" is meant (in the case of a coal mine) the coal itself. By "mineral gotten" is meant the total mineral sent up by the miner, which includes stones and substances other than coal which come up in the hutch together with the coal. If there could be any doubt about this construction of the two phrases, it would be set at rest by reference to the proviso which speaks of deductions.

> "In respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten."

The enacting part of the clause, therefore, provides that where wages depend on results the miners shall be paid, not upon the total weight of the mineral gotten by them, but upon the amount of coal contained in it. This is a fair basis of payment because it is the coal that measures the value of the work done by the miner. The stones and rubbish are not only useless when brought to the surface, but they are much better left in the pit, where they serve to lessen the volume of the excavation and pro tanto diminish the consequent subsidence of the surface. But there is a further provision in the enacting part of the clause. No doubt, it is primarily for the protection of the miner, but it is truly in the interests of both parties that an accurate record should be taken of the only relevant matter that can be definitely and accurately ascertained at the moment without hindrance to the working of the pit, i.e., the weight of the total contents of the hutch. The legislature throws upon the employer the duty of ascertaining this. But it is only the weight of the total mineral that can thus be ascertained, and the words of the clause make it clear that this is realised and intended by the legislature. The words used in this connection are "mineral gotten" not "mineral contracted to be gotten." The actual provision relating to it reads thus:

> "the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable."

The legislature provides, therefore, that the miner shall be paid according to the actual weight of the coal gotten by him. But it does not and, for practical reasons, could not provide how that weight should be ascertained in each particular case. All that it could do was to provide that the total weight of mineral gotten should be truly and promptly ascertained. There was left unsolved the mode of ascertaining how much of that mineral was actually coal—in other words, what deduction should be made for stones, rubbish, &c. This is a matter which must depend on the circumstances of each particular case and could not be legislatively provided for. But the Act did all that it was possible to do to prevent the continual friction that might so easily arise between the parties in connection with the determination of this question of fact. It put in a proviso giving to the parties the widest powers of agreement as to how the necessary deductions from the gross weight of the mineral should be made and determining what those deductions should be. From the nature of the case these matters must rest ultimately on agreement. But the proviso goes so far in its efforts to bring about and facilitate an agreed method of arriving at the desired result, that upon its true construction I am of opinion that, if the parties have agreed that deductions should be made, their representatives have the widest powers of agreeing as to the mode to be adopted in calculating them.

In the argument before us great importance has been attached to the words "special mode" in the proviso. It is not a phrase of limitation, but simply means the method agreed upon, whatever that may be, of settling these deductions while the work goes on. It will be noticed that when the parties have agreed that deductions shall be made the mode of making them is a matter that may be agreed on by the checkweigher on behalf of the men and some person appointed for the

purpose on behalf of the employer with power in case of difference to call in an umpire whose method of appointment is specified. There is no need to go back to the principals themselves to fix the mode of determining the deductions. In practical working this is doubtless of great importance since it is to the true interest of all parties that the actual amount of coal raised should be promptly and accurately ascertained. But in theory it amounts to but little, because any arrangements so made can be put an end to by terminating the fundamental agreement that deductions shall be made under the terms of the proviso.

It is, however, unnecessary to examine the proviso further, because it is clear that in the present case the pursuer, together with the rest of the miners, refused to act under it. They were, of course, entitled so to refuse. The form that their refusal took was that of refusing to agree to any deduction from the gross weight of mineral in any hutch unless that particular hutch had been "craw-picked," i.e., the contents emptied out and the coal separated from the stones and rubbish, and the latter separately weighed. They would not allow the experience thus gained as the amount of extraneous material coming up with the coal to be applied generally or to any other hutches. The pursuer has not even allowed so much as this, for in cases where a hutch was actually craw-picked and the amount of stone and rubbish in it ascertained directly, he has claimed for the gross weight without any deduction. It is evident that the defenders could not be expected to consent to such a method of ascertaining the amount of coal raised by the miners. To do it in this way would make it necessary to craw-pick every hutch, and all parties are agreed that it would be impracticable so to do, as it would necessarily stop the working of the colliery. I am afraid that it is clear that this was what the pursuer relied upon. Someone had led the miners to believe that, if they did not agree to any practicable method of arriving at the deductions, no rectification of the weights as ascertained by weighing at the pit's mouth could be made, and they would be entitled to be paid on the gross weight of the mineral raised by them whether it was coal or not. In this they were wholly wrong. Their behaviour in this respect could not alter the contract that they should be paid on the actual weight of the "mineral contracted to be gotten," or, in other words, that their employers should pay them on the amount of coal raised and on that alone. Agreeing or not agreeing to deductions does not alter the rights of the parties under the contract; it only affects the mode of proof by which the result of those rights in the shape of money is ascertained. If there is an agreed reduction it is binding on both parties, and decides absolutely as between the parties what is the weight of coal which the miner is to be taken to have raised and for which he is entitled to be paid. But if there is no such binding admission as to the weight of coal raised, it must be decided by whatever tribunal has to decide it by the same machinery by which all other issues of fact are decided, viz., by evidence. The issue is, of course, on the pursuer. He has to prove that he won the coal for which he is claiming payment, and he does not discharge this onus by producing evidence as to the sum of the gross weights of the mineral in the hutches he has sent up, for it is not denied that this was not all coal. The court must do the best it can upon the whole of the evidence before it to decide how much coal there was in that mineral, and, if it cannot arrive at any conclusion on the point, the pursuer has failed to support his case.

This emphasises the desirability of the parties behaving reasonably in agreeing to some system of arriving at the net weight of the coal in the hutches which can be applied during the course of the working, so that differences can be settled as and when they arise. The terms of the proviso show that the legislature contemplated this being done. It was assumed that people would try to avoid disputes by behaving reasonably, and I greatly regret that in this case there was a refusal on the part of the miners to adopt any reasonable arrangment to settle the matter by agreement as indicated by the proviso. Such a course of action cannot benefit the party adopting it, for while the proviso does not in any way alter the contract

or compel the parties to act under it, the tribunal which has to decide the question of fact can hardly abstain from giving the benefit of any doubt which may arise upon the evidence to that one of the parties that has done its best to prevent the dispute arising by its willingness to act reasonably in the matter of agreeing to the proper deduction from the gross weight, as indicated by the proviso. In the present case, however, the sole evidence adduced by the pursuer in support of his claim is the list of gross weights. The defenders adduced evidence which makes it clear that a substantial part of this gross weight was not coal, and in addition gives to the court evidence on which they can reasonably arrive at an estimate of its amount. Accepting that evidence (which is practically uncontradicted) there is nothing due to the pursuer, because he has been paid upon the weights for which he claims with the deduction of such amounts of extraneous matter. The pursuer has, therefore, failed to prove his case, and the judgment of this House ought, in my opinion, to be that the interlocutor appealed against should be reversed, and that the case should be remitted to the Court of Session with instructions to dismiss the action.

Solicitors: *Walter H. Guthrie*, for *Ross & Connell*, W.S., Dunfermline, and *Wallace & Begg*, Edinburgh; *P. F. Walker*, for *Macbeth, Currie & Co.*, Dunfermline, and *Alex. Macbeth & Co.*, S.S.C., Edinburgh; *Hair & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

DEW *v.* DIRECTOR OF PUBLIC PROSECUTIONS

[King's Bench Division (Earl of Reading, C.J., Darling and Acton, JJ.), October 18, 1920]

[Reported 89 L.J.K.B. 1166; 124 L.T. 246; 85 J.P. 81; 37 T.L.R. 22; 18 L.G.R. 829; 26 Cox, C.C. 664]

Gaming—Lottery—Publication of proposal or scheme—Draft circular sent to printers to be printed—Lotteries Act, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

A proposal and scheme for the sale of tickets in a lottery is published contrary to s. 41 of the Lotteries Act, 1823 [now Betting and Lotteries Act, 1934, s. 22], when the proposal is made known to another person.

Where, therefore, the appellant sent a draft circular containing a proposal and scheme for the sale of tickets in a lottery to printers for reproduction, and circulars were subsequently printed,

Held: the proposal was published to the printers, and, therefore, the appellant was guilty of an offence under s. 41 of the Act of 1823.

Notes. The Lotteries Act, 1823, s. 41, was replaced by the Betting and Lotteries Act, 1934, s. 22. Section 22 of the Act of 1934 is not affected by the provisions of the Betting and Gaming Act, 1960.

Applied: *Ranson* v. *Burgess*, [1927] All E.R. Rep. 667.

As to nature of lotteries see 18 Halsbury's Laws (3rd Edn.) 238 et seq., and for cases see 25 Digest 454 et seq. For the Betting and Lotteries Act, 1934, see 10 Halsbury's Statutes (2nd Edn.) 785.

Cases referred to:

(1) *Huth* v. *Huth*, [1915] 3 K.B. 32; 84 L.J.K.B. 1307; 113 L.T. 145; 31 T.L.R. 350, C.A.; 32 Digest 76, *1063*.

(2) *Powell* v. *Gelston*, [1916] 2 K.B. 615; 85 L.J.K.B. 1783; 115 L.T. 379; 32 T.L.R. 703; 60 Sol. Jo. 696; 32 Digest 76, *1064*.

Case Stated by a metropolitan magistrate sitting at Bow Street.

On Mar. 2, 9 and 15, and April 17, 1920, three informations preferred by the respondent, the Director of Public Prosecutions, against the appellant, George Dew, jointly with one Thomas McVey, under s. 41 of the Lotteries Act, 1823, for that he, the appellant, on Jan. 17, 20 and 29, 1920, did unlawfully publish a proposal and scheme for the sale of tickets and chances in a lottery not authorised by any Act of Parliament, to wit, a sweepstake, called the United Services Sweep, to be drawn in connection with the Grand National Steeplechase and the Derby, were heard and determined by the magistrate, and the appellant was convicted and sentenced to two months' imprisonment with hard labour.

The evidence adduced by the prosecution proved: That certain circulars containing a proposal and scheme for the sale of tickets in the said lottery were printed by the Amalgamated Publicity Services Limited. That the envelopes for the said circulars were supplied ready addressed by the appellant, acting for himself and for one J. J. Masters, and that the circulars were ordered by the appellant and the said Masters to be printed and prepared for posting, and that the payment for the printing of the circulars and their preparation for posting was made by the appellant by cheques signed by the said Masters. That the order was for 500,000 sets of circulars and 200,000 complete sets were printed and stamped ready for posting, and the printing and delivery to the appellant of the circulars ready for posting continued until Jan. 27, 1920. That the circulars were placed in the envelopes, and the envelopes were closed and stamped by the Amalgamated Publicity Services, Ltd., and that a large quantity of the envelopes was thereupon delivered to the appellant and he took them away in Post Office mail bags provided by him for the purpose of posting them. That 37,236 of the envelopes containing the circulars were stopped in the course of post by a sorter in the sorting office of the Post Office acting on the instructions of higher authorities in the Post Office. That of the envelopes which were stopped in course of post some were found open, but the contents of the others were not examined in the Post Office, and all were prevented from reaching the addressees. It was submitted for the appellant that the aforesaid facts disclosed no evidence of publication upon the authority of *Huth* v. *Huth* (1) and *Powell* v. *Gelston* (2). It was submitted for the respondent that the said facts constituted sufficient evidence of publication. The magistrate decided in favour of the respondent and convicted the appellant.

The question of law arising on the above statement for the opinion of the court was whether there was any evidence of publication sufficient to support the conviction.

The Lotteries Act, 1823, s. 41, provided:

> "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries authorised by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorised by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid, . . . such person or persons shall for every such offence forfeit and pay the sum of fifty pounds, and shall also be deemed a rogue and vagabond or rogues and vagabonds, and shall be punished as such in the manner hereinafter directed. . . ."

Cecil Hayes for the appellant.
G. D. Roberts for the respondent.

EARL OF READING, C.J.—The appellant was convicted under s. 41 of the Lotteries Act, 1823, of publishing a proposal and scheme for the sale of tickets in a lottery, and the sole question is whether in law there was evidence of publication to support a conviction. In my opinion the answer is that there was sufficient

evidence to support a conviction, and I rely upon the facts stated in the case with regard to the printing of the circulars. Those statements are, to my mind, sufficient to support the conviction. They show that the circulars containing a proposal and scheme for the sale of tickets in a lottery were printed by a company. To that company the envelopes were sent by the appellant. The circulars were ordered by the appellant and were printed and prepared for posting. The payment for the printing of the circulars and for their preparation for posting was made by the appellant by means of cheques signed by another person. A large number of circulars were printed and stamped ready for posting and were posted, but all were prevented from reaching the addressees, and there is no evidence that any circular was ever delivered to or reached any addressee. Upon that it has been contended for the appellant that there was no evidence of publication to the postal official, who by superior orders opened some of the envelopes, and reliance was placed on two authorities in relation to the law of libel. It is, however, unnecessary to deal with that point, because, in fact, when once it is established, as it is by the finding of the magistrate, that the appellant was responsible for sending the draft circular to be printed by the printing company and that the circulars were printed, there is an end of the whole case, as it is inconceivable that none of the printers read the circulars. When the draft circular was received by the printers for reproduction and it was reproduced, some printer must have read at least one, but it has been argued that that is not publishing a proposal. The fallacy in that argument is that publishing a proposal means nothing more than making known a proposal to someone other than the person who originates it. As soon as it is established that the proposal was made known to another person the proposal has been published. It is clear that this proposal was made known to the printer, and therefore there was publication to the printer. The appeal, therefore, fails. I base my judgment on the evidence as to the printing.

DARLING, J.—I agree. It is amply sufficient if there is publication of a proposal to one person.

ACTON, J.—I agree.

Appeal dismissed.

Solicitors : *G. R. Cran; Director of Public Prosecutions.*

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

R. v. PAUL. R. v. McFARLANE

[Court of Criminal Appeal (Earl of Reading, C.J., Bray and Avory, JJ.), March 15, 1920]

[Reported [1920] 2 K.B. 183; 89 L.J.K.B. 801; 123 L.T. 336; 84 J.P. 144; 36 T.L.R. 418; 64 Sol. Jo. 447; 26 Cox, C.C. 619; 14 Cr. App. Rep. 155]

Criminal Law—Evidence—Cross-examination of prisoner—Incrimination of prisoners charged jointly with him—Evidence in chief of prisoner consisting merely of an admission of his own guilt—Criminal Evidence Act, 1898 (61 & 62 *Vict.*, *c.* 36), *s.* 1.

A prisoner called as a witness for the defence may be cross-examined by counsel for the prosecution in order to incriminate other prisoners charged jointly with him even though his own evidence in chief merely consists of an admission that he is guilty.

Notes. As to evidence of accused see 10 Halsbury's Laws (3rd Edn.) 481, 482, and for cases see 14 Digest (Repl.) 509 et seq. For the Criminal Evidence Act, 1898, s. 1, see 9 Halsbury's Statutes (2nd Edn.) 613.

Cases referred to in argument:

R. v. *McDonell* (*or McDonald*) (1909), 73 J.P. 490; 25 T.L.R. 808; 53 Sol. Jo. 745; 2 Cr. App. Rep. 322, C.C.A.; 14 Digest (Repl.) 510, *4939*.

R. v. *Hadwen*, [1902] 1 K.B. 882; 71 L.J.K.B. 581; 86 L.T. 601; 66 J.P. 456; 50 W.R. 589; 18 T.L.R. 555; 20 Cox, C.C. 206, C.C.R.; 14 Digest (Repl.) 518, *5018*.

Applications for leave to appeal against convictions and sentences.

The appellants were charged together with three other persons with warehouse breaking and stealing a large quantity of valuable furs. The defence set up was an alibi, and evidence was called to support it. One of the defendants, G., charged jointly with the appellants, was asked at the close of the case for the defence whether he wished to give evidence. He was then sworn, and said that he pleaded guilty and had nothing more to say. Counsel for the prosecution then cross-examined G. and obtained evidence from him which incriminated the two appellants.

G. St. John McDonald for the appellants.

The judgment of the court was delivered by

EARL OF READING, C.J.—It has been argued that counsel for the prosecution ought not to have been allowed to cross-examine one G., a fellow prisoner of the appellants at the trial, after G. had admitted that he was guilty in the witness-box. It is said that as the cross-examination of G. was directed to incriminating the appellants, who were charged jointly with him, the convictions could not stand, and the appeals should be allowed. This contention is based on s. 1 of the Criminal Evidence Act, 1898. It was argued that although by the Act of 1898 a person charged is made a competent witness for the defence, yet if that person swears in the witness-box that he is guilty and nothing more, he cannot be cross-examined by the prosecution, as there is then no issue before the court. But there is a fallacy in that argument. When a person charged goes into the witness-box to give evidence for the defence and is sworn, he is in the same position as any other witness, and is, therefore, liable to cross-examination. It does not matter whether he stands mute, or whether he gives evidence for the defence or for the prosecution. His liability to cross-examination does not depend on his statements in the witness-box, but upon the fact that he is called as a witness for the defence. As soon as a person charged goes into the witness-box as a witness for the defence, and is sworn, counsel for the prosecution is entitled to cross-examine him. It has further been contended that counsel for the prosecution is

not entitled to cross-examine a person charged who is called as a witness for the defence with the object of incriminating a person charged jointly with him. No authority was brought forward in support of this proposition, which is a novel one, and contrary to the usual practice, and we consider that it is unsound. There is no ground for giving leave to appeal against the convictions.

Appeals dismissed.

Solicitors: *Bruce Searl; Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

BLACKWELL *v.* BLACKWELL

[Probate, Divorce and Admiralty Division (Sir Henry Duke, P.), March 29, 1920]

[Reported 89 L.J.P. 143; 123 L.T. 175; 36 T.L.R. 478]

Restitution of Conjugal Rights—Compliance with decree—Computation of time—Right to include Sundays.

In computing the time limited for compliance with a decree of restitution of conjugal rights, all days, including Sundays, are to be considered available for compliance.

Notes. Section 14 (1) of the Matrimonial Causes Act, 1950, replaces s. 5 of the Matrimonial Causes Act, 1884 (repealed by the Supreme Court of Judicature (Consolidation) Act, 1925) to the extent that failure to comply with a decree of restitution of conjugal rights is a ground for judicial separation. Adultery and desertion for three years preceding the presentation of the petition are now separate grounds for divorce: see s. 1 (a) and (b) of the Act of 1950 [29 Halsbury's Statutes (2nd Edn.) 388].

As to restitution of conjugal rights see 12 Halsbury's Laws (3rd Edn.) 283 et seq., 391, and for cases see 27 Digest (Repl.) 356, 357.

Adjourned Summons.

The wife petitioned for dissolution of her marriage on the grounds of statutory desertion and adultery. She had on Jan. 22, 1920, obtained a decree of restitution of conjugal rights, ordering the respondent to return to her within fourteen days. This order was duly served on the respondent on Jan. 29, 1920, and he had not complied with it, and had written that he did not intend doing so. On Feb. 13, 1920, the petitioner swore the necessary affidavit in support of a petition for dissolution on the grounds of statutory desertion [s. 5 of the Matrimonial Causes Act, 1884] and adultery, and her petition was filed on that day. On her solicitors applying for the registrar's certificate to set down the cause as undefended, objection was taken that the petition had been filed prematurely, i.e., before the time limited for compliance with the decree of restitution had elapsed, Sundays having been wrongly included in the computation of fourteen days. A summons was taken out on behalf of the petitioner to show cause why the petition should not be set down, and was adjourned into court.

Bayford, K.C. for the petitioner.
W. O. Willis for the respondent.

SIR HENRY DUKE, P., after stating the facts, said: The question has arisen whether from analogy to the rules of the Supreme Court the period, which had elapsed from the date of service of the decree for restitution to the filing of the petition for dissolution of marriage was equivalent to the fourteen days required.

According to the principles requiring acts to be done under the rules of the Supreme Court no doubt it was not, but I do not think that these rules apply to this particular case, which must be dealt with on principle. Looking to reason and general principle the case seems fairly clear. The times limited for obedience to orders are often long, e.g., in the case of those against a party resident abroad, and counsel question in argument whether, when, say three months is the period limited, thirteen extra days should be allowed for the Sundays. It is common knowledge that this has not been the practice, and upon that analogy fourteen days must, I think, mean fourteen natural days, Sundays included. This is not a case where there can be any question whether there was any inability to perform some act on a week-day or a Sunday. All days were alike for compliance with this order, which may be as properly complied with on a Sunday as on a week-day. Having regard to practice and the general reasonableness of the proceedings, I think that fourteen days clearly means fourteen natural days, and as a consequence excluding the days of service, and of swearing the affidavit and filing the petition, the husband was in default when the petition was presented. The petitioner must have leave to set down her petition. I need only add that what I have said applies only to decrees for restitution.

Solicitors: *Soames, Edwards & Jones; Elvy Robb & Welch.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

COLE *v.* KELLY

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), October 20, 23, 1919, February 3, 4, 1920]

[Reported [1920] 2 K.B. 106; 89 L.J.K.B. 819; 123 L.T. 105; 36 T.L.R. 262]

Landlord and Tenant—Repair—Liability of tenant—Covenant to repair—Running with reversion—Obligation of tenant in lease implied in quarterly tenancy granted at end of term—Subsequent tenancy for longer term granted to plaintiff—Right of plaintiff to damages from quarterly tenant for breach of covenant—Conveyancing Act, 1881 (44 & 45 *Vict.*, *c.* 41), *s.* 10 (1).

A lessor held a house on a lease from Dec. 25, 1912, for ten and a quarter years, less thirty days. By an indenture of lease dated Feb. 24, 1913, the lessor demised to the defendant, the first, second, and third floors of the house for five years from Dec. 25, 1912, at a yearly rental of £165 for the first two years and £170 for the three subsequent years, payable quarterly. By the said lease, the defendant covenanted that she would during the term keep the premises thereby demised and the fixtures, painting, papering, and decorations thereof in good and tenantable repair, and would at the termination of the tenancy quietly yield up the premises with the fixtures in a good and tenantable state of repair. On Oct. 29, 1914, the lessor died intestate and letters of administration were granted to administrators. In November, 1917, correspondence passed between the administrators and the defendant whereby it was agreed between them that on the expiration of the term created by the indenture of lease dated Feb. 24, 1913, i.e., on Dec. 25, 1917, the defendant should from that date continue to occupy the floors of the house then occupied by her on a quarterly tenancy, subject to a quarter's notice given on one of the usual quarter days. By a letter dated June 20, 1918, the defendant gave the administrators notice of her intention to quit the premises on Sept. 29,

1918. By an indenture dated July 10, 1918, and made between the administrators and the plaintiff, which recited that the owner of the freehold of the house had refused to consent to an assignment of the premises comprised in the head lease, but had given his consent in writing to the under-lease of the premises by the reciting indenture created, and that it had been agreed that the transfer thereof to the plaintiff should be effectuated by the grant of that underlease, the administrators, in consideration of a sum paid by the plaintiff, thereby demised to her the house comprised in the head lease to hold for the residue then to come of the term of ten and a quarter years less thirty days, except the last three days thereof, subject to, but with the benefit of the said indenture dated Feb. 24, 1913. On Sept. 29, 1918, the defendant gave up possession of the premises occupied by her, and on Oct. 8, the plaintiff commenced this action in which she claimed damages from the defendant for not having kept and delivered up the premises in good repair.

Held: on the true construction of the letters passing between the administrators and the defendant in November, 1917, and in view of the surrounding circumstances, the parties contemplated that the terms of the lease of Feb. 24, 1913, should be implied in the quarterly tenancy then being created, including the defendant's obligation to keep and yield up the premises in good repair; accordingly, that obligation was a "covenant or provision contained" in the quarterly tenancy within s. 10 (1) of the Conveyancing Act, 1881, [see now s. 141 (1) (2) of Law of Property Act, 1925: 20 HALSBURY'S STATUTES (2nd Edn.) 427] and went with the reversionary estate in the property; the plaintiff, being the underlessee of the premises for a term which was to continue longer than the term which the defendant had, was the owner of the reversion, and was "entitled to the income of the land leased" within s. 10 (1); and, therefore, under that subsection she was entitled to recover from the defendant damages for breach of the covenant to repair.

Notes. Applied: *Rye* v. *Purcell*, [1925] All E.R. Rep. 448. Referred to: *Bradbury* v. *Grimble*, [1920] All E.R. Rep. 270; *Rhyl U.D.C.* v. *Rhyl Amusements, Ltd.*, [1959] 1 All E.R. 257.

As to the benefit of tenants' covenants running with the reversion see 23 HALSBURY'S LAWS (3rd Edn.) 649, 650, and for cases see 31 DIGEST (Repl.) 338 et seq.

Cases referred to:

(1) *Horn* v. *Beard*, [1912] 3 K.B. 181; 81 L.J.K.B. 935; 107 L.T. 87, D.C.; 31 Digest (Repl.) 467, *5932*.

(2) *Dougal* v. *McCarthy*, [1893] 1 Q.B. 736; 62 L.J.Q.B. 462; 68 L.T. 699; 57 J.P. 597; 41 W.R. 484; 9 T.L.R. 419; 4 R. 402, C.A.; 31 Digest (Repl.) 59, *2156*.

(3) *Right d. Flower* v. *Darby and Bristow* (1786), 1 Term Rep. 159; 99 E.R. 1029; 31 Digest (Repl.) 58, *2149*.

(4) *Wedd* v. *Porter*, [1916] 2 K.B. 91; 85 L.J.K.B. 1298; 115 L.T. 243, C.A.; 31 Digest (Repl.) 59, *2157*.

(5) *Morgan* v. *William Harrison, Ltd.*, [1907] 2 Ch. 137; 76 L.J.Ch. 548; 97 L.T. 445, C.A.; 31 Digest (Repl.) 35, *1914*.

(6) *Blane* v. *Francis*, [1917] 1 K.B. 252; 86 L.J.K.B. 364; 115 L.T. 850, C.A.; 31 Digest (Repl.) 60, *2168*.

(7) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 39 Digest 402, *380*.

(8) *Ellis* v. *Torrington*, [1920] 1 K.B. 399; 89 L.J.K.B. 369; 122 L.T. 361; 36 T.L.R. 82, C.A.; 31 Digest (Repl.) 341, *4733*.

Also referred to in argument:

Johnson v. *St. Peter, Hereford (Churchwardens)* (1836), 4 Ad. & El. 520; 1 Har. & W. 720; 6 Nev. & M.K.B. 106; 5 L.J.K.B. 116; 111 E.R. 883; 31 Digest (Repl.) 376, *5055*.

Throckmerton v. *Tracy* (1555), as reported in 1 Plowd. 145; 75 E.R. 225; 39 Digest 117, *106.*

Manchester Brewery Co. v. *Coombs*, [1901] 2 Ch. 608; 70 L.J.Ch. 814; 82 L.T. 347; 16 T.L.R. 299; 31 Digest 114, *2547.*

Williams v. *Burrell* (1845), 1 C.B. 402; 14 L.J.C.P. 98; 4 L.T.O.S. 415; 9 Jur. 282; 135 E.R. 596; 31 Digest 129, *2669.*

Burges v. *Wickham* (1863), 3 B. & S. 669; 33 L.J.Q.B. 17; 8 L.T. 47; 10 Jur. N.S. 92; 11 W.R. 992; 1 Mar. L.C. 303; 122 E.R. 251; 39 Digest 422, *546.*

Baynes & Co. v. *Lloyd & Sons*, [1895] 1 Q.B. 820; 64 L.J.Q.B. 411; 72 L.T. 505; 43 W.R. 524; 11 T.L.R. 356; affirmed [1895] 2 Q.B. 610; 64 L.J.Q.B. 787; 73 L.T. 250; 59 J.P. 710; 44 W.R. 328; 11 T.L.R. 560; 14 R. 678, C.A.; 31 Digest (Repl.) 134, *2732.*

Turner v. *Walsh*, [1909] 2 K.B. 484; 78 L.J.K.B. 753; 100 L.T. 832; 25 T.L.R. 605, C.A.; 35 Digest 341, *836.*

Appeal by the plaintiff from an order of LUSH, J., giving judgment for the defendant in the action mentioned above.

By the Conveyancing Act, 1881, s. 10 (1):

"Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

Compston, K.C., and *Foà* for the plaintiff.

Disturnal, K.C., and *H. H. Slesser* for the defendant.

BANKES, L.J.—The point to be decided is very short. In 1912 Miss Hammond became the assignee of the lease of a house in Baker Street, London, which lease expired in 1923. In February, 1913, she let the three upper floors and the hall and passages to the defendant for a term of five years expiring on Dec. 25, 1917. In 1914 Miss Hammond died intestate. In November, 1917, shortly before the defendant's lease expired, the defendant entered into correspondence with one of the two legal personal representatives of Miss Hammond regarding the terms upon which she might continue in occupation of the premises, and it was agreed that she should remain on as tenant, one of the terms being that either party might give a quarter's notice to determine the tenancy. In June, 1918, the defendant gave to the legal personal representatives notice that she intended to quit at Michaelmas. On July 10, 1918, the legal personal representatives by deed underlet the whole house to the plaintiff for the residue of their term less three days. It is alleged that when the defendant's lease expired on Dec. 25, 1917, and when the defendant went out of occupation at Michaelmas, 1918, the premises which she had occupied were out of repair, and the plaintiff seeks to recover from the defendant damages for breach of covenant in not having kept them and delivered them up in repair. The defendant contends that she is under no liability to the plaintiff even if there were breaches on her part of her covenant to repair. LUSH, J., decided in the defendant's favour, on the ground that, the plaintiff being only entitled to sue the defendant by virtue of s. 10 of the Conveyancing Act, 1881, the case had not been brought within that section.

The first point is whether the plaintiff is the owner of the reversion and as such entitled to sue for breaches of covenant. As LUSH, J., pointed out, this case is not

distinguishable in its facts from *Horn* v. *Beard* (1), and as the plaintiff was the underlessee of the premises under the lease of July 10, 1918, for a term which was to continue longer than the term which the defendant had, the plaintiff was entitled to the reversion. It also appears clear from s. 10 of the Conveyancing Act, 1881, that, if the case comes within the section, the plaintiff can sue as being "entitled to the income of the land leased." Therefore, in the learned judge's view, with which I agree, the plaintiff has established her position of reversioner and has a right to sue if the case comes within s. 10.

The question, therefore, is whether or not the covenants to repair and to deliver up in repair are covenants contained in the defendant's lease on her part to be observed or performed. In the first place, is the agreement contained in the letters an agreement for a continuance of the tenancy upon the terms of the old lease except in so far as those terms are expressly varied by the new agreement or are inconsistent with the tenancy so created? The learned judge came to the conclusion that the terms of the old lease, so far as they related to keeping and delivering up the premises in repair, were included in the new agreement, and I agree with him. This case has been spoken of as one where the defendant held over after the expiration of her lease. In my opinion, the expression "holding over" is not properly applicable to a case like the present where terms have been arranged under which the tenant, after the expiration of her lease, continues in occupation of the premises. The distinction between a continuance in occupation on new terms agreed upon and a holding over where no new terms are agreed upon and the tenant remains in occupation with the consent of the landlord, in which case the law implies a holding over on the terms of the previous tenancy so far as they are not inconsistent with the new tenancy created by the holding over, is pointed out by LOPES, L.J. in *Dougal* v. *McCarthy* (2) ([1893] 1 Q.B. at p. 742): when he said:

> "I think this case is governed by what LORD MANSFIELD said in *Right d. Flower* v. *Darby and Bristow* (3)—viz., 'If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract.' I will deal first with the case where there is merely a holding over by the tenant after the expiration of a tenancy for a year by consent of both parties, and nothing is said in reference to any terms of tenancy either by the landlord or the tenant. I think the proper direction to a jury in such a case would be that, there being such holding over, and nothing being said by either party as to terms, it follows from such holding over by implication of law that there is to be a tenancy from year to year on the same terms as those of the lease which has expired, so far as they are not inconsistent with such a tenancy; that they are bound, to use LORD MANSFIELD'S words, to imply a renovation of the old agreement."

That is where the implication is of a tenancy from year to year and is an implication of law. He goes on to deal with the second case:

> "I will now proceed to deal with the case where, after the expiration of the term, letters have passed or conversation has taken place between the parties, as in the present case. In such a state of things it will be a question for a jury whether there has been a consent by both parties to a continuance of the tenancy, and if so on what terms."

In the present case the letters indicated what the terms of the new tenancy were to be. What the terms of the new tenancy were is an inference of fact. I agree with the learned judge that the terms of the old lease as to repairing and delivering up in repair were included in the new agreement. Those terms form part of the agreement because they are implied in it. We have had a discussion upon implied terms and *Wedd* v. *Porter* (4) has been cited. In my view, the authorities show that there may be at least three different classes of implied terms. A term may be implied from the relationship of the parties, as in the case of landlord and tenant of an agricultural holding, where the law implies certain terms as to cultivation of the

land and keeping the premises wind and water tight. A term may be implied from the use of certain words, as for instance "demise" in a lease. Again, there may be cases where a term is implied from the surrounding circumstances existing at the time the agreement is entered into. *Morgan* v. *William Harrison, Ltd.* (5) is an illustration of this class. COZENS-HARDY, M.R., speaking of the terms upon which the tenants continued in occupation of a coal mine, said ([1907] 2 Ch. at p. 143):

> "Therefore the lessees were to be the tenants with a right to get the coal and a right to exercise the way-leave. Both the mine and the way-leave are mentioned and it seems to me irrational to suppose that the parties could have had any other meaning than that they should have the same mutual rights as before except in so far as you can find any stipulation in the old lease which is not applicable to a tenancy at will. Now there is ample authority that a tenant holding over after the expiration of a lease, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested, a tenant from year to year—a yearly tenant; and there is ample authority that under those circumstances the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy; and I can see no principle which can limit that position to a case where the tenancy is by matters subsequently occurring fixed in the sense that it is for a definite period."

In the present case the implication that the parties must have intended to include in the new agreement all the terms of the old lease so far as they were applicable and were not inconsistent with the terms of the new agreement arises from the surrounding circumstances, and they are to be found in the conditions upon which the defendant held the premises under the old lease. The lease, which was an underlease, was of a special character. It was a lease of part only of the house. It contained, among other things, a covenant by the landlord to pay the rates and taxes. Having regard to the surrounding circumstances, I find it impossible to come to any other conclusion than that the parties must have intended to include by implication in the new agreement arrived at by letters which in terms referred only to the duration of the tenancy, the obligation to repair contained in the old lease.

It is then said that, even if that is so, the implied term is not "contained" in the lease within the meaning of s. 10 (1) of the Conveyancing Act, 1881. It was decided by this court in *Blane* v. *Francis* (6) that the expression "lease" in s. 10 means an instrument in writing. In the present case there was an agreement in writing and to that extent the requirements of the section are complied with. Is it true to say that the implied term as to repairs is "contained" in the agreement in writing in the letters? In my opinion, it is. All the terms of the written agreement, whether express or implied, are "contained" in the written agreement, the terms implied being such as the parties must have intended should be included in it. This view seems to me to be borne out by what LORD ESHER, M.R., said in *Hamlyn & Co.* v. *Wood & Co.* (7) as to the principle upon which terms are implied ([1891] 2 Q.B. at p. 491):

> "I have, for a long time, understood that rule to be that the court has no right to imply in a written contract any such stipulation unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

He there spoke of it as a stipulation in the agreement. For these reasons I am unable to take the same view upon this point as the learned judge who came to the conclusion that upon the true construction of the section the implied terms of the agreement of tenancy were not "contained" in the new agreement. Upon this point the appeal succeeds.

It was also contended that the plaintiff was entitled to recover damages for breaches of the covenants to repair in the original underlease of Feb. 24, 1913. The

plaintiff could only sue in respect of those breaches of covenant if she was in a position to prove that she was an assignee of the accrued right of action in respect thereof, and had given due notice as required by s. 25 (6) of the Judicature Act, 1873 [see now Law of Property Act, 1925, s. 136 (1)], if she desired to bring an action in her own name. No such case was made on the pleadings nor at the trial, and no amendment of the pleadings ought to be allowed to enable the plaintiff to raise the point now, because upon the evidence at present before the court I can see no trace of any notice of assignment. In these circumstances it is not necessary to express any opinion whether the plaintiff is an assignee of the alleged accrued cause of action for breaches covenant under the original underlease. I only say that I think that the clause of the underlease of July, 1918, which was relied upon as an assignment, is expressed in language which makes it difficult to say what its true construction is. I, therefore, express no opinion upon it. The appeal will be allowed and the judgment for the defendant set aside, and judgment entered for the plaintiff for damages for breach of the covenant to repair and to deliver up in repair contained in the agreement for the quarterly tenancy, the damages to be assessed by an official referee unless the parties otherwise agree.

SCRUTTON, L.J.—The arguments have covered a wide field, but the most important part of the case ultimately depends upon the meaning of two words in s. 10 (1) of the Conveyancing Act, 1881.

Miss Hammond had a leasehold interest in a house in London. She sublet certain parts of the house to the defendant, Mrs. Kelly, for a term from Dec. 25, 1912, to Dec. 25, 1917. When the term had nearly expired it was agreed by certain letters passing between the defendant and the administrators of Miss Hammond that the defendant should continue in occupation on a quarterly tenancy, no detailed terms of her tenancy being stated in the letters constituting the new agreement. In July, 1918, while the quarterly tenancy was continuing the administrators granted in præsenti a sub-lease of the whole house to the plaintiff, Mrs. Cole, for the residue of the term granted to Miss Hammond less three days subject to but with the benefit of the indenture of underlease to the defendant. I cannot help thinking that the draftsman of that underlease was under the impression that the five years' lease was continuing in operation, so that the plaintiff's lease would be subject to it and that she would have the benefit of it. On Sept. 29, 1918, the defendant, having given due notice, determined her quarterly tenancy and quitted possession. The plaintiff thereupon entered into possession and sued the defendant for damages for breaches of the repairing covenants during the period both of the five years' lease and of the quarterly tenancy.

Section 10 of the Conveyancing Act, 1881, provides that the benefit of every covenant or provision contained in a lease shall go with the reversionary estate in the land immediately expectant on the term granted by the lease. The plaintiff had a term immediately expectant on the defendant's quarterly tenancy. The question is: Was the covenant to repair originally expressed in the five years' lease, a covenant "therein"—that is, in the agreement for the quarterly tenancy—"contained"? This court decided in *Blane* v. *Francis* (6) that s. 10 only applies to a lease in writing. In that case the tenant held over after the expiration of the term, there being no writing, on the terms of the old lease, and it was held that there was no lease which "contained" the covenants for the period of the holding over. In the present case the quarterly tenancy, which continued for three quarters after the expiration of the five years' lease, was under the agreement in writing in the letters. Were the repairing covenants implied in that agreement in writing? If the tenancy was on the terms of the repairing covenants, were the covenants "contained" in the lease, that is, in the agreement in the letters? Where a tenant has for five years been in occupation of part of a house on detailed terms as to its occupation, on terms that the landlord shall pay all rates and taxes, that the tenant shall pay for the gas which she consumes, and that she shall not make any alterations or additions except with the

consent of the landlord, and she continues in occupation after the expiration of the term under an agreement for a quarterly tenancy, are not those terms carried on by implication into the quarterly tenancy? I think that the tenant would have been very much surprised if she had been asked to pay the rates which the landlord had previously paid. The same observation applies to the provisions as to the gas, the alterations, and the use to which the premises might be put. I have no doubt that the quarterly tenancy was on the terms of the previous lease so far as applicable, including the covenants to repair, and that those terms were to be implied from the circumstances of her previous tenancy and the language of the letters about continuing and remaining on.

Then comes the main question in the case, whether the term so implied from the surrounding circumstances is "contained" in the lease. If a term were merely implied by law from the language with no evidence as to facts, it seems to me from the old authorities that an assignee of the reversion could sue on it without the assistance of sect. 10 of the Conveyancing Act, 1881. It is so stated in some of the old authorities cited by SWINFEN EADY, L.J., in *Wedd* v. *Porter* (4) and I accept it as good law. Can the assignee now sue where the term is implied from the language construed in the light of the surrounding circumstances? In my view, he can. The term is contained in the lease construed with reference to the surrounding circumstances. The fact that there is evidence of the surrounding circumstances in order to construe the language which the parties have used in their written agreement does not seem to me to make it the less a covenant "therein contained" within the meaning of s. 10 of the Act. LUSH, J., took the view that, though there was such a term by implication, it could not be said to be "contained" in the lease. That is, I think, too narrow a view to take of the section. When a term is implied in a lease from the language used and the surrounding circumstances, the implied term is "contained" in the lease within the meaning of the section. This has the result of giving the plaintiff the right to sue for damages under the covenants of the lease as contained in the quarterly tenancy. But I think it also follows from the language of the section that it does not on the facts of this case give her a right to sue for a breach of the covenants to repair in the five years' lease, as her reversionary estate in the land was not immediately expectant on the term granted by that lease. I do not express any opinion whether, if the plaintiff brings a new action and proves a good notice of assignment, the alleged assignment being the clause giving her the benefit of the five years' lease, she will not, under the decision of this court in *Ellis* v. *Torrington* (8); be able to sue for damages for breaches of the repairing covenants contained in the five years' lease. I do not express any opinion on that point. It was not pleaded, nor argued below.

The result is that the plaintiff has a right to sue for damages for breaches of the covenant to repair contained in the agreement for the quarterly tenancy, but no right at present to sue for damages for breaches of the covenant to repair in the five years' lease; and we express no opinion as to the possibility of suing on the alleged assignment of accrued causes of action for breaches of the covenant to repair, if any, in the five years' lease. The appeal will be allowed.

ATKIN, L.J.—The first question is: Upon what terms did the defendant hold the premises under the new quarterly tenancy? In reference to that one has to approach the question recognising that the law is that

> "where tenants hold over after the expiration of a term, and the facts do not exclude an implied agreement to hold upon the terms of the old lease, then the law determines that they impliedly hold subject to all the covenants in the lease which are applicable to the new situation":

per SWINFEN EADY, L.J., in *Wedd* v. *Porter* (4) ([1916] 2 K.B. at p. 98). I think that that rule applies wherever there has been a holding over, the law being, as I understand it, that a holding over with the consent of the landlord primâ facie gives rise to a tenancy at will, which by subsequent payment of rent may be converted into

a tenancy from year to year, or the parties may by their acts or by agreement convert the tenancy at will into a tenancy of a more fixed duration, as a weekly, or a monthly, or a yearly tenancy. But in all those cases, unless there is something to contradict the view that the tenant will continue to hold upon the terms of the old tenancy, then those terms, so far as they are applicable, as SWINFEN EADY, L.J., said, to the new situation, will apply. I accept the view expressed by COZENS-HARDY, M.R., in *Morgan* v. *William Harrison, Ltd.* (5), where, after the passage read by BANKES, L.J., which I need not read again, he went on to say ([1907] 2 Ch. at p. 143):

> "I am prepared to hold that where you find an express tenancy at will created on the termination of a lease, the same principle ought to be applied as would apply if you had a subsequent agreement to pay either the original rent or an increased rent—that is to say, all the terms and conditions of the original lease apply so far as they are consistent with such tenancy."

'One has to approach the case upon that footing, and even without reference to those principles of law it appears to me that upon the true construction of the letters in this case, construing them, as one is obliged to construe all documents which are alleged to contain contractual terms, with reference to the position of the parties at the time, the parties agreed that the quarterly tenancy should be subject to the terms of the former tenancy. The premises were business premises in Baker Street, let at a rent of £150 a year, consisting of part only of the house, where arrangements had to be made for lighting such parts of the house as were used in common by the occupiers, and where it was certainly usual, and I should say necessary, to have a stipulation as to the repairs and as to payment of the rates by the landlord. It is suggested by the defendant that the new arrangement was simply one for a payment of £150 a year for these premises on a quarterly tenancy. If that was the arrangement, it materially altered the terms of the tenancy. Whereas under the five years lease the tenant paid £150 a year and the landlord paid the rates, under the new suggested arrangement the tenant would pay £150 a year and the rates. I do not believe that either party contemplated that or that the tenant would have agreed to it. I think that on the true construction of the letters—in one of which the landlord speaks of the defendant wishing "to continue the tenancy," and in another of their letting the defendant "remain as tenant"—the parties contemplated that the terms of the former tenancy should continue to apply. I agree, therefore, with the learned judge that the terms of the old lease as to repairs were implied in the new agreement of tenancy.

That being so, it seems to me to be far too narrow a construction to place upon s. 10 (1) of the Conveyancing Act, 1881, that those terms, implied as they are in the contract in writing, are not "contained" in that contract. That which is implied in a document is, in ordinary language, contained in it. I think it would be depriving the statute of its beneficial effect in removing technicalities if we were to substitute a technicality of the worst kind, and so defeat the object of the enactment. For these reasons I think that the implied term is "contained" in the document in which it is implied, and that, therefore, the plaintiff is entitled to sue in respect of the stipulations in the quarterly tenancy. We decide nothing as to the measure of damages in that claim. I also agree that it is not open to the plaintiff on the pleadings to claim in respect of the old lease which had expired some months before she acquired any title to these premises. It seems to me that she can only do so under an assignment of a chose in action by her lessors. No such claim as that has been made on the pleadings, and I say no more about it. The judgment for the defendant will be set aside.

Appeal allowed.

Solicitors: *J. H. Tuppen; Kenneth Brown, Baker, Baker.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

PORT OF LONDON AUTHORITY *v.* ORSETT UNION

[House of Lords (Lord Birkenhead, L.C., Viscount Haldane, Lord Dunedin and Lord Buckmaster), November 21, 22, 24, 1919, January 30, 1920]

[Reported [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69; 36 T.L.R. 233; 18 L.G.R. 153; 192 B.R.A. 709]

Rates—Assessment—Profits basis—Ascertainment of rateable value—Allowance for tenant's profit—Consideration of hereditament rebus sic stantibus.

By the Port of London Act, 1908, the appellant authority was formed to take over dock undertakings in the port previously carried on by privately owned dock companies, and to manage and develop those undertakings. The authority had the same powers to charge limited rates and dues as the transferred undertakings had had. The receipts of the authority were to be applied in payment (i) of the expenses of working and maintenance, (ii) interest on stock issued to shareholders in the transferred undertakings in consideration of the transfer of those undertakings, (iii) interest on loans raised otherwise than by the issue of port stock, (iv) creation of a sinking fund and a reserve fund, or (v) for such purposes for the benefit of the port as the authority should determine.

Held: the fact that under the statute the appellant authority was not permitted to make profits in the same way as an ordinary commercial concern did not preclude the rating authority, in arriving at the rateable value of the appellant authority's hereditaments, from making an allowance for tenant's profit.

Mersey Docks and Harbour Board v. *Liverpool Overseers* (1) (1873), L.R. 9 Q.B. 84, overruled so far as it decided the contrary.

Per Lord Buckmaster: The actual hereditament of which the hypothetical rent is to be determined must be the particular hereditament as it stands with all its privileges, opportunities, and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament. The character and extent of the various deductions from the gross revenue must be fixed in relation to those conditions.

Notes. Considered: *London Playing Fields Society* v. *South-West Essex Assessment Committee*, [1930] All E.R. Rep. 104; *St. James' and Pall Mall Electric Light Co.* v. *City of Westminster Assessment Committee* (1932), 97 J.P. 48. Referred to: *Poplar Assessment Committee* v. *Roberts*, [1922] All E.R. Rep. 191; *Metropolitan Water Board* v. *St. Marylebone Metropolitan Borough Assessment Committee*, [1923] 1 K.B. 86; *Kingston Union Assessment Committee* v. *Metropolitan Water Board*, [1926] All E.R. Rep. 1; *Slaytor* v. *Newcastle-upon-Tyne Assessment Committee*, [1926] 1 K.B. 172; *Ladies' Hosiery and Underwear, Ltd.* v. *West Middlesex Assessment Area Assessment Committee*, [1932] All E.R. Rep. 427; *Racecourse Betting Control Board* v. *Brighton Corpn.*, [1941] 2 All E.R. 595; *Croydon Gas Co.* v. *Croydon County Borough Rating Authority*, [1946] 1 All E.R. 384; *Yeovil R.D.C.* v. *South Somerset and District Electricity Co.*, [1947] 1 All E.R. 669; *Rawlence* v. *Croydon Corpn.*, [1952] 2 All E.R. 535; *Mid-Northamptonshire Water Board* v. *Lee (Valuation Officer)*, [1957] 2 All E.R. 143.

As to valuation for rating on the profits basis see 32 Halsbury's Laws (3rd Edn.) 77–79, 86 et seq., and for cases see 38 Digest (Repl.) 609 et seq. For Rating and Valuation Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 103.

Cases referred to:

(1) *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1873), L.R. 9 Q.B. 84; 43 L.J.M.C. 33; 29 L.T. 454; 38 J.P. 21; 22 W.R. 184; 38 Digest (Repl.) 669, *1204.*

(2) *Mersey Docks and Harbour Board Trustees* v. *Cameron, Jones* v. *Mersey Docks and Harbour Board Trustees* (1865), 11 H.L. Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur. N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest (Repl.) 545, *395.*

(3) *Sculcoates Union* v. *Kingston-upon-Hull Dock Co.*, [1895] A.C. 136; 64 L.J.M.C. 49; 71 L.T. 642; 59 J.P. 612; 43 W.R. 623; 11 R. 74, H.L.; 38 Digest (Repl.) 668, *1189*. A

(4) *L.C.C.* v. *Erith Parish* (*Churchwardens, etc.*) *and Dartford Union Assessment Committee, West Ham Parish* (*Churchwardens, etc.*) v. *L.C.C., St. George's Union Assessment Committee* v. *L.C.C.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *L.C.C.* v. *Erith Overseers, L.C.C.* v. *West Ham Union, L.C.C.* v. *Woolwich Union, L.C.C.* v. *St. George's Union*, Ryde, Rat. App. (1891–93) 382, H.L.; 38 Digest (Repl.) 481, *47*. B

(5) *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee*, [1901] A.C. 175; 70 L.J.K.B. 584; 84 L.T. 542; 65 J.P. 579; 49 W.R. 610; 17 T.L.R. 444, H.L.; 38 Digest (Repl.) 620, *886*. C

(6) *Great Central Rail. Co.* v. *Banbury Union, Sheffield Union* v. *Great Central Rail. Co.*, [1909] A.C. 78; 78 L.J.K.B. 225; 100 L.T. 89; 73 J.P. 59; 25 T.L.R. 143; 53 Sol. Jo. 177; 7 L.G.R. 227; 2 Konst. Rat. App. 759, H.L.; 38 Digest (Repl.) 646, *1055*.

(7) *R.* v. *London School Board* (1886), 17 Q.B.D. 738; 55 L.J.M.C. 169; 55 L.T. 384; 50 J.P. 419; 2 T.L.R. 633; Ryde, Rat. App. (1886–90) 225; sub nom. *London School Board* v. *St. Leonard, Shoreditch Assessment Committee*, 34 W.R. 583, C.A.; 38 Digest (Repl.) 616, *862*. D

(8) *R.* v. *Southampton Dock Co.* (1851), 17 Q.B. 83; 20 L.J.M.C. 228; 17 L.T.O.S. 106; 15 J.P. 552; 15 Jur. 859; 117 E.R. 1213; 33 Digest 457, *1695*.

Appeal by the Port of London Authority from an order of the Court of Appeal (Bankes, Warrington and Duke, L.JJ.), reported [1919] 2 K.B. 1, affirming an order of the Divisional Court upon a Case Stated by the Essex Quarter Sessions on an appeal against a poor rate made upon the appellants. E

Talbot, K.C., *Ryde, K.C.*, and *Konstam, K.C.*, for the appellants.

Colefax, K.C., *Hawke, K.C.*, and *Jeeves* for the respondents.

The House took time for consideration. F

Jan. 30. The following opinions were read.

LORD BIRKENHEAD, L.C.—The question now before this House arose in the course of a rating appeal to the Essex Quarter Sessions brought by the present appellants in respect of that part of their undertaking which is known as Tilbury Docks. The appellants are a public body incorporated by the Port of London Act, 1908, and the docks are vested in them on the conditions laid down by that Act, which is a public general Act. On Dec. 5, 1917, the Essex Quarter Sessions made an order embodying their decision, and their findings are set out in the Case which they subsequently stated for the opinion of the High Court: G

"The quarter sessions in giving judgment on the said appeal fixed the gross estimated rental of the port authority's undertaking in the parish of Chadwell St. Mary at £106,863, and the rateable value thereof as £52,063, and stated that in arriving at this decision the court had acted upon the decision in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1) and it had in consequence made no allowance for tenants' profits beyond allowing interest on the capital employed. . . ." H

The Case raised two questions, only one of which is material, namely: I

"Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenants' profits."

The Case proceeded:

"If the court answers . . . in the affirmative the decision of the quarter sessions is to stand, otherwise the Case is to be remitted to them to determine the gross and the rateable values respectively in the light of and in accordance with the decision of the court."

A The Divisional Court, conceiving itself equally bound by the decision of the Court of Queen's Bench referred to, affirmed the decision of quarter sessions. The Court of Appeal came to the conclusion that the question should be answered in the negative, but did not remit the case to quarter sessions. The view of the Court of Appeal was that in substance the respondents had succeeded and they, therefore, dismissed the appeal, and this appeal comes before your Lordships in the unfortunate position that neither of the parties supports the form of the order made by the Court of Appeal.

The difficulty in this, as in so many other cases, arises from the terms of the Parochial Assessment Act, 1836, s. 1:

> "No rate for the relief of the poor in England and Wales shall . . . be of any force which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same reasonably might be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deduction therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent. . . .": [see now Rating & Valuation Act, 1925, s. 22, s. 68 (1)].

Where a hereditament is let on such terms, the only task of the rating authority is to find out the actual rent, and in any case where the property is let or is of the same character as other hereditaments which are let, the adjusting of the figures to arrive at the "net annual value" is a question of fact. There is, however, no such guide available with regard to hereditaments such as docks, and, therefore, it is necessary to have recourse to some factor other than the valuation of the market to determine what is the net annual value of the hereditaments to be rated. Several methods are available for such cases, and it does not follow that the rating authority would necessarily be wrong if it adopted one method when dealing with one hereditament and another method when dealing with a different hereditament. Subject to the exception which I mention later, the quarter sessions here adopted a very usual method—namely, to make a calculation based on the profit earning capacity of the docks. By this method the amount of the gross receipts is ascertained, and from such amounts are deducted the expense of earning such receipts, the deductions provided for by statute, interest on tenant's capital and the estimated amount of tenant's profit. The figure so ascertained would give the rating authority a valuable indication as to the rent which the hypothetical tenant would be likely to give for the right to occupy the hereditament in question, and, therefore, would enable them to form an opinion as to the correct amount of the "net annual value" for the purpose of rating. If such a method were adopted, then subject to the point at issue in this case it could not be contended that quarter sessions were wrong in law, and, indeed, neither side has so contended. The dispute arises on the exception, viz., that in applying the method to this particular case quarter sessions excluded from their calculation any sum for tenant's profit, and they did so because they conceived that they were bound in law by the authority of *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1). If, therefore, quarter sessions were wrong, they were wrong on a point of law and not on a question of fact, and their finding is open to review and correction.

Now, if these docks had remained in the hands of the former owners, not only would this exception not have been made in applying the method, but it would not have been contended that it ought to have been made. We are, therefore, asked to lay down as a rule of law that where hereditaments, such as docks, are owned and occupied by a public authority which is bound by law not to make profits in the same way as a commercial concern does, or even as a local authority, by municipal trading, may do, then the rating authority must assume that the

hypothetical tenant does not intend or desire to make any profit. It would necessarily follow, therefore, that the transfer of these docks to the appellants of itself increased their annual value and consequently their rateable value, without any other change being made. At one time it was thought that in such a case the exact opposite result followed, viz., that the docks would cease to be rateable at all, but since the decision of this House in *Mersey Docks and Harbour Board Trustees* v. *Cameron*, *Jones* v. *Mersey Docks and Harbour Board Trustees* (2) all such hereditaments have been held to be rateable. As BLACKBURN, J., said, in the course of the opinion given by him on behalf of the majority of the judges consulted (11 H.L. Cas. at p. 479):

> "The company, by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then to paying dividends on the above capital; and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached, the rates must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now, if without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour masters and others who manage it, we change the name of the body which occupied it from that of 'the company,' to that of 'the board' and if instead of the 'company' paying to the shareholders a maximum dividend on their capital, the 'board' must pay to the same individuals the same identical sums, but call them 'interest on bonds' instead of 'maximum dividend on share capital,' what difference does this make?"

For these and other reasons set out in his opinion BLACKBURN, J., reached the view accepted by the House of Lords, that the Mersey Docks were rateable. Subsequently, the question of tenant's profits was considered by the Court of Queen's Bench in the *Mersey Docks Case* (1) already cited. BLACKBURN, J., was a member of the court, and delivered the judgment upon which quarter sessions acted in the present case. The provisions of the Acts which regulate the undertaking of the Mersey Docks and Harbour Board are materially different from the corresponding provisions of the Port of London Act, and it might be possible, on a detailed examination of those provisions, to discover reasons which would justify a distinction being drawn between the Mersey Docks and the appellants' undertaking, and even a difference in the rateability of those undertakings. I prefer, however, to base my judgment upon other and broader considerations, and, therefore, do not pause to deal with these differences at length. The decision of the Court of Queen's Bench was that, on the true construction of the statutes applicable, no hypothetical tenant could lawfully derive any pecuniary benefit from his occupation, and, therefore, that no allowance should be made for tenant's profit. BLACKBURN, J., said (L.R. 9 Q.B. at p. 97):

> "If the premises were let to a tenant, it must be a tenant subject to this Act (i.e., to the Mersey Dock Acts), bound to hand over the rates received after deducting the expenses and charges of collecting the rates . . . and the persons paying the dock rates would have a right to object to any part of them being applied to pay tenant's profits. . . . In such a case as the present, where an actual demise on any terms be impracticable, and where a demise on the terms that the tenant should receive a profit beyond the expense of collection, would, if practicable, be illegal, we think no deduction should be made on account of tenant's profits."

This decision has been mentioned in a number of cases in this House, but that part which is now under discussion has never been expressly affirmed or overruled.

Before considering this judgment of BLACKBURN, J., I think it desirable to re-state certain propositions of law which must at the present day be regarded as established.

A First, the question of rateability does not depend on whether the occupier does, or can, make a profit by the use to which he puts the hereditament; it depends on whether the occupation is of value. Secondly, in considering what rent a tenant would pay, the rating authority must consider the owner who is in actual occupation, or, indeed, the only possible occupier, as a possible tenant. Thirdly, in cases such as the present where a hereditament is enhanced in value by its connection B with a profit-bearing undertaking, such as docks, the profits earned, and the share of profits attributable to any particular hereditament, have to be taken into account. Fourthly, in such cases, any restriction imposed by law on the profit-earning capacity of the undertaking must be considered, for the profits to be taken into account must be such as the tenant can earn under the only conditions in which he is allowed to earn profits at all. In other words, if the law has prevented the C hereditaments being profitable at all, then the occupation is of no value, and if the law has restricted its profit-earning capacity, then the effect of such restriction will tend to diminish the value. This proposition does not mean, and ought not to be understood to mean, that, where profits can lawfully be earned, but such profits must be applied in a particular way or for a particular purpose, the occupation of the hereditament is valueless, and, therefore, not rateable, or, on the other D hand, that the tenant derives no profit from the occupation, and, therefore, the whole profit increases the net annual value of the land. With the greatest respect to LORD BLACKBURN, I think that in the second case he had not in his mind the full bearing of the principle which he enunciated in the earlier case. It will be seen that by s. 284 of the Mersey Docks Acts (Consolidation Act, 1858 (21 & 22 Vict., c. xcii), surplus profits were to be applied in extinguishing loans and other E charges, and, on their extinction, the profits were to be applied in reducing the dock rates; and by s. 4 of the 1859 Act (22 Vict., c. xx) the board was empowered to create a sinking fund. It is easy to conceive that the Inland Revenue would rightly claim, for purposes of income tax, that the hypothetical tenant made profits, and that provisions such as those I have cited do not limit the profit earning-capacity so much as prescribe rules for the application of profits when earned. F The same observation applies with even greater force to many of the rules prescribed by s. 21 of the Port of London Act, 1908, as binding upon the appellants.

I am, therefore, constrained, reluctant as I am to question the very great authority of any opinion of LORD BLACKBURN, to hold that, in the judgment which I am now considering, he omitted to observe the distinction between restrictions upon profit-G earning capacity and rules providing for the application of profit when earned, and that, so far as he did so omit, his judgment cannot be upheld. In so holding, I do not mean that his judgment was wholly wrong; there are provisions in the Mersey Acts, and also in the Port of London Act, which have, or may have, the effect of limiting the profit earning capacity of the docks respectively in question. So far as there are such provisions, they come within the fourth of the propositions H to which I have referred, and must be taken into account by the rating authority in fixing the rateable value of such hereditaments. In my opinion, the *Mersey Docks Case* (1) did not preclude the quarter sessions from entering upon an enquiry as to the amount of tenant's profits that a hypothetical tenant would expect to make, or, if it did, it was wrongly decided, and the question put by the quarter sessions I must therefore be answered in the negative. In the result, the case must be remitted to them for further consideration. This appeal must, therefore, in my view, be allowed, the respondents paying to the appellants their costs here and below, and I move your Lordships accordingly.

VISCOUNT HALDANE.—Under its Act of 1908 the Port of London Authority was incorporated for the administration and improvement of that port. The scheme of the Act was that the new authority should carry on the undertakings to be transferred to it from the then existing dock companies, as well as acquire other

undertakings of an ancillary character, and should possess powers of new construction and of management, as well as certain other powers. The undertakings of the existing dock companies (including that of the London and India Docks Co.) were ultimately transferred, under the powers conferred by the Act, to the new authority in consideration of the issue to these companies of stock of the new authority. In every case the new authority had the same power to carry on the undertakings transferred to it, and, in the main, to charge limited rates and dues, which the company, the undertaking of which was so transferred, possessed in respect of vessels entering or leaving its dock. The receipts of the authority were, under s. 21, to be applied in payment, first, of the expenses of working and maintenance; secondly and thirdly, of interest on the various classes of stock thus issued; fourthly, of interest on loans raised otherwise than by the issue of port stock; fifthly, of moneys required for a sinking fund or for redemption of capital liability; sixthly, for payment into a reserve fund prescribed by the Act, and, finally, for such purposes and in such manner for the benefit of the port as the authority should determine. The old dock companies carried on business in order to make profits, and the scheme of the Act of 1908 appears to have been to give their stockholders a surrogatum in the shape of a new stock, which was to take the place of the existing stock, and to return fixed rates of interest in substitution for the shares of profits taken as dividends on their stock by the old stockholders. It is, therefore, to my mind, plain that the new port authority was in this sense made by the Act a concern which had to carry on a profit-earning business, at all events so far as was required in order to earn profits out of which to pay this so-called interest. The new authority was limited, like the old dock companies, as to the amounts it could charge for dues, but it was permitted to retain any surplus left, after defraying these, and the other charges imposed on its revenues under s. 25, and to apply that surplus as it thought proper for the purposes and for the benefit of the port. Under Part 5 of the second schedule to the Act the appropriate portion of the revenue paid over to a dock company by the authority is to be applied, after discharge of any liabilities of the company, which continue under the provisions of the Act, by being distributed among the various stockholders of the company as if it were profits available for distribution as dividend.

The question which has now arisen relates to the principle on which certain hereditaments at Tilbury, which formed a part of the transferred undertakings of the London and India Docks Co. should be rated by the respondents, who are the rating authority. The controversy is whether the appellants, the port authority, are entitled to claim an allowance for tenants' profits from the respondents in arriving at the rateable value of these hereditaments. The statute which governs the power to rate, the Parochial Assessment Act, 1836, prescribes that the basis is to be an estimate of the net annual value of the hereditaments, defined as the rent at which the same might reasonably be expected to be let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent charge, after deducting the probable average annual cost of repairs, insurance, and other expenses necessary to maintain them in a state to command such rent.

I will now, for convenience, state what I think are the fundamental principles ascertained as regulative of the rights of rating authorities, after a good deal of judicial controversy. It is settled that in estimating the amount of rent for which the premises may, for rating purposes, be expected to let, there is to be excluded from that amount the share of the profit from their occupation which the tenant would require for himself as an inducement to become tenant. It is also settled that the premises are not the less rateable merely because the owner is in occupation, and is capable in law and fact neither of himself letting, nor of becoming a tenant. He is none the less on that account to be taken as an "hypothetical tenant" for the purpose of arriving at the annual value. For the premises may have a value for him due to their special suitability for his purpose, and it may be estimated that he would be willing to give more rent for them for this reason than

anyone else would give. Again, it has been laid down that the true test is not whether pecuniary profit can be made out of the occupation, but what is its value to the person concerned, measured, I think, simply by what he would be willing to give in order to obtain it. It has further been made clear that in 1864, the decision of this House in *Jones* v. *Mersey Docks and Harbour Board Trustees* (2) that while property held by the Crown, or by persons occupying it exclusively for the service of the Crown, is not rateable under any statute in which the Crown is not expressly named, the mere fact that the property is in the hands of trustees who occupy it for the maintenance of works declared to be beneficial to the public, and have to apply the profits exclusively for the maintenance of their undertaking, and not for their own benefit, does not exempt it from rateability. If, however, the legislature has prohibited them from making any profit at all, or any profits exceeding a specified amount, then their premises cannot be rated on any hypothesis as to possible profits inconsistent with this prohibition. The occupation is in such a case said to be "sterilised" in relation to any conceivable amount beyond the limit of the prohibition. That was explained in the decision of this House in *Sculcoates Union* v. *Kingston-upon-Hull Dock Co.* (3), which made it clear that this qualification may have to be made when considering the application to hypothetical tenancy of the general principles to which I have referred in the first place, and which were laid down in the judgment of LORD HERSCHELL, L.C., in *L.C.C.* v. *Erith Parish* (*Churchwardens, etc.*) (4).

In the case now under consideration the appellants, the Port of London Authority, were rated by the respondents for poor rate on the basis that £119,240 was their gross estimated rental for the hereditaments in question, and that £64,440 was the rateable value. The appellants appealed to the quarter sessions for the county of Essex, and that body reduced the gross rental value to £106,863, and the rateable value to £52,063. But they stated a Special Case with questions, of which the only one we have to consider is the first: Whether they were right in holding that they were precluded by law from making any allowance for tenants profits in arriving at the rateable value of the hereditaments. They made no such allowance beyond one of interest on tenants' capital, considering that they were precluded from doing so by the decision of the Court of Queen's Bench in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1). The King's Bench Division held on this Special Case that they were bound by that decision, and gave formal judgment upholding the view of quarter sessions. The Court of Appeal were of opinion that the first question raised by the Special Case could not be answered in the affirmative, on the ground that the refusal of an allowance for the tenants' profits depends upon questions of fact to be determined by the rating authority, but they thought that quarter sessions were right in their views that no general allowance for tenants' profit could legally be made in the case under consideration. In effect the Court of Appeal dismissed the appeal. What we have now to decide is whether the view so taken was correct, or whether the case should be remitted to the King's Bench Division to have the first question answered in accordance with a different view to that of the Court of Appeal.

In the courts below the opinion appears to have prevailed that the case of the appellants was covered by the decision in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1). If it were clear that it was so covered I should feel reluctantly bound to review what was laid down by a decision of such authority. But I am by no means sure that the provisions of the Mersey Docks and Harbour Act, 1857 (20 & 21 Vict., c. clxii), which defined the position of the Mersey Docks and Harbour Board, and was construed by the Court of Queen's Bench in that case, in the view taken of them in that case, presents a true analogy to those provisions of the Port of London Act, 1908, with which we are concerned here. In the instance of the Mersey Docks an early statute passed in the reign of George III (51 Geo. 3, c. cxliii) had vested the docks and work on the Liverpool side of the river in the corporation of Liverpool, as trustees of the Liverpool Docks, on trust, out of the

amount of the rates they were empowered to levy, when all charges and mortgages on the rates had been paid off, and provision had been made for cost of management and collection of rates and improvements, repairs, and maintenance of the docks and works vested in the trustees, to lower and reduce the rates and disputes which the statute had empowered the trustees to levy. Other docks having been formed on the Cheshire side of Birkenhead, these also were vested, by the Birkenhead Docks Act, 1955 (18 & 19 Vict., c. clxxi), in the corporation of Liverpool. By a subsequent Act, the Mersey Docks and Harbour Act, 1857, the whole of the debts and property vested in these trustees of the Liverpool Docks was transferred to the Mersey Docks and Harbour Board, to form one estate under a uniform system of management. By s. 56 of this Act it was provided that no moneys receivable by the board should be applied to any purpose except such as conduced to facilitating shipping. There were no shareholders of the board, and no members of the board or other person could derive any personal advantage from the trust. Provision for payment of interest on money borrowed for construction, and provision for the application of any surplus income, were made by the Mersey Docks Acts Consolidation Act, 1858, which prescribed that, after paying the interest on money borrowed, and after providing for the construction of authorised works and their maintenance, and for management, preservation, and improvement of the Mersey Docks Estate, the surplus of the moneys received by the board should be applied in repayment of the principal of the sums borrowed or owing, and the expiration of certain annuities, and when this had been accomplished then in reduction of the rates authorised to be taken, and not for any other purpose. The board claimed an allowance in estimating the rateable value of their property for tenants' profits. The Court of Queen's Bench decided that they were not entitled to this. BLACKBURN, J., in delivering the judgment of the court on the question, pointed out that the revenue that was permitted to be raised was completely appropriated to payment of expenses and charges and other specified purposes of the same kind. If the premises were let it could only be to a tenant bound under the statute to apply what he received, after defraying expenses of collection, to these purposes, and nothing could be made available for tenants' profits, for these were in effect declared to be illegal. I think that the substance of this judgment was that in the view of the court the Mersey Docks, if treated as in the hands of a hypothetical tenant, must be treated as in that case sterilised in his hands as far as possible profit to himself was concerned. The scheme of the Acts to which I have referred bears this out. For even if the docks were improved out of revenue, any pecuniary fruit due to the improvement had to go in reduction of rates and dues. There were no share or stockholders who were to receive part of the revenue earned as an equivalent of their profits from a transferred undertaking, and there was no way in which the docks could be made to have a greater pecuniary annual value for the trustees as distinguished from the ship-owning public. This appears to me to have been the character of the scheme of legislation there, and in the absence of a detailed examination and argument on the details of its provisions, I do not find myself in a position to pronounce that the Court of Queen's Bench took a wrong view of them.

The scheme established by the Port of London Act is materially different from what the scheme was taken to be. In so far as the appellants can increase their revenue (and this is permitted to them within limits prescribed for dues and rates), the surplus so obtained is to go for the benefit of the port in such form as they choose. They may increase the annual value of the property by investing the surplus in this fashion. It, therefore, appears to me that their position is quite different from that attributed to the trustees of the Mersey Docks. For the latter could neither accumulate and invest surplus revenue nor had they stockholders who received interest from them with character of profit. In the view which I take, *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1) does not preclude me from coming to the conclusion that the appellants may be entitled to an allowance for tenants' profit. That case was not inconsistent with the previous

A decision of this House in *Mersey Docks* v. *Jones* (2) in 1864. There all that was held was that the mere circumstance that the trustees derived no benefit from their occupation, inasmuch as the surplus was earmarked for the benefit of the public in the form of the reduction of rates and dues, did not exempt the docks from liability to be rated. The question of an allowance for tenant's profits did not arise, and it was not dealt with until *Mersey Docks and Harbour Board* v. *Liverpool* B *Overseers* (1) was subsequently decided in 1873. In the case before us I think that the appellants may, on principles which are now well settled, be entitled to such an allowance. I am, therefore, of opinion that the Court of Appeal were wrong in coming to a different conclusion, and that the case should be remitted to the King's Bench Division to answer the first question raised by the Special Case in the negative as held by the courts below, but with the very important declara- C tion added, that the provisions of the Port of London Act, 1908, do not in law preclude the appellants from making a claim to an allowance for tenants' profits going beyond interest on capital employed, if on the facts they can establish such a claim.

LORD DUNEDIN.—LORD HALSBURY in *Mersey Docks and Harbour Board* v. D *Birkenhead Assessment Committee* (5) pointed out that much of the difficulty in rating cases had arisen from the advisory character of the judgments pronounced by the various courts of review, forgetting that the question to be determined was in its inception a question of fact for the assessing body, and that the province of the courts lay only in correcting errors of law. I had occasion myself, in the subsequent case of *Great Central Rail. Co.* v. *Banbury Union* (6) to point out E that the dictum—simple in itself—became sometimes a hard saying when you had to follow it. No one doubts its soundness, yet what it comes to is this. The question of what an assessing body ought to do in a particular case cannot be laid down without trenching on a question of fact. But if an assessing body, having considered the case, bases its valuation on the view either that it must do or that it must not do a certain thing in arriving at that valuation, that is a question F of law and the courts of review may say whether the assessing body was right or wrong. And it is not in every case easy to draw a sharp line which relegates to its own compartment each of these three propositions.

I regret to think that the judgment in this case of the Court of Appeal cannot stand as it is. It is not upheld either by the appellants, as is natural, who lose by it, or by the respondent, who wins under it. This is not conclusive, though it G engenders uncomfortable feelings. But it cannot stand, in my view, for two cogent reasons. In the first place, it answers the first question in the negative, and if that is so settled the necessary corollary is to remit the case, whereas the order does no such thing but affirms the finding of the quarter sessions. In the second place it grievously, I think, misinterprets the attitude and argument of the appellants. The learned lord justice who delivered the leading judgment says:

H

> "The appellants are contending that the assessment committee are, as a matter of law, bound to deduct a full tenant's profit from the dock receipts before arriving at the rateable value."

That such an argument was raised before quarter sessions may be true and the statements in the stated Case suggest it. But it was not pleaded before your I Lordsips' House, and when counsel for the appellants assures us that he used the same argument in the Court of Appeal as he has used before us, I confess I accept the statement.

I, therefore, address myself directly to the question put in the Special Case which states:

> "The quarter sessions in giving judgment on the said appeal fixed the gross estimated rental of the port authority's undertakings in the parish of Chadwell St. Mary at £100,863 and the rateable value thereof at £52,063, and stated

that in arriving at this decision the court had acted upon the decision in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1), and it had in consequence made no allowance for tenants' profits beyond allowing interest on the capital employed. . . ."

The natural sequence to that statement is question (i) which is as follows:

"Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant's profits?"

That raises, in my humble judgment, the question sharply and decisively: Was the judgment in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1) right or wrong? I confess I see no way of practical utility to distinguish that case from this. In my view, that case has never been treated in text books, as it was treated by quarter sessions here, as laying down a general principle irrespective of the particular circumstances of the case. That was a decision only of the Queen's Bench before the Judicature Act. It is, therefore, not a judgment of a Court of Appeal, such as a judgment in Exchequer Chamber would have been, and, in any case, is not binding on the House. On the other hand, it is a judgment of a judge of very high authority, and it was pronounced more than forty years ago. But again there have been many judgments in this House on the general subject since then which touch, if they do not decide, the question.

What is the inquiry which the commissioners and quarter sessions are engaged on? It is to find the net annual value of the hereditament in question. That is to say; and here I quote textually from the statute: "of the rent at which the same might reasonably be expected to let from year to year" subject to certain deductions which I need not recite, or, in other words, which have been often adopted when seeking to answer the question: What would the hypothetical tenant give for the subject? If the subject is an ordinary one, similar in character to other subjects which have stood the test of the markets, or better still, if it has stood the test of the market itself without disturbing circumstances, the enquiry is simple. But when the nature and the circumstances of the hereditament in question do not admit of such a test, some other way must be found. There are several ways of attacking the problem. One way is to consider what the hypothetical tenant could make out of the hereditament, not in order to rate that profit, but in order to find out what he was likely to give in order to have the opportunity of making that profit. Another way is to see what it would cost an owner to produce the hereditament in its present form, and then to see what a tenant, who had not himself the money to be an owner, would give the owner yearly, it being assumed that the sum must bear some relation at ordinary rates of interest to what has been spent. No question of law is necessarily involved in either of these methods. Should an assessing authority so state its method of procedure, then, as Lord Halsbury said in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (5):

"What abstract proposition of law can be laid down to say that the recorder [the assessing authority in that case] was wrong?"

The method of looking at the profits which are earned, in order to see what the hypothetical tenant would give, has been often employed when the ordinary market test was unavailable and in particular it has often been employed in the case of docks. Assuming that these docks were in private hands, no one has said that it would not be at once an ordinary and a proper mode of procedure to calculate this: first find the gross receipts as based on experience, then deduct the expenses of getting these receipts, the statutory deductions in the Poor Law Assessment Act, a sum for interest on tenant's capital, and a further sum to represent the tenant's profits. This would be what might have been, and probably would have been, done had the docks here remained with the former private owners. It would appear from the statements in the Special Case, and the statements of parties that that is

A precisely the method which the quarter sessions adopted here, with this material exception, that they have made no deduction in respect of tenant's profits, because they thought they were precluded from doing so as a matter of law by reason of the decision in *Mersey Docks & Harbour Board* v. *Liverpool Overseers* (1). Accordingly, they put the question directly: Were they right in so thinking?

B The first observation that occurs is that it is a very curious result that because a hereditament is transferred from private ownership to the ownership of a public authority, the old shareholders, no longer getting dividend, but instead of that a fixed sum payable on stock issued by the authority, the rateable value of the hereditament which, so far as productiveness is concerned, remains unchanged, should suddenly be raised. This remark was made in this House in *Jones* v. *Mersey Docks and Harbour Board Trustees* (2), by BLACKBURN, J., himself, reading the C opinion of the majority of the consulted judges (11 H.L. Cas. at p. 479). It is true that there the question was whether there was rateability at all, but if appropriate to that there is no reason, so far as I can see, why it is not equally appropriate to the amount of rateability which, after *Jones* v. *Mersey Docks* (2) ex hypothesi exists, though that was not settled at the date of the *Mersey Docks & Harbour Board* v. *Liverpool Overseers* (1). I now turn to the reasons given by BLACKBURN, J., in D *Mersey Docks & Harbour Board* v. *Liverpool Overseers* (1) (L.R. 9 Q.B. at p. 97).

> "In the present case the value of the occupation depends entirely on the collection of the rates. Section 284 of the Mersey Docks Act requires that all the rates shall be appropriated in payment of all expenses and charges of collecting the rates and several other purposes therein specified. If the premises were let to E a tenant, it must be to a tenant, subject to this Act, appointed to hand over the rates received after deducting the expenses and charges of collecting the rates to those purposes, and the persons paying the dock rates would have a right to object to any part of them being applied to pay tenant's profits except in so far as an allowance for that might be included in the expenses and charges of collecting the rates. But the expenses and charges of collecting the rates actually F incurred by the Mersey Docks Board, who are occupiers, are allowed for and deducted, and the contention for the board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary to the provisions of the Mersey Docks Act, levy in dock rates a sum in addition to all the actual expenses of collection for his own benefit."

G He then cites the case of a tithe rentcharge and quotes a saying of CROMPTON, J.:

> "It is difficult to see in such a case why a man might not take the tenancy on the same terms, or nearly so, as the collection."

It is a daring thing to accuse LORD BLACKBURN of confusion of thought, yet I suppose quandoque bonus dormitat Homerus is as true of lawyers as of poets, and I cannot help feeling that there is a confusion here arising, as counsel for the appel- H lants justly pointed out, from the varying sense of the word profit. If you take the sum which an undertaking will bring in and deduct what it costs to run it, and find a balance, that is, if you like to call it so, a profit. I think the better word would be earning capacity. But call it what you like there it is. What becomes of it afterwards is another matter. This learned judge says that any one who took the docks I must take them under the Act of Parliament, and would be precluded from applying the money to pay tenant's profits. Here profits is being used in another sense. I am not quite satisfied even with the initial statement. Suppose the assessing body had said: If a private person had these docks without rating powers, and then said to the public: "Come and use them and I will charge you so much if you come," and there was every reason to suppose that the public could pay his charges, and the assessing body had then calculated, on that assumption, what the hypothetical tenant would offer as rent for the ability to do the same, I do not think that that assessing body would have transgressed any legal principle. But I agree that if in

calculating receipts you take the produce of rates which can only be levied under the Act, then you must suppose the tenant to be under the Act. None the less, if you wished to find out what would be actually offered, why should it be wrong to say he would not offer the whole amount of the return? It is here that CROMPTON, J., in his judgment as to the rent charge seems to me to save himself by the words: "or nearly so." If it were not for those words I would think that he was mixing up investment with tenancy. A man will pay such and such a capital sum to acquire tithe rent-charge, and the way he will get at it will be to say the tithe charge is so much, and to get it I have to pay the expenses of collection, and then I will calculate so many years' purchase, or what is the same thing on the basis of a certain interest for my money, and arrive at what I will give. But whoever heard of a man giving £100 a year to get £100 a year? So that really the plan of calculating on the difference between receipts and expenditure breaks down unless you go on to consider what a tenant would probably in the circumstances give, or, if you so like to put it, what margin would he allow himself for contingencies. The same class of confusion is, I think, to be found in the application sought to be made by the respondents' counsel of the *London School Board* (7) and the *Sewer Cases* (4). What the *London School Board* (7) and the *Erith Case* (4) really settled was summarised by myself in the *Banbury Case* (6) where I said:

> "They seem to me to fix conclusively that rateable value is not destroyed either because (1) there is no profit de facto derived from the land, or (2) the occupants were disabled from making profit, (3) there is no one in the world, except the actual occupant, who, if the land as occupied were given up, would have any possible use for it."

But, as to the matter now in hand, be it remembered that in these cases there was no possible inquiry open on the line of receipts and payments. I mean exhaustive inquiry, for I have not forgotten that in the last case on sewers in this House the sewers were partially a source of profit from payments made by others to allow their sewage to be put into them. I think the confusion was exposed and got rid of by LORD HERSCHELL in the *Erith Case* (4). He speaks of the expression "struck" by sterility," and he says ([1893] A.C. at p. 591):

> "Now if land is struck with sterility in any and everybody's hands, whether by law or by its inherent condition, so that its occupation is, and would be, of no avail to anyone, I should quite agree that it cannot be rated to the relief of the poor, but I must demur to the view that the question whether profit, by which I understand is meant pecuniary profit, can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable."

This seems to me to be the key of the whole matter. Sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects the value—the latter does not. The same thing is practically said by LORD DAVEY in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (5) ([1901] A.C. at p. 185):

> "I conceive that in principle and impliedly (as I think has been held in subsequent cases which have come before the courts) what was really decided was that, notwithstanding the restrictions upon the application of the profits resulting from carrying on that business on the hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation which was to be the subject of rating."

After saying that he really derives this view from *Jones* v. *Mersey Docks* (2), he says (ibid. at p. 186):

> "In other words, it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings."

All this seems to me directly contrary to what BLACKBURN, J., said in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1). It is not for me to say what calculation the assessing body ought to make, but seeing the question they have to answer is: What would the hypothetical tenant give? I say unhesitatingly that, in my view there is no rule of law which prevents them performing the operation described as deducting tenant's profits. I am, therefore, of opinion that the question should be answered in the negative and the case remitted to quarter sessions.

LORD BUCKMASTER.—The Port of London Authority is a body corporate established by the Port of London Act, 1908, to administer, preserve, and improve the Port of London. To effect this purpose the undertakings of certain existing dock companies were, by the statute, transferred to the new body in exchange for the issue of certain classes of port stocks in certain proportions. The statute also fixed the method for distribution of the receipts, and provided in due order for the payment of (a) the expenses of working, (b) interest on the different stocks that were issued and on any loan raised, (c) for payment of the sum required by the statute for a sinking or redemption fund, (d) for the creation of a reserve, and directed that the ultimate balance should be made applicable for the benefit of the port. Part of the undertakings so acquired by the port authorities consisted of the Tilbury Docks; and the question that arises for determination is in respect of the rating of this hereditament.

The difficulty is familiar. It is due to the fact that, under the Parochial Assessments Act, 1836, s. 1, by which the value for rating is fixed, it is essential to apply the test of a yearly letting and taking between landlord and tenant for the purpose of determining what should be the net annual value on which the rates are levied. This policy is simple and capable of ready application in respect of property like that usually dealt with by means of leases or other tenancy agreement; but it becomes extremely difficult of application when used as a standard of value to property which, in the commercial sense, would never find a tenant at all. These difficulties have been avoided, even if they have not been overcome, by the process of beginning with the gross receipts of the undertaking, and then, after making all the necessary deductions, ascertaining a balance, part of which is attributable to tenants' profits, and the rest is assumed to be rent. This course was pursued in the present instance, but the deduction which the Port of London sought to make for tenant' profits was disallowed by the court of quarter sessions, who stated that, in fixing the rateable value, they had acted in accordance with a decision of long standing known as the *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1), which, in their view prevented any such deduction being made. A Special Case was, accordingly, stated in which the question upon which the opinion of the court was (so far as the matter now relevant is concerned) "whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant's profits."

It is important to observe that the real question at issue is not the extent to which the deduction for tenant's profits should proceed, nor whether, in fixing the rateable value, all the circumstances associated with the character and limitation of the undertaking should be borne in mind. The question asked was the exact question: "Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant's profits." The Divisional Court, doubtless acting on what they believed to be the effect of the authority of the *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1), without investigation affirmed the court of quarter sessions and the Court of Appeal approves and applies this decision. It seems difficult, however, to believe that that was what the Court of Appeal really meant, for BANKES, L.J., in giving judgment, says that the answer to the first question submitted to the court must be in the negative, and continues:

> "There is, in my opinion, no reason why the court of quarter sessions should eliminate altogether from their consideration the question of tenant's profits."

WARRINGTON, L.J., stated his view that the real question was not whether the quarter sessions were precluded from making or having to make the allowance, but whether they were entitled to make or refuse it as one of fact to be decided by consideration of all the material circumstances. But this is not what the court of quarter sessions said. They considered themselves bound by law to refuse the consideration of the items, and they did not leave themselves open to consider whether in the words of WARRINGTON, L.J.:

> "They were entitled either to decline to make or to make the allowance according as on the facts they found themselves justified in adopting the one course or the other."

DUKE, L.J., took the same view. With the statement quoted from BANKES, L.J., I am in entire agreement. The question is essentially a question of fact, and in its determination the character of the undertaking, and in particular its statutory restrictions, are matters to be brought into account. The decision of the court of quarter sessions, however, acting in what they regarded as the true meaning of the decision in L.R. 9 Q.B., say that, as no profits can be earned for the benefit of the parties exercising the statutory jurisdiction, all tenant's profits should be eliminated. With this I disagree. The conclusion would indeed, lead to a strange and bewildering result. Before the acquisition and collection under one head of the property of the various docks, profits were earned by the different companies and paid to their respective shareholders and others interested in the various concerns. In ascertaining for rating purposes the then rateable value of these properties taken separately, it could not be disputed that deduction in respect of tenant's profits was rightly and properly made. The revenues now received are applied in payment of the exact equivalent of these profits to the several original owners and their successors, according to their several interests in the stock issued to acquire the profits. The result of the respondents' argument would, consequently, be that this simple operation which could, on no hypothesis have improved the rateable value of the property, had none the less resulted for purposes of rating in a very considerable increase of such value. It is quite true that the hypothetical tenant of such an undertaking as the present must, on the hypothesis, be a tenant who is subject to the restrictions which have been imposed on the carrying on of the undertaking by the legislature. This may materially affect the rateable value of the hereditament by reason of the fact that such restrictions may impose a limit upon its profit-earning capacity. But the method of application of such profits, however closely defined and regulated they may be, does not mean that they cannot be earned, and, consequently, that they may not be brought into consideration in determining the rateable value.

I turn now to consider how far the authorities affect the position. The earliest that is relevant to this case is *Mersey Docks* v. *Jones* (2). The statement of LORD BLACKBURN in that case is very material. He said (11 H.L. Cas. at p. 448):

> "Where there is an actual demise of property the tenant . . . is rateable without any regard to the purpose to which the rent is applied. A company forming a dock under an Act of Parliament, which incorporates these Acts, [The Companies Clauses Acts and the Harbour Docks, and the Piers Clauses Act, 1847] is bound to maintain the docks and to allow the public to use these and to receive rates, and it is common to have a maximum limit put on the rate of dividend. It is indisputable that a company thus occupying a dock is one occupier and rateable as such. Now if, without in any way altering the mode in which the docks are engaged by the public or altering the rates leviable or changing the harbour master and others who manage it, we change the name of the body from that of the company to the board, and if instead of the company paying to the shareholders a maximum dividend on their capital, the board must pay the same identical sums but, call them interest on bonds, what difference does it make?"

A The next case is just that which has given rise to the present difficulties, the *Mersey Dock and Harbour Board* v. *Liverpool Overseers* (1). It is not easy from the report to be satisfied of all the circumstances and conditions attaching to the Mersey Docks. But it is clear from the argument that the point that is now under discussion was raised by counsel, who quoted in support of his contention the *R.* v. *Southampton Dock Co.* (8), and it was in answer to that contention that Blackburn, J., B suggested the analogy of a lease of tithes, and the learned judges ultimately decided in plain terms that the board was not entitled to a reduction for tenant's profits. In the judgment of the court a distinction that is obvious and sound in principle is drawn between the rateable value of premises and the actual profits that are made upon them, and they point out that profits are only material so far as they afford evidence of what may reasonably be expected to be made from the occupation. C Reference is then made to the section of the Act that requires that all rates should be appropriated in payment of all expenses and charges made in collecting the same, and it then continues in these words :

> "But the expenses and charges of collecting the rates actually incurred by the Mersey Dock Board, who are occupiers, are allowed for and deducted, and the D contention for the board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary to the Provisions of the Mersey Dock Act, levy in dock rates a sum in addition to all the actual expenses of collection for his own benefit."

I understand this as meaning that in the case then under decision the gross sums received did not include sums that could be used in payment of interest on bonds or E securities representing the equivalent of ownership, and, if this were so, the decision might be correct, but it would have no application to the present case. If the original port revenue cannot on the proper hypothesis include any sums which are the equivalent of tenants' profits, then obviously no deduction ought to be made under that head. This may have been the fact in that case, and it is, therefore, quite possible that the statement may be supported by the special circumstances to F which it refers but if it was intended to lay down a general principle applicable in circumstances like the present, it is not, in my opinion, in accordance with the law.

Sculcoates Union v. *Kingston-upon-Hull Dock Co.* (3) is an easier case to understand. Railway and tramway lines formed part of a dock system, but the dock companies were prohibited from taking any tolls for their use. It was held that if tolls could be exacted a tenant could be found. It was decided by your Lordships' G House, reversing the judgment of the Court of Appeal, that the statutory restrictions must be considered in this connection, and the rents that would have been earned but for these restrictions, ought not to be regarded. In other words, that decision emphasised and made clear a principle that must always be applicable to such cases. The actual hereditament of which the hypothetical rent is to be determined must be the particular hereditament as it stands with all its privileges, opportunities, and dis- H abilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament. The character and extent of the various deductions from the gross revenue must be fixed in relation to these conditions. This has not been done in the present case, and, in my opinion, therefore, the appeal should be allowed.

Appeal allowed.

Solicitors : *E. F. Turner & Sons; Kingsford, Dorman & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

BRITISH AND FOREIGN INSURANCE CO., LTD. *v.* WILSON SHIPPING CO., LTD.

[House of Lords (Lord Birkenhead, L.C., Viscount Finlay, Lord Shaw, Lord Moulton and Lord Sumner), July 2, 5, 30, 1920]

[Reported [1921] 1 A.C. 188; 89 L.J.K.B. 981; 123 L.T. 756; 36 T.L.R. 890; 65 Sol. Jo. 25; 15 Asp. M.L.C. 114; 26 Com. Cas. 13]

Insurance—Marine insurance—Successive losses—Liability of insurer—Ship insured against marine risks—Damage from marine risks—Damage not repaired—Loss of ship by war risk.

When a vessel insured against perils of the sea is damaged by one of the risks covered by the policy, and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy (e.g., a war risk), the insurer is not liable for the unrepaired damage.

Livie v. *Janson* (1) (1810), 12 East. 648, approved.

Decision of Court of Appeal, [1920] 2 K.B. 25, reversed.

Notes. Referred to: *Pesquerias Secaderos de Espana S.A.* v. *Beer* (1947), 175 L.T. 495.

As to the liability of an insurer for successive losses see 22 Halsbury's Laws (3rd Edn.) 140, and for cases see 29 Digest 250, 251. For Marine Insurance Act, 1906, see 13 Halsbury's Statutes (2nd Edn.) 14.

Cases referred to:

(1) *Livie* v. *Janson* (1810), 12 East, 648; 104 E.R. 253; 29 Digest 250, *2024*.
(2) *Stewart* v. *Steele* (1842), 5 Scott, N.R. 927; 11 L.J.C.P. 155; 29 Digest 249, *2011*.
(3) *Knight* v. *Faith* (1850), 15 Q.B. 649; 19 L.J.Q.B. 509; 15 L.T.O.S. 277; 14 Jur. 1114; 117 E.R. 605; 29 Digest 126, *790*.
(4) *Lidgett* v. *Secretan* (1871), L.R. 6 C.P. 616; 40 L.J.C.P. 257; 24 L.T. 942; 19 W.R. 1088; 1 Asp. M.L.C. 95; 29 Digest 251, *2033*.
(5) *Pitman* v. *Universal Marine Insurance Co.* (1882), 9 Q.B.D. 192; 51 L.J.Q.B. 561; 45 L.T. 46; 46 L.T. 863; 30 W.R. 906; 4 Asp. M.L.C. 444, 544, C.A.; 29 Digest 249, *2013*.
(6) *Potter* v. *Campbell*, *Wingate* v. *James* (1867), 2 L.J.N.C. 223; 17 L.T. 474, n.; 16 W.R. 399, 401; 3 Mar. L.C. 29, n.; 29 Digest 285, *2325*.

Also referred to in argument:

Stewart v. *Merchants Marine Insurance Co.* (1885), 16 Q.B.D. 619; 55 L.J.Q.B. 81; 53 L.T. 892; 34 W.R. 208; 2 T.L.R. 156; 5 Asp. M.L.C. 506, C.A.; 29 Digest 245, *1977*.

The Dora Forster, [1900] P. 241; 69 L.J.P. 85; 49 W.R. 271; 16 T.L.R. 380; 29 Digest 250, *2031*.

Woodside v. *Globe Marine Insurance Co.*, [1896] 1 Q.B. 105; 65 L.J.Q.B. 117; 73 L.T. 626; 44 W.R. 187; 12 T.L.R. 97; 40 Sol. Jo. 115; 8 Asp. M.L.C. 118; 1 Com. Cas. 237; 29 Digest 246, *1985*.

Appeal by insurers under a marine policy from an order of the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), reported [1920] 2 K.B. 25, reversing a judgment of Bailhache, J., in favour of the present appellants.

The dispute arose on a policy of marine insurance subscribed for by the appellants on the respondents' steamship *Eastlands*, and the question for determination was whether the appellants were liable under the policy in respect of damage suffered by the ship, which had not been repaired at the time of her total loss during the currency of the policy, but from a risk not covered by the policy, or whether there was a merger of the partial loss in the total loss. Bailhache, J., on the authority of *Livie* v. *Janson* (1) gave judgment for the appellants, but his judgment was

A reversed by the Court of Appeal (BANKES, WARRINGTON and SCRUTTON, L.JJ.), and judgment was entered for the respondents for the sum claimed.

The facts appear in their Lordships' opinions.

MacKinnon, K.C., and *Claughton Scott* for the appellants.
R. A. Wright, K.C., and *Jowitt* for the respondents.

B The House took time for consideration.

July 30. The following opinions were read.

LORD BIRKENHEAD, L.C.—This is an appeal from an order of the Court of Appeal reversing a judgment of BAILHACHE, J., in an action brought by the respondents against the appellants for a loss under a policy of insurance. The respondents were the owners of the steamship *Eastlands*, which was insured against marine risks under a time policy for the period from Feb. 20, 1917, to Feb. 20, 1918. The appellants were among the subscribers to that policy. There was no policy covering war risks, but during the whole of the currency of the marine insurance policy the vessel was chartered to the Admiralty under the form of charter known as T.99, whereby, among other obligations, the Admiralty assumed all responsibility for war risks, and agreed, in the event of a total loss from such risks, to pay to the respondents the ascertained value of the vessel at the time of such loss. On three several occasions, namely, on Sept. 16 and 19 and Oct. 29, 1917, the ship sustained damage from marine risks. On Dec. 17, 1917, she was dry docked and surveyed at Cardiff, when temporary repairs were effected to make her seaworthy, but permanent repairs, estimated to cost £1,770, were postponed, and, in fact, were never executed for on Jan. 25, 1918, the vessel was torpedoed by an enemy submarine and became a total loss. The respondents have received from the Admiralty a sum of money which was calculated by deducting from the agreed "sound" value the sum of £1,770, which is the estimated cost of the repairs which were never executed. There is no dispute as to the appellants' liability for the cost of the temporary repairs. They have paid their proportion, but as to their share of the estimated cost of the unexecuted repairs, they dispute liability on the ground that they are not bound to pay for damage which, before it was repaired, was followed during the currency of the policy by a total loss.

The question which requires decision is whether under a policy of marine insurance the assured can recover in respect of damage sustained by the ship insured during the currency of the policy when the ship is totally lost before the damage is in fact repaired. It is evident that two aspects of this question may arise: (i) Where the total loss is caused by a peril insured against by the policy in question; (ii) where the total loss is not covered by that policy. The first case, as to which no question is raised on this appeal, is governed by s. 77 (2) of the Marine Insurance Act, 1906. The second case, which requires decision, is not dealt with by the Act. Some attempt was made to found argument upon this omission, but no inference can properly be drawn from it either way. It is necessary to examine the law as established by the existing authorities, in conformity with the provision contained in s. 91 (2) of the Act that

> "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

The earliest case which requires consideration is *Livie* v. *Janson* (1), which was decided by LORD ELLENBOROUGH in 1810. The action was brought upon a policy of insurance upon the ship *Liberty*, the insurance being declared "to be on ship and cargo warranted free from American condemnation." During the currency of the insurance the ship was damaged by ice driving the ship ashore. The master and crew endeavoured without success to get the ship off, and the next morning

she was discovered and seized by the American authorities. LORD ELLENBOROUGH stated the issue in these terms (12 East, at p. 653):

> "The ship and goods were damaged by perils of the sea and were afterwards seized by the American government and condemned; and the question is whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect of the previous partial loss by sea damage?"

He states his conclusion (ibid. at p. 654):

> "We may lay it down as a rule that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is indemnity to the assured, and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged?"

In whatever form the principle upon which this decision is based should be stated, the decision itself is clearly right. If not, the assured, whose vessel becomes a total loss during a voyage in the course of which she meets a succession of gales, each of which causes damage, would, in a case to which s. 77 (2) of the Act of 1906 does not apply, be in a position to claim under his policies for each of these losses in succession, although none of them is or could be repaired, and he could at the same time recover the value of the ship as a total loss if she is wrecked during the currency of the policies. Such a result would, of course, be contrary to the principles upon which marine insurance has always been conducted. The owner would not, in such a case, merely be indemnified against loss, but he would also receive a profit.

Stewart v. *Steele* (2) was a case in which *Livie* v. *Janson* (1) was cited and discussed both during the argument and in the judgments. MAULE, J., in the course of his judgment, stated the fundamental principle (5 Scott, N.R. at p. 949):

> "That the proper time to estimate the loss, where the party is put to no expense, is at the expiration of the risk."

This principle underlies the decision of LORD ELLENBOROUGH, for, as MAULE, J., in an earlier passage says (ibid.):

> "It is said that the plaintiff had a vested right of action at the moment of the happening of the loss which nothing could afterwards divest. That, I apprehend, is quite contrary to the doctrine laid down by LORD ELLENBOROUGH in *Livie* v. *Janson* (1)."

The learned judge was of opinion that, inasmuch as the time for assessing unrepaired damage is at the expiration of the risk, if the vessel is totally lost before the risk expires there is nothing upon which such assessment can be made. *Knight* v. *Faith* (3) contains a comment by LORD CAMPBELL, C.J., upon *Livie* v. *Janson* (1), and the other judges of the court were parties to this comment. He remarked (15 Q.B. at p. 668):

> "The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired; and if a total loss occurs from which they are exempt they are not liable for any prior partial loss which, in that event, does not prove prejudicial to the assured,"

and he pointed out that in *Livie* v. *Janson* (1) the risk which caused the total loss was expressly excepted from the policy.

Such was the state of the authorities at the date when the last edition which was prepared by the author, of ARNOULD'S LAW OF MARINE INSURANCE, was published

A in 1857. In that work the late MR. ARNOULD stated the law in the following terms ((2nd Edn.) vol. 2, pp. 1003, 1004):

> "If a ship has been actually repaired in a port of distress, and be afterwards totally lost before arriving at her port of destination, the cost of such repairs may be recovered cumulatively in addition to the total loss, either quâ average or as money laid out and expended in labouring for the safeguard and recovery of the ship under the general printed clause in the policy; but this rule only applies to repairs actually made; hence, where a ship was put back twice in distress, and on the first occasion was actually re-coppered, but on the second occasion was only surveyed but not repaired, and in the course of the survey some of her wales, &c., were necessarily removed in order to examine her timbers, and never repaired but sold, with the rest of the ship, as wreck, it was held that the cost of the re-coppering might be recovered in addition to a total loss, but not the estimated cost of replacing the wales; where no repairs have been made, no previous partial loss by sea damage can be recovered from the underwriters as a particular average, in addition to a subsequent total loss, but where a previous partial loss, though unrepaired, is followed by a sale of ship, which, not being justifiable, does not transfer the property, nor operate a total loss, such partial loss may be recovered."

It is clear from the footnotes that the learned author did not forget that the subsequent total loss might be from a risk excepted from the policy, and that he did not consider that this circumstance affected the liability of the underwriters for unrepaired partial damage. In other words, if, after partial damage has been sustained and before it is repaired, the ship is totally lost during the currency of the policy, then, in his opinion, the underwriter is under no liability for such partial damage, whether he has to pay a total loss or not.

The next case of importance is *Lidgett* v. *Secretan* (4), decided by WILLES, J. In that case, while a ship which had suffered partial damage was being repaired, the policy expired and shortly afterwards, before the repairs could be completed, she was totally destroyed by fire. During the argument the learned judge remarked that the reason for applying the doctrine of merger

> "where the partial loss and the total loss occur during the continuance is obvious; the parties never intended that the insurers should be liable for more than a total loss in any event. But the same reason does not apply where the partial loss takes place during the period covered by one policy and the total loss whilst the ship is insured for a different voyage and under another policy."

In his judgment (L.R. 6 C.P. at p. 625) he reverts to this topic and comments on *Livie* v. *Janson* (1):

> "There is another case—viz., where after the vessel has sustained damage but has not been repaired, and has subsequently and during the currency of the policy been totally lost by a peril excepted out of the policy and in respect of which the assured was his own insurer. Such was the case of *Livie* v. *Janson* (1)."

Counsel for the respondents admitted that, if this passage were good law, the respondents must fail, but he contended that the dictum was wrong. LINDLEY, J., in *Pitman* v. *Universal Marine Insurance Co.* (5) made a pronouncement to the same effect as that of WILLES, J., and counsel for the respondents also admitted that, if this opinion was in law well founded, the respondents in this case are wrong. *Pitman's Case* (5) turned upon the question: What is the true principle upon which an unrepaired loss is to be estimated? In the course of his judgment LINDLEY, J., remarked:

> "Against what do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured

against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained. If, in such case, the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against the assured can only claim for a total loss: he cannot claim both."

The judgment of LINDLEY, J., was upheld by the Court of Appeal, with a variation which is not relevant to this part of his judgment.

The authorities establish the existence of a rule whereby underwriters are not liable for unrepaired damage if there is a total loss before the expiration of the policy. As stated by LORD ELLENBOROUGH in *Livie* v. *Janson* (1), and by the Court of Queens Bench in *Knight* v. *Faith* (3), the rule might appear to be limited to the case where "the previous deterioration became ultimately a matter of perfect indifference to the insurer's interests." BAILHACHE, J. (adhering to the view expressed by WILLES, J., and LINDLEY, J., in the cases cited), came to the conclusion that there was no such limitation. The Court of Appeal, on the other hand, having regard to the statement of the rule by LORD ELLENBOROUGH and LORD CAMPBELL, were of opinion that the condition was an integral part of the rule, and, therefore, that the present case was on the facts distinguishable from *Livie* v. *Janson* (1). If LORD ELLENBOROUGH'S words are taken to mean that the circumstance more than once insisted on is a condition to the application of the rule, the Court of Appeal may well have been right in the distinction which they drew. I have, however, come to the conclusion that no such condition ought to be admitted. LORD ELLENBOROUGH was dealing with unusual facts, and his judgment must be construed in relation to those facts, but the rule ought not to be limited in the manner suggested. I adopt the reasoning of BAILHACHE, J., in the following passage from his judgment:

"Whether an underwriter is or is not liable for unrepaired damage cannot be ascertained until the expiration of the policy. If before the expiration of the policy there is a total loss, he is not liable to pay for the earlier unrepaired damage sustained during the currency of the same policy, and it makes no difference whether the total loss falls upon him or is due to an excepted peril against which the owner is insured or uninsured. The true doctrine is that the smaller merges in the larger, and the rule is not limited to the ground upon which it was based by LORD ELLENBOROUGH, namely, that there was no continuing prejudice. The question in every case must be: Did the total loss happen before the underwriter's liability for the unrepaired damage accrued? If yes, he is not liable; if no, he is liable. It would be strange if an underwriter's liability should vary with the terms of some contract not needing to be disclosed to him which the owner has made with some stranger to the contract of insurance."

It is beyond doubt that if the respondents had been their own insurers they could not have recovered. Their argument in effect is that by an independent contract of their own which confers on them a right of indemnity they have been enabled to increase the burden on the insurers, and this by reason of the circumstance that, as it has been applied, they have not obtained a complete indemnity. As to the amount which the Admiralty deducted from the "sound" value the respondents were their own insurers, and their loss is due, therefore, not to a peril insured against, but to their failure to obtain complete indemnity under the terms of their charterparty. Such a cause is no concern of the underwriters and cannot, in my judgment, be treated as a material fact in determining their liability. The true rule is capable of statement in the following proposition. When a vessel insured

against perils of the sea is damaged by one of the risks covered by the policy, and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, then the insurer is not liable for such unrepaired damage. The rule so stated embodies the principle upon which underwriters and merchants have based their practice in such matters for upwards of a century, and, even if this House were of opinion that the rule did not correctly state the law, it would be a matter for grave consideration whether such a rule, which has been observed for so long, which has been expressly or impliedly incorporated in so many contracts, and which has profoundly influenced the course of dealing between merchants, should be reversed at this period of its history. In my opinion, this question does not arise. For the above reasons I am of opinion that the judgment of the Court of Appeal should be reversed and that of Bailhache, J., be restored, and I move your Lordships accordingly.

VISCOUNT FINLAY.—The respondents were the owners of the steamship *Eastlands*. That vessel was chartered to the Admiralty under the form of charter known as T. 99, under which the Admiralty are not liable for any sea risks, but undertake risks of war "on the ascertained value of the steamer if she be totally lost at the time of such loss or, if she be injured, on the ascertained value of such injury." The respondents insured the steamer against sea risks in the value of £62,000 under a time policy subscribed by the appellants covering the period from Feb. 20, 1917, to Feb. 20, 1918.

[His Lordship stated the further facts and continued:] The liability of the insurer in the case of total loss in any ordinary insurance is for the value of the vessel at the commencement of the risk. If the indemnity given by the Admiralty against war risks had been in that form no claim for the partial loss would have arisen, as the payment for the total loss would have been on the sound value of the ship at the commencement of the risk. The question in the case is whether the shipowners are entitled for this purpose to rely on the fact that by reason of their special bargain with the Admiralty there fell to be deducted from the value of the vessel the sum of £1,770 in respect of the unrepaired damage as taking them out of the rule in *Livie* v. *Jansen* (1). In that case the insurance was on ship and cargo from New York to London, warranted "free from American condemnation," these last words having reference to an embargo that had been imposed by the United States government. The vessel, in leaving New York, was driven by floating ice upon the rocks and seriously damaged. She was seized by the officers of the American Customs House, and the ship and cargo were condemned for breach of the embargo. The policy covered the deterioration in the vessel and cargo due to the sea damage, while in respect of the total loss by seizure and condemnation the owner was his own insurer. Lord Ellenborough held that the underwriter could not be made liable for the sea damage. He said:

> "Considering the deterioration of the ship and cargo then as the extent of what is referable to sea damage, we think we may lay down as a rule that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interest, he cannot make it the ground of a claim upon the underwriters. . . . If the property, whether damaged or undamaged, would have been equally taken away from him and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged?"

If the damage resulting from the sea perils had been repaired the amount disbursed for that purpose would have been recoverable on the policy in spite of the subsequent loss. But if the repairs have not been executed the liability cannot accrue until the termination of the risk under the policy, and, if before that happens, there is a total loss, the partial loss is "swallowed up" in the total.

The decision in *Livie* v. *Janson* (1) is attacked by MR. PHILLIPS in his TREATISE ON THE LAW OF INSURANCE (5th Edn.), ss. 1136 and 1137. I am unable to agree with the criticisms there made. *Livie* v. *Janson* (1) was carefully considered by WILLES, J., in *Lidgett* v. *Secretan* (4). In that case there was an outward policy at and from London to Calcutta, and for thirty days after arrival, and a homeward policy at and from Calcutta to London, both of which were underwritten by the defendant. On the outward voyage the vessel sustained damage from sea perils. She reached Calcutta, and was dry-docked for repairs. While repairs were in progress the outward policy expired, and afterwards, and while the ship was still at Calcutta, she was totally destroyed by fire. It was held that under the homeward policy the assured were entitled to recover for total loss in respect of the fire, and that under the outward policy the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage on the outward voyage without reference to the sum actually expended on her repairs. During the argument an extract was read from a shorthand note of a judgment by WILLES, J., in a previous case, *Potter* v. *Campbell* (6), in which he said:

> "The doctrine of merger must be limited to a loss happening during the period for which the underwriters' liability extends."

On the same page (L.R. 6 C.P. at p. 620) WILLES, J., is reported as having said, in the course of the argument, that the doctrine of merger could not apply where the partial loss takes place during the period covered by one policy, and the total loss while the ship is insured on a different voyage and under another policy. WILLES, J., develops this at some length in the judgment, and the decision was that there was no merger. This amounts to a recognition of the correctness of the decision in *Livie* v. *Janson* (1), while it is pointed out that the decision has no reference to a case in which the risk under the policy covering the partial damage has run out before the total loss. *Livie* v. *Janson* (1) was decided in 1810, and has always been recognised in England as a decision of authority. It was referred to with approval in *Stewart* v. *Stewart* (2) by MAULE, J., during the argument, and in his judgment in *Knight* v. *Faith* (3) it was recognised by LORD CAMPBELL, while it was pointed out that in the particular circumstances of that case its doctrine did not apply. It has been generally recognised in the text-books. In my opinion, *Livie* v. *Janson* (1) is good law, and the only question is as to the limits within which the doctrine there laid down is applicable. LORD ELLENBOROUGH, in *Livie* v. *Janson* (1), pointed out that by the supervening total loss the unrepaired partial loss had become a matter of indifference to the owners. In *Knight* v. *Faith* (3) LORD CAMPBELL said that in *Livie* v. *Janson* (1):

> "The assured in the event which happened were not in any degree prejudiced by the partial loss, which only rendered the ship less valuable to the American government, the assured being in the same situation as if the partial loss had never occurred."

In the present case the respondents contend that they have been prejudiced by the partial loss inasmuch as in respect of it they have received £1,770 less from the Admiralty than they would otherwise have received. This is true, but the clause of indemnity in the charterparty is a special one. Under the ordinary policy what is recovered in respect of a total loss is the value of the ship at the commencement of the risk. If the indemnity under cl. 19 of the charterparty had been in respect of the value of the steamer at the commencement of the risk, there would have been no prejudice to the assured by reason of the partial loss. He would have recovered the value of the vessel as it stood at the commencement of the risk, when the partial loss had not occurred. It is only by reason of the special bargain with the Admiralty contained in cl. 19 of the charterparty that he received

A from them less in respect of the unrepaired partial damage. BAILHACHE, J., in the course of his judgment, said:

> "It would be strange if an underwriter's liability, which is that the ship should remain unhurt by a peril insured against during the currency of the policy, and whose liability is determined by her loss during the insured term by an excepted peril should vary with the terms of some contract not needing
B to be disclosed to him which the owner has made with some stranger to the contract of insurance. . . . In my judgment, the plaintiff's position by reason of his charterparty with the Admiralty is an irrelevant circumstance."

The judgments in the Court of Appeal do not appear to me to deal adequately with this point. They proceed on the basis that the very special nature of the
C bargain with the Admiralty which reduced the amount payable by the value of the unrepaired damage may be disregarded. They treat the loss of the £1,770 as if it had happened in the ordinary and natural course of things, whereas it occurred only by reason of the special terms in cl. 19 of the charterparty. There is no evidence that the existence of this special clause was known to the insurers in respect of sea risks. Indeed, counsel for the appellants, in answer to a question put by the
D Lord Chancellor, disclaimed resting his case upon any such ground. I express no opinion as to what would have been the liability of the insurers in the present case if there had been evidence from which it could be inferred that their contract of insurance was entered into with reference to the special liability of the Admiralty for total loss under the charterparty. In my opinion, the appeal should be allowed.

E **LORD SHAW.**—I entirely agree with the judgment of BAILHACHE, J., in this case, and I venture to express my full concurrence with the views set forth by my noble and learned friend on the Woolsack in his address. Out of respect to the Court of Appeal, I think it right to add these few words.

[HIS LORDSHIP stated the facts and continued:] In my own opinion, no doubt can be cast on the accuracy of the judgment in *Livie* v. *Janson* (1). It is one of a
F long series. It has never been disapproved. On the contrary, it has been uniformly accepted as sound law. *Livie* v. *Janson* (1) was decided in 1910. In 1842 came *Stewart* v. *Steele* (2); in 1850, *Knight* v. *Faith* (3); in 1871, *Lidgett* v. *Secretan* (4); and in 1882, *Pitman* v. *Universal Marine Insurance Co.* (5). It will not be found in this series of cases of high authority that doubt has been cast upon *Livie* v. *Janson* (1). There are two dicta in the course of that series to which I wish to make special reference. In *Stewart* v. *Steele* (2), MAULE, J., puts the actual
G issue involved in the argument of the appellants thus:

> "It is said that the plaintiff had a vested right of action at the moment of the happening of the loss, which nothing could afterwards divest."

The answer he gave was clear:

> "That, I apprehend, is contrary to the doctrine laid down by LORD ELLEN-
H BOROUGH in *Livie* v. *Janson* (1)."

Further, according to MAULE, J., and in this, I think, he stated acknowledged law, that the proper time of estimating the loss where the party is put to no expense is at the expiration of the risk. Further, what appears to me to approach most nearly to the fundamental principle of such cases is to be found clearly set forth in the judgment of LINDLEY, J., in *Pitman's Case* (5). I venture to repeat it.

I

> "Against what did the underwriters agree to indemnify the insured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by this case, which decided that where a ship has been insured and not repaired, the insurer must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. . . . The insurer has no vested right of action for the injury he has sustained. If in such case a ship is lost whilst the policy is running by a peril not insured against, the insurer has no right of action at all. And

if she was lost by a peril insured against, the insurer can only claim for her total loss, but cannot claim both for a total loss and for the previous partial loss, as he might if the damage had been actually repaired."

That is expressly the principle which underlies s. 77 (2) of the Marine Insurance Act, 1906. It is true, of course, that that section is framed to cover the case of a partial loss, and a total loss, "under the same policy." But the common law of England was not repealed by that statute, and, in my opinion, no argument to that effect can be derived from s. 77 (2) dealing with the one specific case. When a ship, damaged but only partially repaired, is totally lost, it becomes impossible to complete her repair. No contract of indemnity can apply to being recouped for such repair, because that would be to present a false and impossible demand for indemnification, i.e., indemnification for an expenditure which can never be made. If once the principle of indemnity were extended the length of permitting a mere right of action to be the ground or the measure of the indemnity, then the reality of the case is lost sight of, for the right of action is a mere abstraction and represents in truth a right to be recouped for expenses which can never be laid out, and the word "indemnity," or the word "recouping" fails on account of sheer self-inconsistency. One finds oneself not in the region of indemnity against loss, but in the region of profit-earning. This is contrary to all sound principles of marine insurance, and, apart from all those authorities which have been most properly canvassed, I am of opinion, on the principle I have just stated, that this appeal should succeed.

LORD MOULTON.—The question raised by this appeal is one of great gravity. It is in substance the question whether the law laid down by the decision in *Livie* v. *Janson* (1) should be reversed. This decision, delivered by a judge of great eminence, has formed part of the law of marine insurance in this country for more than a century. It has been accepted and acted upon again and again without hesitation by our courts, and the respondents have been unable to produce to us any later decision that throws doubt upon it. Judges of great eminence have taken part in decisions which have treated it as sound law. It is so treated in all the text-books, and there can be no doubt that contracts of insurance to which it applies have during this long series of years been framed on the basis of its authority. In such circumstances, I should have felt great reluctance in setting aside such a decision even if I felt some doubt whether the reasoning of the judgment might not be open to criticism. But I feel no such doubt. In my opinion, the decision was right in every respect, and I am glad that your Lordships' House has an opportunity of giving to it its express authority. Indeed, if *Livie* v. *Janson* (1) had been decided otherwise, the decision would, in my opinion, have been so inconsistent with the principles of our law of insurance that it would not have stood test of time, but would have been speedily differed from by other courts, and would ultimately have been set aside. The only alternative to that decision would have been to hold that when damage was done by perils insured against there instantly accrued a pecuniary claim against the insurer for the estimated cost of the repairs, whether done or undone, a doctrine which, among other things, would have led to the absurd result that all the damage done to a ship immediately before or in a storm in which she was totally lost might be claimed as particular average by an owner who had not insured against total loss. I am aware that the judgments of the learned lords justices in the court below are not formally based on a dissent from the decision in *Livie* v. *Janson* (1). They purport to distinguish it upon a point arising out of the special facts of that case, and, accordingly, they give such an interpretation of the judgment delivered by LORD ELLENBOROUGH in that case to make it inapplicable to the case now before us. I am of opinion that the interpretation which they give to the decision makes it turn on a matter which did not constitute any portion of the reasoning which led to that decision. But I go farther. In my opinion, the facts of this case, so far as they are relevant to the

right of the parties, make it an exact parallel to *Livie* v. *Janson* (1), so that, however the language of the judgments in that case be interpreted, the present case must fall within it. It is only by admitting into their consideration facts which ought to have been excluded by reason of their being res inter alios actæ that the learned members of the Court of Appeal have been able to raise a doubt whether this case comes precisely within the law as laid down in *Livie* v. *Janson* (1).

The facts of this case are very simple. The steamship *Eastlands*, belonging to the respondents, was insured with the appellants against total loss on a valued policy for £62,500. That policy included also an insurance against particular average. War risks were excluded. She sustained damage at sea which was partially repaired at Cardiff at a cost of £928, and this sum has been duly paid to the respondents by the insurers. There remained unrepaired damage to an estimated amount of £770. The ship then sailed from Cardiff and was totally lost by an excepted risk. The above are all the facts relevant to the liability of the appellants under the policy, and, according to the decision in *Livie* v. *Janson* (1), the total loss of the vessel puts an end to all claim for the cost of the unexecuted repairs which have now been rendered impossible by the total destruction of the thing to be repaired. What is then the claim of the respondents, plaintiffs in the action? They allege that they made a contract with the government relative to the charter of the vessel which, while covering them to a certain extent from the excepted perils, did not cover them with regard to unexecuted repairs. What have these matters to do with the liabilities of the insurers under the policy which they signed? It is admitted in the frankest manner by the counsel for the respondents that the insurers had no connection whatever with the contract between the respondents and the government, or with the circumstances in which the respondents entered into that contract. It is also admitted (as is otherwise evident) that the losses sued for in this action are solely due to the special provisions of that contract. To quote from the judgment of Bankes, L.J.:

> "The question is . . . what have the [respondents] in fact lost under the contract with the government by reason of the fact that the vessel had sustained the partial damage which had not been repaired?"

These considerations appear to me to decide the rights of the parties to this action. The insurers' liabilities are fixed by the contract that they have signed and cannot be increased by an act of the assured to which they are no party. It is true that those liabilities may in some cases be lessened by such acts as in a case where the assured has made further contracts which give rise to rights of contribution. But they cannot be increased. This rests on something deeper than the special law of insurance. It is a fundamental principle of our law of contracts. So far as the insurers were concerned, they might, therefore, assume that the assured was making no insurance against the excepted perils, and was taking the war risks on himself. It was immaterial to them whether he was so doing or not so long as they remained strangers to any action that he might take in the matter. I fully agree with the language of Bailhache, J., in his judgment in this case when he says:

> "It would be strange if an underwriter's liability, which is that the ship should remain unhurt by a peril insured against during the currency of the policy, and whose liability is determined by her loss during the insured term, should be increased by reason of some contract not needing to be disclosed to him which the owner has made with some stranger to the contract of insurance."

I also agree with his language at the conclusion of his judgment to the effect that

> "the plaintiff's position by reason of his contract with the Admiralty is an irrelevant circumstance."

It is because I am of opinion that the court below should have on these grounds excluded the matter of the contract with the Admiralty from their consideration in

determining the liabilities of the appellants that I regard this case as differing in no respect from *Livie* v. *Janson* (1), which I hold to have been rightly decided. I am, therefore, of opinion that this appeal should be allowed, that the judgment of BAILHACHE, J., should be restored, and that the appellants should have their costs here and in the court below.

LORD SUMNER.—Section 77 (2) of the Marine Insurance Act, by using the words "under the same policy," enacts something narrower than the decision in *Livie* v. *Janson* (1), for in that case a partial loss, insured under the policy in suit, was followed by a total loss during the same voyage, but not insured under that policy. I do not know why this course was taken. The section is one of a fasciculus of sections headed: "Measure of indemnity," throughout which the words "a policy" and "the policy" are constantly used to denote not merely a single instrument, whether subscribed by one underwriter or by many, but also an entire insurance on the same subject-matter, which is spoken of as one insurance and referred to as if it was expressed in one instrument, although, in fact, the total value insured in respect of that subject-matter may only be fully covered under several instruments or even may only be partially covered by them, while for the residue the assured, as it is said, "becomes his own underwriter." I surmise, therefore, that what this section is really referring to by these words is not a single instrument covering two losses, which are not simultaneous, but is an aggregate insurance effected in one or more policies on one subject-matter, in which the assured is his own underwriter, both for any uncovered part of the total value of his insurable interest in it, and also for any uncovered peril among the aggregate of the perils, to which the subject-matter is actually exposed. If so, the words "under the same policy" mean "during the adventure insured," whether it be a voyage or a period of time. The question is more curious, however, than important for s. 91 (2) preserves *Livie* v. *Janson* (1), and to its full extent according to the true construction, unless or until it is overruled. What I think is important is that the Act says nothing about the partial loss becoming ultimately a matter of perfect indifference to the assured's interest, but only speaks of a sequence in time between a partial loss and a total loss, and of the partial loss not having been repaired. No inference against taking the rule in *Livie* v. *Janson* (1) in its widest sense can be drawn from the Marine Insurance Act, but I think that the language of s. 77 (2) is against the limited construction placed on that rule by the Court of Appeal.

In my opinion, LORD ELLENBOROUGH'S language does not mean that two conditions must concur to relieve an underwriter from liability for unrepaired damage—first, the occurrence of a subsequent total loss, and, second, an absence of any pecuniary interest whatever in the unrepaired partial loss. The words: "and the previous deterioration becomes ultimately a matter of perfect indifference to his interests" explain the effect which the subsequent total loss has on the prior unrepaired damage, and so justify the rule. BANKES, L.J., reads the words as though LORD ELLENBOROUGH had only said: "Where the previous deterioration becomes ultimately a matter of perfect indifference to his interests," and had confined the rule to that case, but they do not really except out of the rule cases where, owing to matters not within the terms of the insurance, the partial loss happens to affect the rights of the assured under contracts to which the underwriter is a stranger. It is simply a fuller expression of the idea afterwards expressed by the word "merger." If the rule means that unrepaired partial losses are swallowed up in subsequent total loss, when the assured is none the worse for them, but survive, and must be paid for, if he would be out of pocket unless he recovers for them on the policy, inadmissible results would follow. I do not see why on this argument the unrepaired partial loss by marine perils should not be recoverable from the marine underwriters on the simple ground that, owing to the insolvency of war-risk underwriters, no indemnity at all can be got for the subsequent total loss by hostilities. So stated, the principle is independent of proximate or direct causation. It would not matter whether the

pecuniary prejudice was the direct or the indirect consequence of the partial loss. If indirect prejudice, directly due to the form of the charter T. 99, enables the assured to recover for the partial loss unrepaired, so would diminution of freight-earning power under the charter, consequent on the damage being unrepaired. On the other hand, if there were a rise in shipping values after the damage was done, which partially or wholly restored the value of the ship as at the date of the total loss to what it had been before the damage was done, this, by throwing on to the Admiralty under the charter part or the whole of the amount of the depreciation due to the absence of repair, would diminish or do away with the marine underwriter's liability. In this case his liability would be made to depend on market fluctuations of the value of the ship during the currency of the policy. Nor am I pressed by the statement that in some cases "the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." If *Livie* v. *Janson* (1) where the assured had no policy against capture, was not such a case, a fortiori the present case is not such an exception. Further, the illustrations put for the purpose of showing that the rule in *Livie* v. *Janson* (1), widely applied, may produce anomalous consequences, seem to me to be either fortuitous hard cases or to be instances of want of skill in arranging the details of the insurances effected. If an assured chooses to be his own underwriter against collision, and look only to the ship that is to blame, no doubt he may come off worse than if he had insured, but this is not a reason for increasing the liability of the underwriters, with whom he insured, beyond what it would have been, if he had taken out a policy against the risk of collision. I do not see anything intrinsically in conflict with a contract of insurance in the proposition that perils insured against have not caused any direct loss, where, although the ship was damaged, the owner had nothing to pay, and, although the ship was depreciated, she ceased to exist as a ship before the time came for measuring the amount to be recovered. At that date there was no pecuniary loss against which the owner would be indemnified.

I agree that it is not now practicable to overrule the law as it has so long been understood to have been laid down in *Livie* v. *Janson* (1). I do not, however, rely merely on its authority. I think it is fully consistent with what I take to be the principles of marine insurance. In practice contracts of insurance by no means always result in a complete indemnity, but indemnity is always the basis of the contract. Where all the risks to which a ship is exposed at one time are covered by each of several underwriters, and it is only the total amount of the insurance that is distributed, the aggregate of the insurance is regarded as having been designed to give one indemnity, and for certain purposes the policies are so applied. If the assured has not insured the full value insurable, he is deemed to be his own underwriter for the residue. The foundation of the rule in *Livie* v. *Janson* (1), of course, is that an assured cannot be allowed to recover under a contract of indemnity both a total loss, which he has suffered, and a partial loss, which in substance he has not. It is said, and truly, that it is a rule to prevent the assured from recovering more than a full indemnity, not to save underwriters from having to pay a full indemnity, but—what is a full indemnity? If the application is limited to the one policy in suit, or to the one subscriber sued, the whole attempt to restrict the assured to one full indemnity fails at once. If it extends to the whole body of assurances, which he takes out in respect of all risks affecting the subject-matter of insurance during the voyage or time adventured upon, the measure of a full indemnity is only got by looking at the risks run, not at the persons liable for them. Otherwise, the indemnity would be full or more than full at the mere choice of the assured. It seems to me that the aggregate of the insurances is to be looked at where it is the perils insured against that are distributed and some perils, causing loss or some categories of loss, are covered by one person and some by another. I do not see why an assured should be allowed to recover more than an indemnity where his war risk is placed with A. and his marine risk with B., if he could not have done so had both been placed with A. or both with A. and B. in equal moieties. Further, and the same purpose,

namely, that of reducing insurance as far as possible to a complete indemnity, I do not see why an assured should not be considered to be his own underwriter where he places one set of risks with one set of underwriters and another with another, just as much as where one set of underwriters covers, although not to the full amount. If the owner has not assured a complete indemnity by effecting contracts which will procure it for him, he must to the extent of the deficit be treated as having underwritten it himself. I regard 19 of charter T. 99 as an insurance policy for this purpose. In the event, which happened, it fell short by £1,770 of covering the full value, in which the assured was interested, when the contracts were first effected. Accordingly, I think he must be treated as being his own underwriter for the difference between the ship's value when totally lost, which is all he covered with the Admiralty, and the ship's value at the inception of the risk, which is her value for the purposes of the other policies according to ordinary rules and apart from special valuations, which do not seem to affect the principle. Whether he insured in this manner with the Admiralty because he chose to do so, or because he could not help himself is immaterial. I agree further that the £1,770 was lost directly by the form in which the liability of the Admiralty is expressed, in the sense that from the time when the charter became effective the assured had made himself the party to bear any depreciation from unrepaired partial damage, which might exist at the time of the total loss. Of course, it is not contended that he can alter the meaning of his marine policy by the arrangements that he chooses to make with the Admiralty, but I think it is equally impracticable to say that the marine policy impliedly promises to pay for unrepaired damage if less than the original value is recoverable under the charter for a subsequent total loss, but not to pay for it when the charter provides otherwise. I, therefore, think that the appeal succeeds and that the judgment of BAILHACHE, J., should be restored.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.; Hancock, Middleton & Lewis.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

CHARLES WADE & CO., LTD. *v.* LONDON AND NORTH WESTERN RAIL CO.

[KING'S BENCH DIVISION (Rowlett and McCardie, JJ.), November 4, 5, 1920]

[Reported [1921] 1 K.B. 582; 90 L.J.K.B. 593; 125 L.T. 166; 37 T.L.R. 81]

Carriage of Goods—Railway—Special contract—Contract contained in more than one document—Signature—Signature in print at top of contract—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict.*, *c.* 31), *s.* 7.

In June, 1917, and May, 1918 the defendant railway company addressed to the plaintiffs, as well as to a number of other traders who were their customers, a letter stating that where traders used their own forms of consignment note, they must indorse the notes with a reference to the company's "owner's risk" or "company's risk" consignment notes, and stating that, unless they were so indorsed, the company would only accept consignments under the standard conditions set out on their consignment notes. At the top of the plaintiffs' consignment note were printed the words: "From Charles Wade & Co., Ltd.," and there were also at the bottom of the form the words, "at owner's risk." Condition 3 of the conditions in the defendant company's standard consignment note provided that the company should not be liable for non-delivery of a consignment unless a claim was made in writing within fourteen days. Goods consigned by the plaintiffs in January, 1919, were lost in transit. Some inquiries

were made at the company's offices, but no written complaint was made with regard to the loss until the 16th April. On a claim by the plaintiffs to recover the value of the goods,

Held: a special contract within s. 7 of the Railway and Canal Traffic Act, 1854, need not be in one document, and the plaintiffs' consignment note must be read with the railway company's standard consignment note and as embodying condition 3 of that note; a special contract could be signed within the meaning of s. 7 by a signature at the top, or at the bottom, or in the body of the contract, and that signature could be by a stamp, a mark, an initial, in print, or by lithograph, and in the present case the plaintiffs' name printed at the top of their consignment note was a signature for the purposes of the section; therefore, the contract of carriage was subject to condition 3, and, as the plaintiffs had not made a claim within the fourteen days specified in that condition, their claim failed.

Joshua Buckton & Co., Ltd. v. *London and North Western Railway* (1) (1917), 87 L.J.K.B. 234, approved.

Notes. As to special contracts for carriage of goods by rail see 4 HALSBURY'S LAWS (3rd Edn.) 164, 165, and ibid., vol. 31, pp. 746–751. For cases see 8 DIGEST (Repl.) 60 et seq. For Railway and Canal Traffic Act, 1854, see 19 HALSBURY'S STATUTES (2nd Edn.) 695.

Cases referred to:

(1) *Joshua Buckton & Co., Ltd.* v. *London and North Western Railway* (1917), 87 L.J.K.B. 234; 117 L.T. 556; 34 T.L.R. 119; 8 Digest (Repl.) 62, *403.*

(2) *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H.L. Cas. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 9 Jur. N.S. 914; 11 W.R. 1023; 11 E.R. 1109; H.L.; 8 Digest (Repl.) 60, *394.*

(3) *Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q.B. 373; 70 L.T. 218; 58 J.P. 318; 42 W.R. 285; 10 T.L.R. 176; 38 Sol. Jo. 154; 10 R. 85, D.C.; 8 Digest (Repl.) 56, *364.*

(4) *Leeson* v. *Holt* (1816), 1 Stark. 186, N.P.; 8 Digest (Repl.) 40, *225.*

(5) *Ridgway* v. *Wharton* (1857), 6 H.L. Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 4 Jur. N.S. 173; 5 W.R. 804; 10 E.R. 1287, H.L.; 39 Digest 386, *234.*

(6) *Cave* v. *Hastings* (1881), 7 Q.B.D. 125; 50 L.J.Q.B. 575; 45 L.T. 348; 46 J.P. 56, D.C.; 12 Digest (Repl.) 159, *1022.*

(7) *The Teutonia* (1872), L.R. 4 P.C. 171; 8 Moo. P.C.C.N.S. 411; 41 L.J. Adm. 57; 26 L.T. 48; 20 W.R. 421; 1 Asp. M.L.C. 214; 17 E.R. 366, P.C.; 12 Digest (Repl.) 459, *3428.*

(8) *Schneider* v. *Norris* (1814), 2 M. & S. 286; 105 E.R. 388; 12 Digest (Repl.) 175, *1153.*

(9) Saunderson v. Jackson (1800), 2 Bos. & P. 238; 126 E.R. 1257; 12 Digest 155, *991.*

(10) *Sheers* v. *Thimbleby & Son* (1897), 76 L.T. 709; 13 T.L.R. 451; 41 Sol. Jo. 558, C.A.; 12 Digest 157, *1003.*

Appeal from Birmingham County Court.

The plaintiffs, Charles Wade & Co., Ltd., sued the London and North Western Rail. Co. for the sum of £20 7s. 8d., the value of certain steel bars entrusted by the plaintiffs to the defendants for conveyance from Birmingham to Ellesmere Port, and lost in transit.

Condition 3 of the company's "owner's risk" consignment note was in the following terms:

"The company shall not be liable for loss from or damage or delay to a consignment . . . unless a claim be made in writing within three days after the termination of the carriage of the consignment or any part thereof or, in the case of

traffic to places outside the United Kingdom, the termination of the carriage by a railway company of the United Kingdom, nor for non-delivery of a consignment unless a claim be made in writing within fourteen days after its receipt by the first contracting company."

The county court judge held that the condition was just and reasonable, but that the contract was not signed by the plaintiffs within the meaning of s. 7 of the Act of 1854, and, therefore, the plaintiffs were entitled to recover the value of the goods lost, and he gave judgment for them accordingly. The defendants appealed.

By s. 7 of the Railway and Canal Traffic Act, 1854:

"Every [railway] company . . . shall be liable for the loss of or for any injury done to . . . any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said . . . articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable . . . Provided also, that no special contract, between such company, and any other parties respecting the receiving, forwarding, or delivering of any . . . articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such . . . articles, goods, or things respectively for carriage . . ."

Eustace Hills, K.C., and *R. A. Willes* for the railway company.

Hurst, K.C., and *Finnemore* for the plaintiffs.

ROWLATT, J.—In this case, which raises questions of some importance, the plaintiffs sued the London and North Western Rail. Co. for the loss of certain steel bars entrusted to them for conveyance, and the defence of the railway company was that a condition formed part of the contract between the parties under which a claim had to be preferred within a certain time to fix the company with liability, and that that had not been done. That condition is one of some printed conditions on the consignment notes of the railway company, both on the consignment note in respect of goods to be conveyed at carrier's risk, and on the note in respect of goods to be conveyed at owner's risk. The company had taken up the position (which they had intimated to the trade by circular and, as is found by the learned county court judge, had intimated to this particular plaintiff by circular twice) that if owners used their own consignment notes, they must insert the clause that the goods were to be carried at carrier's risk or owner's risk, whichever was desired, and that, if neither was done, some other conditions would apply. That was notified to the business community and to the plaintiffs.

These goods were consigned by the plaintiffs on a consignment note of their own, the original of which is before us, which bore at the head of it their name in the largest type which appears in the document: "From Charles Wade & Co., Ltd.", with their address, and at the bottom there are, in the next largest type which the document contains, the following words: "At owner's risk." Under the Railway and Canal Traffic Act, 1854, any condition must be just and reasonable, and the county court judge has found—and this has not been questioned—that the condition referred to here is just and reasonable. But under that Act there are two other things to be found in a case of this kind—there must be a special agreement between the parties, and also a special contract must be signed by the parties. To sign a contract implies that it must be wholly in writing, and the question here is whether those two conditions have been complied with. I think the county court judge has found that there was a contract; it is not free from obscurity in his judgment, but I

do not think, on the facts he has stated, that he could have found otherwise. It has been said that the case had been conducted in the county court on the footing that the words, "at owners' risk," were to be read out of the document. I cannot conceive how that could possibly have been done. This document was the consignment note. The plaintiffs put it forward as the foundation of their case, as proving their consignment, the acceptance of the goods under it being testified by the signature on it of the representative of the railway company. Without a suit for rectification of the document, I do not think it is open to the plaintiffs to say that the undeleted words which appear on its face, and, indeed, as part of it, can possibly be excised.

With those remarks I pass from the question whether there is a contract at all, because I think that it is on the footing of an affirmative finding in that respect that this case has been dealt with by the county court judge. But I must refer, before I finally leave that part of the case, to the concluding words in the judgment of the county court judge, which is the only point which has caused me any difficulty. At the end of his judgment he says:

> "On the facts of this case I find that this condition was just and reasonable, but it was certainly not signed so as to comply with the requirements of s. 7 [of the Act of 1854]"

That is assuming, so far, that there was no signature on the document which contained the condition. Then he goes on to use these remarkable words:

> "No doubt an agreement may arise by conduct as well as by signature, but the facts are not sufficient to enable one to draw an inference, nor was it contended that I should be justified in doing so."

I do not think the judge can possibly be saying that the facts are not sufficient to enable him to draw the inference that there was a contract apart from the question of signature, because he goes on to say: "Nor was it contended that I should be justified in doing so." If that was not contended, there was nothing to discuss, no matter for argument before him, and the whole thing would have been pure waste of time. I do not quite know what he did mean, and I will not speculate, but I am perfectly certain he cannot mean that, because he continues:

> "Holding as I do that the signature of the plaintiff firm was essential to enable the defendants to avail themselves of the defence put forward, it follows that the defendants' ground of defence fails."

I think what he is saying is: "The whole point of this case is whether there was a signed contract," and I agree that it is the whole—and an important—point of the case.

To that I propose to address myself. The signed contract must be a contract in documents to which the signature is appended, but there need not be only one document nor need there be a signature on every document, but as LORD WESTBURY said, in delivering the leading speech in *Peek* v. *North Staffordshire Rail. Co.* (2), the condition must be set out in the document that is signed or it must be incorporated with the document that is signed by direct reference. Those words, of course, only lay down a principle which is exemplified in many other cases, and, in their application to any particular case, the facts and the language used must be looked at sensibly and reasonably according to the true meaning of the words as between the parties. In *Peek* v. *North Staffordshire Rail Co.* (2), BLACKBURN, J., in giving his opinion to the House of Lords, puts very carefully what is to be found in a great many other cases, the principle upon which evidence is admitted bearing upon—I use that phrase for the moment—the effect of the contract. Whenever anything is mentioned in a contract, what it relates to must be identified. If the name of the most celebrated person or thing is mentioned, still in principle it has to be identified. If a person or thing is not very well known, it may be easy, but the principle remains the same. That is what, in this passage, BLACKBURN, J., calls "explanatory evidence." It is evidence to show what the written word means, what it refers to; but the evidence which cannot be admitted is that which goes to show what the

parties intended. Evidence can be admitted to show what the parties said, what their language is, but not what they intended apart from the meaning of the language as applied to the thing to which it relates.

In *Peek* v. *North Staffordshire Rail. Co.* (2) the position was that there had been communications between the parties in which the consignor was informed that, unless he consigned his goods to be insured, certain consequences would result. He consigned his goods not to be insured, and then it was said that the consequences referred to were incorporated. The House of Lords said that was not so, and BLACKBURN, J., explained the reason why it was not so. Evidence must be adduced to show what those consequential results of delivering to be carried without insurance would be. The words themselves merely stated that the goods were not to be insured, but something passed between the parties which showed that there were to be some consequential results. They might be anything. Parol evidence must be adduced to show what those results were. BLACKBURN, J., said that that was not a contract, which depended upon the document which could be construed without parol evidence, which merely said what the words meant. In the present case it seems to me that we are in a different position. I think that one cannot get away from it upon the evidence before the county court judge—and they are facts which are known to everybody who has had occasion to study this class of business —that the phrase "at owners' risk" here simply refers by way of a short title to a document with printed words upon it, which was the document on the back of the owner's risk consignment note, and, therefore, these words, "at owners' risk" in the consignment note have the same meaning as if they had been written out "owners risk as per the company's consignment note." That is what those words mean and nothing else. It was said that the words "owner's risk" might mean "owner's risk" vaguely, generally, and that they did not necessarily point to the document, but I do not think that that can be accepted. I think it must be taken as clear that the words "owner's risk" here have a definite meaning, and it is a question what that meaning is. It is that the words are used as a label to identify another document. On these grounds I think the appeal succeeds.

McCARDIE, J.—This appeal raises questions of some importance, both to railway companies and to consignees, and these questions are, in my opinion, questions of considerable difficulty.

In January, 1919, the plaintiffs dispatched steel bars by the defendant railway company from Birmingham to Ellesmere Port under a consignment note. The goods were never delivered by the railway company. They went astray; hence the plaintiffs claimed damages for breach of contract. The answer to that claim was that, under cl. 3 of the owner's risk consignment note of the defendant company, the plaintiffs were debarred from claiming unless the claim was made within a few days after the loss of the goods. The question at the trial was whether or not the plaintiffs were bound by that express condition in the consignment note. The document under which the plaintiffs delivered was headed as follows: "From Charles Wade & Co., Ltd., Midland Iron Works, Aston, Birmingham," in clear decisive print. It then said to the railway company: "Deliver in as good condition as received to Messrs. F. A. Frost and Son" so many bars of steel. At the foot of the note in very clear print indeed, unmistakeable in size, the words "at owner's risk." The question is whether or not that document signed by the plaintiffs embodies cl. 3 of the standard consignment note of the railway company's owner's risk. This really involves a consideration of an important, but, it is said, ill-framed, section of the Railway and Canal Traffic Act, 1854, namely, s. 7. I do not read the section in full. I merely point out that it provides that a railway company cannot escape liability for negligence in receiving or delivering goods by conditions unless those conditions are judged by the court to be just and reasonable. The clause provides in a later stage

A "that no special contract between such companies and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage."

B It is to be observed that the section does not provide for any special form of contract. It does not suggest a special form. It uses the words, "special contract" which, in themselves, are rather singular, and I am not aware that in any part of the Railway and Canal Traffic Act, 1854, are the words so used. Doubtless the words have not been used in any other part of the Act. What is the meaning of those words, "special contract"? In my view, when one has regard to the history of C railway company legislation, it is clear that the words do not mean a contract with special facilities. The words have a totally different signification and their origin springs from events which took place before the Carriers Act, 1830.

It was quite common before that Act was passed for common carriers to limit their liability by the simple publication of public notices. If those notices were publicly exhibited, the carrier could escape from responsibility even for serious D negligence and even though the notice was not brought home to the mind of the person who consigned. The matter is put on that point most concisely by Wright, J., in *Shaw* v. *Great Western Rail. Co.* (3), where he says ([1894] 1 Q.B. at p. 381):

"For some time before 1830 it had become settled that [a carrier] could do [limit his liability even for negligence] by a mere public notice, although not brought home to the customer in any way."

E A very interesting example of the law that then prevailed is to be seen in the summing up in *Leeson* v. *Holt* (4) by Lord Ellenborough. When the Act of 1830 was passed, it contained s. 6, and it stated, after dealing with many things to which I need not refer:

F "Provided always, and be it further enacted that nothing in this Act contained shall be construed to annul or in anywise affect any special contract between such mail contractor such coach proprietor or common carrier, and any other parties for the conveyance of goods and merchandise."

The words "special contract" are there employed. That meant that if a public notice, a placard or letter, whatever it might be, was, as it was called, brought home to the customer, then a special contract was made. Any sort of notice might G suffice if it was brought home, and, as was put again by Wright, J., in *Shaw* v. *Great Western Rail. Co.* (3):

"After the Act of 1830 it was necessary for him to show a special contract for that purpose; but a general notice brought home to the customer was held to be a special contract because the customer who sent his goods after notice H of the condition was held to have assented to it: see per Blackburn, J., in *Peek* v. *North Staffordshire Rail. Co.* (2)."

Therefore, the words "special contract" in s. 7 refer, in my view, to the special contract of the character which I have named. It is obvious that that special contract, so far from being a contract characterised by strict formality, was, on the contrary, a bargain characterised by the very opposite features, often informal. I Section 7 required that this special contract should be signed. It is clear, since *Peek's Case* (2), that a special contract must be contained in a document or documents, otherwise it cannot be signed; and that it has not necessarily to be in one document is clear now by the great authority, which has been referred to, of Lord Westbury, in *Peek's Case* (2), where he says (10 H.L. Cas. at p. 568):

"Such special contract in writing signed by the party delivering the goods, must itself either in terms or by distinct reference set out or embody the condition in question. But I am of opinion that those words 'not insured'

do not refer to the written condition or afford any ground upon which the written condition can be regarded as incorporated with the letter." A

That is all I need refer to in that connection. The same point was refered to by LORD CRANWORTH where he said thus (ibid. at p. 571):

"There is no written document signed by the person delivering the goods either stating the terms on which, according to the fourth plea, the marbles were to be carried, or referring to any other document which in general principles of law could be referred to, which would prove those terms." B

Therefore, as my Lord has said, the contract need not be in one document, but if not in one, then it is clear that it may be in several. The only question, therefore, is, whether or not there is a contract here, not indeed complete in itself, but a contract which embodies or refers to or incorporates another document. C It is quite true that this note, signed by the plaintiffs, does not expressly refer to the "owner's risk" consignment note of the defendants, but I take it that the only rule which can be applied satisfactorily here is the rule which has been established with regard to decisons under the Statute of Frauds. I think that the decisions upon that statute, the terms of which I need not state, are well set out in LEAKE ON CONTRACTS (3rd Edn.), at p. 227: D

"The note or memorandum may consist of several writings if sufficiently connected by internal reference, either direct or inferential; and extrinsic evidence is admissible to apply the references and to identify the writings referred to. Thus a correspondence between the parties by letters sufficiently connected together by their contents, and containing or referring to documents containing the terms of the contract constitutes a sufficient note in writing. A letter ackowledging an agreement according to instructions given to a solicitor, where parol evidence was admitted to identify the instructions. So, a letter referring to 'our arrangement,' which was identified with a previous memorandum of terms." E

The authorities are set out: *Ridgway* v. *Wharton* (5), *Cave* v. *Hastings* (6), and others. F

In my view, the decisions on the Statute of Frauds are decisions which may properly be applied to the present case. If that is so, we have to construe this document and see whether or not it embodies or incorporates any other document. It says, "at owner's risk." How are those words to be interpreted? After all, I conceive that, although there happened to be here some special statutory requirements, yet this is a mere business document intended to be a business record of a transaction, and hence I think in this case, as in any other case which may arise in the Commercial Court, whether it be under charterparty or what not, that we are to adopt the principle which was stated by MELLISH, L.J., in *The Teutonia* (7) where he said (L.R. 4 P.C. at p. 182): G

"A mercantile contract which is usually expressed shortly and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties." H

That being so, what is the fair business meaning of these words "at owner's risk"? The county court judge, as he was entitled and bound to do, and as we are entitled and bound to do, looked at the circumstances of the case to see what happened between the parties. In 1917 and 1918 the company had laid before the plaintiffs two notes, one the owner's risk note and the other the carrier's risk note; the former the lower rate of carriage, the latter the higher rate. They were two perfectly well-known notes. Everyone who sends goods by a railway company, every business man in the country, knows of the existence of those two notes as well as he knows of the existence of a bill of exchange, and that being so it has been notorious for many years, and the plaintiffs obviously knew it perfectly well, that they could send by owner's risk or by carrier's risk, and they themselves print I

upon these pieces of paper the words, "at owner's risk." To my mind, it is perfectly clear that, in doing that, they were not employing a mere vague phrase, a thing in the air; but they were saying: "We are sending this upon the terms of the owner's risk consignment note." Suppose they put the words, "owner's risk consignment note" upon this, would there be any doubt upon the matter? Suppose they put "O.R.N.," would there be any doubt? These words, "at owner's risk," represent to everyone, and were known by the plaintiffs to be, a reference to the fact that they were sending by the owner's risk consignment note. The result is, to my mind, that, having regard to the circumstances, these words do incorporate, as my Lord has said, the label or document called "the owner's risk consignment note."

That being so, there is, in my opinion, not a formal contract, but a special contract between the parties within the meaning of s. 7, subject to the question of signature. Again, my Lord has put the matter more forcibly than I can do upon that, but I respectfully add that, in my opinion, it is impossible to sever different branches of law and have one class of signature for the Statute of Frauds and another class of signature for s. 7 of the Railway and Canal Traffic Act, 1854. I always deplore the existence of what I call the contrary line of decisions, and when I look at the cases upon signature which have been decided on the Statute of Frauds, it is clear that they carry the word "signature" to the utmost possible extent. The cases I mention are very well collected in Stroud's Judicial Dictionary under the word "Signature." It is perfectly clear that in those circumstances under the Statue of Frauds the signature may be at the top, at the bottom, or in the body of the, contract; it may be a stamp, a mark, an initial; in print or by lithograph. Indeed I see in *Schneider* v. *Norris* (8), followed by *Saunderson* v. *Jackson* (9) the name of the seller was printed on the bill or parcel, and was apparently, he having written something else on the paper, held to be an adoption by the seller of his own printed name. Suppose, for example, at the time this note was signed by the plaintiffs they had printed "Charles Wade & Co., Ltd.," or lithographed it or stamped it, surely that would be a signature. Therefore, the only point which can be taken is whether or not it may be different at the top from what it is at the bottom. In my view, having regard to the decisions under the Statute of Frauds, these words "Charles Wade & Co., Ltd." must be taken as being a verification of the document which was handed in by the plaintiffs to constitute the contract between the defendants and themselves.

My Lord has not referred to the decision in *Joshua Buckton & Co., Ltd.* v. *London and North Western Railway* (1). I think it only right and respectful that the court should refer to that decision of Astbury, J. There, so far as I can see, the facts and documents were substantially the same as regards this question of signature. There was a printed signature in substance, "Joshua Buckton & Co.," in the centre of the note there signed by the plaintiffs. Astbury, J., after considering the authorities under the Statute of Frauds, decided that the principle of those cases applied to the consignment note in *Buckton's Case* (1), and, therefore, the special contract which he held to exist in that case was signed within the meaning of s. 7 of the Act of 1854. This court by this decision adopts and approves the lucid and able judgment given by Astbury, J., in that case. I wish only to add that, in dealing with the incorporation of documents under the Statute of Frauds, I had meant to refer to one particular case which illustrates the extent to which that doctrine of incorporation has been carried. It is a cogent case, *Sheers* v. *Thimbleby & Son* (10). I will not go into the facts, but many authorities are there reviewed, and that decision illustrates the extent to which the doctrine of incorporation has been carried by the courts under the Statute of Frauds. For the reasons given by my Lord and those added by myself this appeal should, in my view, be allowed.

ROWLATT, J.—I ought also to have dealt with the question about the signatures being at the top instead of at the bottom. I entirely agree with what has fallen

from my learned brother. It seems to me that there is no question of fact in that, when you once get it that the document is delivered with the intention that the name of the party printed upon it should identify and give authority to the document as coming from him.

Appeal allowed.

Solicitors: *M. C. Tait; Leader, Plunkett & Leader*, for *Burn, Lowe, Sons & Co.*, Birmingham.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

HANSFORD *v.* JAGO AND OTHERS

[Chancery Division (Russell, J.), November 17, 18, 19, 1920]

[Reported [1921] 1 Ch. 322; 90 L.J.Ch. 129; 125 L.T. 663; 65 Sol. Jo. 188]

Easement—Grant—Quasi-easement—Right to pass along strip of land—Conveyance of house with "appurtenances"—Right "appertaining" to the land—Conveyancing Act, 1881 (44 & 45 *Vict.*, *c.* 41), *s.* 6 (2) (4).

By a conveyance, dated in 1919, the vendor purported to convey "all that messuage and dwelling-house with the gardens outbuildings and appurtenances belonging thereto."

By s. 6 (2) of the Conveyancing Act, 1881 [see now Law of Property Act, 1925, s. 62 (2) (4): 20 Halsbury's Statutes (2nd Edn.) 427]: "A conveyance of land, having houses . . . thereon, shall be deemed to include . . . all . . . passages . . . privileges, easements, rights, and advantages, whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed."

Held: (i) the word "appurtenances" in the conveyance was apt to include and did include a quasi-right of way or right to pass over a strip of land behind the dwelling-house leading to a highway which the occupier of the house was enjoying at the time of the conveyance; (ii) the words to be read into the conveyance under s. 6 (1) of the Conveyancing Act, 1881, were effective to make the conveyance include a grant of such quasi-easement and right, there being nothing in the conveyance expressing a contrary intention within s. 6 (4) of the Act.

Thomas v. *Owen* (1) (1887), 20 Q.B.D. 225, applied.

Easement—Implied grant—Quasi-easement—Implication of grant in simultaneous conveyances to different purchasers—Knowledge by each purchaser of other conveyances.

The doctrine of the implied grant of an easement or quasi-easement applies to a case of simultaneous sales to different purchasers of adjoining dwelling-houses where each purchaser knows that the vendor is selling the other dwellings with the enjoyment of the easement or quasi-easement.

So, where a vendor sold each of four cottages in one block to a different purchaser, the occupiers of the cottages at the time of the sale had enjoyed a quasi-right of way or right to pass over a strip of land behind the cottages which led to a highway, and the plaintiff, one of the purchasers, knew that the vendor was selling the other three cottages with the enjoyment of the strip,

Held: there was an implied grant to each purchaser of the quasi-easement or right which had been enjoyed by the occupier of the cottage bought by him at the time of the conveyance, and the plaintiff was not entitled to an injunction to restrain the other purchasers from passing over the strip.

Allen v. *Taylor* (2) (1880), 16 Ch.D. 335, and *Swansborough* v. *Coventry* (3) (1832), 9 Bing. 305.

A *Easement—Implied grant—Quasi-easement—Right to pass over trodden track, not definitely formed road.*

For the grant of a quasi-right of way to be implied it is not necessary that the way in question should be a formed road.

Where the surface of a strip of land was hard from being trodden on and there were tracks leading to the doors of four cottages which backed on to the B strip,

Held: it would appear that the strip had been set apart to provide access to the cottages, and the grant of a right to pass over it would be implied in the conveyance to a purchaser of each cottage.

Donnelly v. *Adams* (4), [1905] 1 I.R. 154, and *Rudd* v. *Bowles* (5), [1912] 2 Ch. 60, applied.

C

Notes. Applied: *Cory* v. *Davies*, [1923] 2 Ch. 95. Approved: *Gregg* v. *Richards*, [1926] Ch. 521. Distinguished: *Aldridge* v. *Wright*, [1929] 2 K.B. 117. Referred to: *Liddiard* v. *Waldron*, [1933] 2 K.B. 319; *Hapgood* v. *Martin & Sons, Ltd.*, [1934] All E.R. Rep. 370.

As to the creation of easements by grant and implication see 12 Halsbury's D Laws (3rd Edn.) 530 et seq., and for cases see 19 Digest 22 et seq.

Cases referred to:

(1) *Thomas* v. *Owen* (1887), 20 Q.B.D. 225; 57 L.J.Q.B. 198; 58 L.T. 162; 52 J.P. 516; 36 W.R. 440, C.A.; 19 Digest 34, *166*.

(2) *Allen* v. *Taylor* (1880), 16 Ch. 355; 50 L.J.Ch. 178; 19 Digest 50, *278*.

(3) *Swansborough* v. *Coventry* (1832), 9 Bing. 305; 2 Moo. & S. 362; 2 L.J.C.P. E 11; 131 E.R. 629; 19 Digest 50, *276*.

(4) *Donnelly* v. *Adams*, [1905] 1 I.R. 154.

(5) *Rudd* v. *Bowles*, [1912] 2 Ch. 60; 81 L.J.Ch. 277; 105 L.T. 864; 19 Digest 48, *265*.

(6) *Bolton* v. *Bolton* (1879), 11 Ch.D. 968; 48 L.J.Ch. 467; 43 J.P. 764; sub nom. *Bolton* v. *London School Board*, 40 L.T. 582; 19 Digest 101, *641*. F

(7) *Hill* v. *Grange* (1555), 1 Plowd. 164; 2 Dyer, 130 b; 75 E.R. 253; 17 Digest (Repl.) 255, *587*.

(8) *Beddington* v. *Atlee* (1887), 35 Ch.D. 317; 56 L.J.Ch. 655; 56 L.T. 514; 51 J.P. 484; 35 W.R. 799; 3 T.L.R. 363; 19 Digest 35, *180*.

(9) *Pwllbach Colliery Co., Ltd.* v. *Woodman*, [1915] A.C. 634; 84 L.J.K.B. 874; 113 L.T. 10; 31 T.L.R. 271, H.L.; 36 Digest 299, *431*. G

(10) *Jones* v. *Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.T. 386; 24 T.L.R. 309; 19 Digest 43, *229*.

(11) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 12 Digest (Repl.) 682, *5256*.

(12) *Brown* v. *Alabaster* (1887), 37 Ch.D. 490; 57 L.J.Ch. 255; 58 L.T. 266; 36 W.R. 155; 19 Digest 32, *156*. H

(13) *Pearson* v. *Spencer* (1863), 3 B. & S. 761; 8 L.T. 166; 11 W.R. 471; 122 E.R. 285; sub nom. *R.* v. *Pearson*, 1 New Rep. 373, Ex.Ch.; 19 Digest 101, *632*.

(14) *Wheeldon* v. *Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest 45, *253*.

(15) *Palmer* v. *Fletcher* (1663), 1 Lev. 122; 1 Keb. 553, 625; 1 Sid. 167; 83 E.R. 329; 19 Digest 50, *274*. I

(16) *Geraghty* v. *M'Cann* (1872), I.R. 6 C.L. 411; 19 Digest 98, *608 viii*.

Also referred to in argument:

Bayley v. *Great Western Rail Co.* (1884), 26 Ch.D. 434; 51 L.T. 337, C.A.; 19 Digest 35, *178*.

Birmingham Dudley and District Banking Co. v. *Ross* (1888), 38 Ch.D. 295; 57 L.J.Ch. 601; 59 L.T. 609; 36 W.R. 914; 4 T.L.R. 437, C.A.; 19 Digest 47, *261*.

Cecil v. *Langdon* (1884), 28 Ch.D. 1; 54 L.J.Ch. 313; 51 L.T. 618; 33 W.R. 1, C.A.; 43 Digest 680, *1107*.

Compton v. *Richards* (1814), 1 Price, 27; 145 E.R. 1320; 19 Digest 50, *275*.

Nicholls v. *Nicholls* (1899), 81 L.T. 811; 19 Digest 97, *607*.

Re Peck and London School Board's Contract, [1893] 2 Ch. 315; 62 L.J.Ch. 598; 68 L.T. 847; 41 W.R. 388; 3 R. 511; sub nom. *Peck* v. *London School Board*, 37 Sol. Jo. 372; 19 Digest 35, *182*.

Phillips v. *Low*, [1892] 1 Ch. 47; 61 L.J.Ch. 44; 65 L.T. 552; 8 T.L.R. 23; 19 Digest 52, *290*.

Schwann v. *Cotton*, [1916] 2 Ch. 459; 85 L.J.Ch. 689; 115 L.T. 168; 60 Sol. Jo. 654, C.A.; 19 Digest 52, *291*.

Witness Action for a declaration and an injunction.

In 1911 J. B. Dugdale purchased a rectangular plot of ground at Wareham in Dorsetshire, having a frontage on a lane known as Bonnett's Lane. On this plot he built four cottages in one block, known as Nos. 1, 2, 3, and 4, Bonnett's Lane. The cottages had yards at the back, at the back of which was a continuous brick wall in which there were, in the case of each cottage, a back door, and a trap door communicating with an earth closet. These doors and trap doors gave access from each back yard to a continuous strip of land forming part of the rectangular plot purchased by J. B. Dugdale and separated from the property of an adjoining owner by a hedge running parallel to the brick wall. The end of the strip adjacent to No. 4, Bonnett's Lane was blocked by another brick wall, and the end adjoining No. 1, Bonnett's Lane was left open and gave access to a lane known as Carrion Lane. The cottages were let in due course, and the refuse from the cesspools and earth closets was removed by way of the strip into Carrion Lane. Rough tracks were formed over the strip, from which it was clear that access to the cottage from the rear was obtained by way of the strip. At the time of the erection of the cottages the plans were submitted to and approved by the Wareham Borough Council, and their byelaw 75 provided that a privy erected in connection with a building should be constructed

> "In such a manner and in such a position as to afford ready means of access to such privy for the purpose of cleaning such privy and of removing filth therefrom and in such a manner and in such a position as to admit of all filth being removed from such privy, and from the premises to which such privy may belong, without being carried through any dwelling-house."

A similar provision was also set out in the byelaws as to cesspools. In 1919, in consequence of the death of J. B. Dugdale, the property was sold and each of the cottages, including the corresponding portion of the strip of land, became the property of a separate owner. No. 1 was purchased by the plaintiff in this action, No. 2 by the defendant Elizabeth Wellstead, No. 3 by A. C. Brown, and No. 4 by the defendants S. H. Jago and his wife. Each of the conveyances purported to convey "all that messuage or dwelling-house with the gardens outbuildings and appurtenances belonging thereto." A dispute arose as to a right of way over the strip. The plaintiff, taking the view that the occupants of the cottages Nos. 2, 3, and 4 had no right of way to Carrion Lane by way of the strip, erected a wooden and corrugated iron fence between his portion of the strip and the adjoining portion. This fence was pulled down by the son of the defendant Elizabeth Wellstead with her approval, and the plaintiff commenced this action for a declaration that the occupants of cottages Nos. 2, 3, and 4 had no right of way across that portion of the strip lying outside his back wall, for an injunction restraining the defendants from trespassing on his land, and for damages for the destruction of the fence. RUSSELL, J., found upon the evidence (i) that from the date of the erection of the cottages down to the date of their sale the strip was constantly used by the occupants for passing between their respective back-doors and Carrion Lane, that the earth closets were emptied by means of the trap doors and their contents removed to

Carrion Lane by persons coming on to the strip with carts and horses, and that the cesspools and dustbins were emptied in the same manner; and (ii) that the strip was worn with rough tracks in such a way that no one seeing it could have doubted that it was used as a back approach to the cottages.

By the Conveyancing Act, 1881, s. 6 [see now Law of Property Act, 1925, s. 62 (2) (4): 20 HALSBURY'S STATUTES (2nd Edn.) 427]:

"(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages, whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings, conveyed, or any of them, or any part thereof. . . . (4). This section applies only if and so far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained."

Bovill for the plaintiff.

Preston, *K.C.* and *Farwell* for the defendants.

RUSSELL, J. (after stating the facts and making the findings of fact stated above continued:)—Those being the facts counsel for the plaintiff opened the case by putting in the conveyance to the plaintiff and saying that as it is a clear conveyance of the first of the cottages including the strip adjoining the yard of the cottage, the onus is on the defendants to establish their right over the strip. Counsel for the defendants accepted this, and the question is whether he has discharged that onus.

The form of the action is this. The plaintiff having asserted his right to prevent anyone passing over his portion of the strip by erecting a fence by way of obstruction, it was pulled down, and thereupon he commenced these proceedings for a declaration that the defendants other than Benjamin G. Wellstead were not entitled to any right of way, and for an injunction to restrain them from trespassing on his part of the strip, and also against Benjamin G. Wellstead and his mother for damages for pulling down and damaging the fence. The defence set up is fourfold. First, the defendants claim that there is in the conveyances an express grant of right of way by reason of the property having been conveyed with the appurtenances, and they claim that the word "appurtenances" is apt to include and does include a right which, although not a right of way in any legal sense at the date of the conveyance, was a right that was de facto in the course of enjoyment at that date. Secondly, it is said that if the word "appurtenances" is not apt to include a quasi right of way of this nature, there is none the less an express grant of the right under the general words to be read into the conveyance by s. 6 (2) of the Conveyancing Act, 1881. Thirdly, it is said that, even if there is no express grant in either of the two ways mentioned, a grant of the right must be implied, and authorities have been cited in support of that view. Lastly, it has been pleaded, though not argued at any length, that the defendants are entitled to the right of way as a way of necessity.

Upon the first of these contentions the question is whether the word "appurtenances" in a conveyance will include something which was not an easement in a strict sense at the date of the conveyance. Counsel for the plaintiff says that it will not, and he cites in support of this view *Bolton* v. *Bolton* (6). That case related to a contract and not a conveyance. It was a contract by which the trustees and executors of T. J. Bolton agreed to sell to the School Board for London: "First, all those the several messuages and tenements described in the first

schedule hereto, with their appurtances, and the inheritance thereof, in fee simple, free from incumbrances." The contract was dated in 1877, and, therefore, was entered into before the Conveyancing Act, 1881. In pursuance of this contract a draft conveyance was submitted by the School Board to the vendors. This draft conveyance contained a grant to the School Board of the lands

> "together with all erections, fixtures, ways, lights, rights, privileges, easements, and appurtenances whatsoever for the said pieces or parcels of land and hereditaments respectively, or any part thereof respectively appertaining, or with the same or any part thereof now or heretofore enjoyed or reputed as part or member thereof."

The vendors struck out the words "or with the same or any part thereof now or heretofore enjoyed," and added words excepting a right of way into Portobello Road, but expressly granting a right of way into Lonsdale Road. The question was whether the contract justified the insertion of these words, and it was argued that it did not include a way to the land sold which the vendors had used over adjoining land of their own. FRY, J., said:

> "The contract for the sale of the property does not contain any words with regard to the right of way. In my view, therefore, the contract was for the conveyance of the premises with all that was appurtenant or appendant to them and nothing more. Mr. Bolton's trustees are perfectly willing to grant a right of way over the road which leads into Lonsdale Road, but they decline to grant a right of way over a road which leads into Portobello Road. The School Board contend that they are entitled to the latter right of way. The first question then is, was the way into Lonsdale Road, or was the way into Portobello Road appurtenant or appendant to Buckingham Mews, the property contracted for? In my opinion neither of the ways was either appurtenant or appendant. The common words, 'with all ways thereunto appertaining,' strictly and properly speaking, never carry a right of way over another tenement of the grantor; and for this simple reason: When a man who is owner of two fields walks over one to get to the other, that walking is attributable to the ownership of the land over which he is walking, and not necessarily to the ownership of the land to which he is walking. . . . Therefore, in my judgment, the right of way claimed cannot be claimed as appurtenant or appendant to the property contracted for."

All the decision comes to is that that particular contract was a contract for the sale of the land and its appurtenances in the strict sense. It is not a decision that the word "appurtenances" may not include something not an appurtenance in the strict sense, and if it were, it would be inconsistent with the decision of the Court of Appeal in *Thomas* v. *Owen* (1).

In that case the Court of Appeal had to construe a lease which contained a demise to the plaintiff of a farm "and all houses, buildings, and appurtenances thereto belonging." The fact was that at some time before the date of the lease the person in occupation of the land enjoyed the privilege of going along the soil of a lane forming part of another farm, but both the farms belonged to the same owner, so that there could not have been in any strict sense a right of way appurtenant to the farm being demised. The Court of Appeal held that the word "appurtenances" was apt in that case to include such a right of way as was being enjoyed at the date of the lease. FRY, L.J., said:

> "It was contended before us that the absence in the lease of 1878 of any other general words than the word 'appurtenances' made an important difference and distinguished this case from the earlier authorities to which we have referred. No doubt the word 'appurtenances' is not apt for the creation of a new right, and the word 'appurtenant' is not apt to describe a right which had never previously existed, and therefore the mere grant of all appurtenances or

of all ways appurtenant to the principle subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long ago as the fourth year of Philip and Mary (*Hill* v. *Grange* (7)) the word 'appurtenances' has easily admitted of a secondary meaning, and is equivalent in that case to 'usually occupied.' Here at the date of the lease of 1878 Lon Car Glas was not in the occupation of the lessor, but in that of the defendant, and the defendant had, as we have held, acquired an estate in it as against which the right of way was reserved, and reserved for the benefit of the land and house of the plaintiff, and under these circumstances we think that the right of way did pass under the word 'appurtenances'."

I prefer to follow that decision, and I hold, therefore, that the word "appurtenances" in these conveyances was apt to include and did include this privilege or right which was being enjoyed by the existing tenants at the date of the sale.

In case, however, I am wrong in the view I have taken on this first point, I proceed to consider the second point—whether there was not in any case an express grant by reason of the words to be read into every conveyance under s. 6 (2) of the Conveyancing Act, 1881. [HIS LORDSHIP read the sub-section.] If that were all, it is quite clear that the general words to be read into the conveyances would have the result of making the conveyances include a grant of the privileges and rights which the tenants were enjoying up to the time of the conveyances. But it is said that by virtue of sub-s. (4) of the section the general words are only read into a conveyance when a contrary intention is not expressed and that a contrary intention is shown here because the conveyances do contain the word "appurtenances." I am unable to accede to that view. It is a very strong thing to say that, when a section of an Act of Parliament provides that a conveyance of land having houses or other buildings on it is to be deemed to include a large number of different matters unless a contrary intention is expressed in the conveyance, the mere fact that the draftsman has elected to include one or two of these matters expressly in the conveyance should operate as an indication of an intention that the remainder should not be included. The point has not hitherto been decided. In *Beddington* v. *Atlee* (8), CHITTY, J., considered it, but refrained from deciding it. So far as I am concerned, my view is that the mere inclusion of the word "appurtenances" is not sufficient to show a contrary intention so as to exclude the operation of s. 6 (2).

Supposing, however, that I should be wrong on both these points, there still remains for consideration the question whether a grant ought to be implied of the right in question here. On this point I will read a passage from LORD PARKER'S judgment in *Pwllbach Colliery Co. Ltd.* v. *Woodman* (9):

> "My Lords, the right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted."

That is the case of a right necessarily ancillary to the employment of another right. He goes on:

> "The class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: (see *Jones* v. *Pritchard* (10) and *Lyttelton Times Co. Ltd.* v. *Warners, Ltd.* (11)). But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in

some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

It is quite clear here from the manner in which the land was laid out that the strip at the back of these four cottages was intended to be used in a definite and particular manner and in no other—that is, as an approach to the rear of the cottages. Numerous authorities have been brought to my attention. In *Brown* v. *Alabaster* (12), KAY, J., reviewed a large number of the previous cases and deals with, among others, *Pearson* v. *Spencer* (13), of which the headnote is (3 B. & S. 761):

". . . Where the owner of a farm divided it by his will into two portions, devising them to A. and B. respectively, and the portion of B. was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of A.; and the devisor during his life had used a way in a certain direction over that property; Held, affirming the decision of the Queen's Bench, that a right to use that way passed to B. by the devise."

KAY, J., after reading that headnote, says:

"Now I pause there to say that this is distinctly an advance of doctrine. That particular way was not, of course, necessarily a way of necessity. It was not held that a way of necessity passed, but that this particular way passed, and the ground of the judgment given by ERLE, C.J., is this:

'We have been much struck with the argument of Mr. Mellish, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the court below on the construction and effect of James Pearson's will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling-houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement'."

That seems to me to describe the class of case where each tenement is so constructed that it involves dependency on an adjoining tenement in order to be enjoyed in the state in which it was sold.

The matter is also put in another way in *Wheeldon* v. *Burrows* (14), which was also discussed by KAY, J., in *Brown* v. *Alabaster* (12). KAY, J., quotes from THESIGER, L.J.'s, judgment in the former case in these terms:

" 'We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the

property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted'."

The interpretation there interposed and placed in brackets above is necessary, because, where the owner of two tenements grants one of them, there can be no easement at the moment of the grant over the other tenement, the two tenements having belonged to one and the same person, and an easement being a right over the land of somebody else. Thesiger, L.J., adds that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant.

These principles, primâ facie, apply to the present case subject to the question whether they apply when there has not been a sale of part and a retention of another part of a tenement, but a sale of the whole by simultaneous sales to different persons. It seems to me to be clear on the authorities that the same principles do apply. In *Allen* v. *Taylor* (2) the headnote is this (16 Ch.D. 355):

"When the owner of a dwelling-house and adjoining land sells the house to one person and the land to another under contemporaneous conveyances, either purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build thereon so as to obstruct the lights of the house."

This is the general proposition of law, and then the headnote goes on to state the facts:

"A testator being owner in fee of a piece of land with two dwelling-houses thereon, and of another piece of land immediately adjoining, with a warehouse at the further end thereof, devised his real estate to his two sons and another person in trust for sale, giving his two sons, or either of them, an option of purchasing any part of his real estate. By two separate but contemporaneous conveyances, executed by the trustees of the will, the one piece of land and the two dwelling-houses thereon were conveyed for value, 'together with all lights thereunto belonging,' and all the estate, &c., to the one son in fee, and the other adjoining piece of land and the warehouse were conveyed for value, together with all lights, &c., and all the estate, &c., to the other son in fee. An injunction was granted restraining the successor in title to the purchaser of the last-mentioned piece of land and warehouse from building on his land in such a way as to obstruct his neighbour's lights."

Sir George Jessel, M.R., there says (ibid. at p. 357):

"There can be no doubt that the law as laid down by *Palmer* v. *Fletcher* (15) is the law of the present day; that is, that where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or quasi-easements. All that is now, I take it, settled law. I take it also that it is equally settled law that if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house. Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights; can it be said that the purchaser of the land is entitled to block up the lights—the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyances? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights, and as part of one transaction he takes the land: he cannot take away the lights from the house."

Applying that here, Hansford, the plaintiff, knew that at the same time that he was buying the first cottage, the vendor was selling Nos. 2, 3, and 4, with the enjoyment of the strip at the rear of the cottages for going to and from the cottages from and to Carrion Lane. He cannot take away that right. SIR GEORGE JESSEL, M.R., continues:

> "But, as I said before, it is a question of what is the settled law on the subject. I see the point is so stated in almost so many words by TINDAL, C.J., in *Swansborough* v. *Coventry* (3). He says: 'In the present case the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought, within the application of this general law, namely, that a grantor shall not derogate from his own grant'."

It seems to me on the authority of that case and *Swansborough* v. *Coventry* (3) that the doctrine of implied grant applies equally to a case of simultaneous sales to different persons of the whole of a property. In the present case there would seem, accordingly, to be an implied grant of the right or quasi-easement enjoyed at the time of the conveyance of the four cottages.

Counsel for the plaintiff, however, says that, although a grant will be implied in certain cases, it has never been implied when the quasi-easement was a right of way except when there was a formed road. Let me recapitulate at this point my view as to the physical condition of the strip in question at the date of the sale. It is a strip of land between a wall and a fence about 10 to 12 ft. wide running the exact length of the rear of these four cottages and inclosed upon all sides except where it abuts on the highway. Each of the houses has a back door opening into it, and there are also trap doors from the earth closets of the four houses opening into the strip. The surface of the strip was hard from being trodden on, and there were tracks leading up to the back doors of the cottages. That, to my mind, can indicate only one thing to a person observing it—namely, that the owner of that land has set apart the strip as a means by which the cottages were to enjoy access to Carrion Lane and the contents of the earth closets were to be taken away. Indeed, if I may quote the words of one of the plaintiff's own witnesses, Mansfield: "Any sensible person would say that the back doors were for access to Carrion Lane." I think he could have added that the strip was set apart to provide that access and to afford a means of emptying the earth closets." What is required in the case of a quasi-easement is the quality of being apparent. That quality may be arrived at in different ways, and, no doubt, the easiest case is that of a made-up road. It is most important, if not essential, that the road should be made up when it is sought to establish the apparency of a quasi-easement of way over an uninclosed piece of land, but when every other possible indication is present as here, and they all point to a defined and inclosed strip having been set aside to provide an access to the rear of certain houses, I certainly decline to hold, unless compelled to do so by authority, that the absence of a made-up road prevented the establishment of an implied grant. Counsel for the plaintiff relied on *Donnelly* v. *Adams* (4), not indeed as a decision, because the judgment of BARTON, J., in the court of first instance was not adopted by the Court of Appeal, who reversed his decision on other grounds, but he relied on many expressions contained in the authorities cited by BARTON, J., and also on the whole tendency of that judgment and the opinion which appears to permeate it. In other words, he suggests that if the judgment of BARTON, J., is read it becomes abundantly clear that he was intending to show the necessity in such a case as this of establishing that there was a made-up road. I do not take that view. In that case there had up to the date of the severance been no user of any kind, much less was there any indication of an existing way. This is clear from this passage of BARTON, J.'s, judgment:

> "I come to the real question at issue at the trial, namely, the question whether the right to these ways, or either of them, ought to be held to have passed by

implication with the lease. The house was practically a new one. One tenant occupied it for a short time before the plaintiff's father took the lease of 1888. But having regard to the date of the head lease of 1886 and to the fact that the house was the second one built upon the plot after the date of the head lease, the occupation of that tenant must have been brief. No question was put suggesting any previous user of these ways, or either of them, before the lease of 1888. There is no evidence of any previous user. Accordingly, this is not a case in which, in order to enjoy the premises 'in the usual manner as previously enjoyed,' there was any 'necessary dependence' upon the adjoining lands."

The case sought to be established in *Donnelly* v. *Adams* (4), was that the grant of the ways might be implied from subsequent user. Thus BARTON, J., said:

"Plaintiff's case is not rested upon prescription or lost grant or any ground of that kind. Her counsel rely upon the subsequent user, only as evidence of an implied grant. In addition to the subsequent user, plaintiff's counsel rely upon the existence of this back door as part of the demised premises, and upon the inconvenience of bringing coal in by the front door."

Therefore, it is clear what case the learned judge was dealing with. He then goes through the authorities to show that in such a case the mere existence of a door is not sufficient and will not make a quasi-easement appurtenant, but that it must be shown that there was a "visible way" or a "back lane or back passage" or a "manifest mode of access" or a "made or marked way" or a "defined road" or a "marked or defined way" or something "capable of being described or identified as a way." I have taken all these phrases from different parts of the judgment of BARTON, J., and it appears to me that every one of these phrases fits the condition of affairs here. I am not prepared, therefore, to accept, and do not accept, *Donnelly* v. *Adams* (4) or the cases there referred to as authorities to show that the absence of a made-up way is fatal to a claim to an implied grant of a right of way of this character, and, indeed, when I turn to the decision of the Court of Appeal in *Donnelly* v. *Adams* (4) I find FITZGIBBON, L.J., saying:

"The law is stated in *Geraghty* v. *M'Cann* (16). I admit that neither by express nor by implied grant can a vague or uncertain right be created. Every lawful way must be capable of identification; it must have a terminus a quo and a terminus ad quem. But it is not essential to a way that there shall be a beaten track between its termini. The precise line which a person must follow in exercising a right of way need not always be the same."

HOLMES, L.J., says:

"Whatever may have been once thought, it is now settled that a grant of a right of way may be implied in a conveyance or lease over land belonging to the grantor or lessor and remaining in his possession; but it is contended on behalf of the defendant that this can only be done when at the date of the grant or lease there was on the servient tenement some physical indication of the way such as a made road or beaten track. It seems to me that there is no legal principle requiring such an artificial limitation."

Counsel for the defendants relied upon *Rudd* v. *Bowles* (5), a decision of NEVILLE, J., where the headnote is as follows ([1912] 2 Ch. 60):

"Defendant B. had granted to G. separate leases of four plots of land fronting on H. Road, and four houses which had been erected thereon by G. under a building agreement. The plan on each lease, which was made part of the description, showed a row of twelve plots with houses thereon fronting on H. Road, including the house demised which alone was coloured, and a strip of land coloured brown running past the back of all the plots to E. Road. The position of this strip on the plan suggested that it was intended to give access

to the back of the plots, but there were no words on the plan expressing such an intention. This strip of land was included in the building agreement but not in the leases. The leases were executed in May, 1903, and then bore no date, except the year 1903, but the dates July 27, 28, 29 and 30, 1904, respectively, were afterwards inserted by agreement between the parties. At the latter dates the houses had been completely erected and surrounded with a fence in which gates or openings had been made in the back fences giving access to and from the brown strip. This strip, which belonged to B., had never been fenced or marked off from the rest of B.'s land. The plaintiff was a mortgagee of G. who had entered into possession and claimed a right of way over the brown strip."

So the strip only existed as such on the plan. It was held there that an implied right of way over the brown strip was granted by the leases to the lessee and those claiming under him. The importance of that case is the state of facts there as regards the brown strip, which is stated as follows:

"The gates had been regularly used by the occupiers of the houses, but the strip coloured brown had never been fenced or in any way marked off from the rest of the defendant Bowles' land at the back of the gardens, and therefore the occupiers in using their back gates had not confined themselves exactly to the brown strip."

It is not like this case where the occupiers could not wander off the strip because it was a narrow, defined and inclosed channel. NEVILLE, J., says:

"When the leases were originally executed the houses demised by them were nearly completed, but the fence at the back had not been erected. It must even then have been fairly obvious to anyone inspecting the houses with the plan upon the leases before him, having regard to the laying out of the ground and the construction of the houses, that the back gardens were intended to open upon the four-foot strip of land indicated on the plan; while at the date which the leases bear the matter was made clearer, the back fences having then been erected, and the position of the gates defined. . . . In my opinion, reading the leases in the light of the surrounding circumstances, an intention to grant a right of way must necessarily be inferred. Although the path was never made up, except by the putting down of a little gravel by some of the tenants outside their gates, it was used by the occupiers of the houses until the happening of the events which led to the action. It is true that the land behind the gardens, being waste land, and no boundary fence to the north of the four-foot strip having ever been erected, the tenants and the tradesmen passing from Enslin Road to the garden gates did not confine their user to the four-foot strip; but inasmuch as there is no question here of the acquisition of a right by user, this seems to me quite immaterial."

So that NEVILLE, J., there certainly took the view that the absence of a made-up road was not vital. It is often very important that there should be a made-up road, especially when the right is claimed over uninclosed land, but, where there are other indicia to show that a strip of land was intended to be used as a way, it is not necessary that there should also be a made-up road to establish the right. The result is that, even if I am wrong in thinking that there was an express grant of the right of way, either by virtue of the use of the word "appurtenances" in the conveyances or by virtue of the words read into the conveyances pursuant to s. 6 of the Conveyancing Act, 1881, I should still hold that the vendor of the four cottages must be taken to have granted to each of them the right to use the strip in the rear of the cottages as a way in the same manner as it was being enjoyed by the tenants of these cottages before and up to the date of the conveyances. That will involve implying in the conveyances such reservations or grants as may be appropriate to confer this common right.

The only remaining point is whether the right to use the strip as a way could be established on the ground that it is a way of necessity. That has not been fully argued, and I can see that there would be serious difficulty in establishing it so far as the ingress and egress of individuals to and from the cottages are concerned, as there is an alternative means of approach available by the front of the cottages. I incline, however, to the view that a way of necessity might have been made out in respect of the right to get to the trap doors of the earth closets over the strip for the purpose of emptying them of their contents. As the property existed when it was sold I am satisfied that it was not possible in the case of any of the houses to empty the closets otherwise than by the trap doors. If the closets had been provided with different arrangements, it might have been possible to empty those belonging to the first and fourth cottages without using the strip by taking the contents through to the front of the houses and so to Bonnett's Lane by paths alongside the houses, but it is not so with regard to the second and third cottages which extended right across the plots, so that the contents of the earth closets could only have been brought to the front of the houses by taking them through the houses contrary to the byelaws of the local authority. It is not, however, necessary for me to decide that point. I hold, on the first three grounds that I have stated, that the right of way was either expressly or impliedly granted, and therefore that this action fails and must be dismissed with costs.

Solicitors: *Gibson & Weldon*, for *J. W. Miller*, Wareham; *Robinson & Bradley*, for *E. S. Clark*, Wareham.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

DEY *v.* PULLINGER ENGINEERING CO.

[KING'S BENCH DIVISION (Bray and Sankey, JJ.), July 20, 21, 30, 1920]

[Reported [1921] 1 K.B. 77; 89 L.J.K.B. 1229; 124 L.T. 534; 37 T.L.R. 10]

Company—Bill of exchange—Liability—Bill drawn by director on behalf of company—Implied authority—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 77.

A company, by its articles of association, empowered its directors to authorise the managing director to draw bills of exchange on behalf of the company. Without being so authorised, the managing director drew a bill of exchange on behalf of the company. In an action on the bill against the company as drawers of the bill,

Held: the managing director, in drawing the bill, was a "person acting under [the] authority" of the company within the meaning of s. 77 of the Companies (Consolidation) Act, 1908, and as, by its articles, the company was empowered to authorise its managing director to draw bills of exchange, a holder in due course was entitled to assume that he had authority without being bound to inquire whether he had an actual authority; the company was, accordingly, liable.

Premier Industrial Bank, Ltd. v. *Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.* (1), [1909] 1 K.B. 106, disapproved.

Notes. The Companies (Consolidation) Act, 1908, was repealed and replaced by the Companies Act, 1929, which in turn has been repealed and replaced by the Companies Act, 1948. For s. 77 of the Act of 1908, see s. 23 of the Act of 1948.

Referred to: *Kreditbank Cassel G.m.b.H.* v. *Schenkers*, [1926] 2 K.B. 450.

As to a company's contracts, see 6 HALSBURY'S LAWS (3rd Edn.) 425 et seq., and for cases see 9 DIGEST (Repl.) 674 et seq. For the Companies Act, 1948, s. 33, see 3 HALSBURY'S STATUTES (2nd Edn.) 486.

Cases referred to:

(1) *Premier Industrial Bank, Ltd.* v. *Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.*, [1909] 1 K.B. 106; 78 L.J.K.B. 103; 99 L.T. 810; 25 T.L.R. 17; 16 Mans. 22; 9 Digest (Repl.) 687, *4526*.

(2) *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; 64 L.J.Ch. 451; 72 L.T. 375; 43 W.R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C.A.; 9 Digest (Repl.) 545, *3589*.

(3) *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, *Howard* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93; 65 L.J.Ch. 536; 74 L.T. 473; 44 W.R. 536, C.A.; 9 Digest (Repl.) 675, *4458*.

(4) *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (1869), 4 Ch. App. 460; 39 L.J.Ch. 27; 20 L.T. 641; 17 W.R. 689, L.JJ.; 9 Digest (Repl.) 686, *4522*.

(5) *Fountaine* v. *Carmarthen Rail. Co.* (1868), L.R. 5 Eq. 316; 37 L.J.Ch. 429; 16 W.R. 476; 10 Digest (Repl.) 1271, *8978*.

(6) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur. N.S. 663; 119 E.R. 886, Ex.Ch.; 9 Digest (Repl.) 660, *4374*.

(7) *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 33 L.T. 383, H.L.; 9 Digest (Repl.) 687, *4529*.

Appeal from the judgment of a master in an action under Ord. 14, r. 7.

The plaintiff claimed to recover the sum of £2,000 from the defendants on a bill of exchange dated Nov. 12, 1919, purporting to be drawn on behalf of the defendants by H. J. Pullinger, the managing director, E. J. Bedford, director and Thomas Howe Williams, secretary, and accepted by the secretary. The plaintiff was the holder in due course of the bill, which was dishonoured on presentation. The defendants set up the defence that the persons drawing the bill had no authority to draw it on the defendants' behalf. According to the memorandum of association, among the objects of the company was (cl. 3 (13)) "to draw, accept, indorse, and negotiate, promissory notes, bills of exchange. . . ." By the articles of association the directors were empowered (by art. 73) to appoint one or more of their body to be managing director or managing directors on such terms as to the duties to be performed and the powers to be exercised, and all other matters as they thought fit, but so that no managing director should be invested with any power or powers or entrusted with any duties which the directors themselves could not have exercised or performed. Article 75 provided that the

> "business of the company shall be managed by the directors who . . . may exercise all such powers . . . and do on behalf of the company all such acts as may be exercised and done by the company."

It appeared that the managing director had been duly appointed in accordance with the articles, but it did not appear from the minute books of the defendants that any resolution had been passed by the directors authorising the managing director and/or any other director to draw bills of exchange on behalf of the defendants. The action was referred to a master who gave judgment for the defendants. The plaintiff appealed.

By the Companies (Consolidation) Act, 1908, s. 77:

> "a bill of exchange or promisory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

Gilbert Beyfus for the plaintiff.

Patrick Hastings, K.C. and *W. F. Swords* for the defendants.

Cur. adv. vult.

July 30. **BRAY, J.,** stated the facts, and continued: It was admitted before the master and before us that the plaintiff was a holder in due course. It therefore becomes unnecessary for me to go into the circumstances under which the plaintiff became the holder. The master held that it had not been drawn by any person acting under the authority of the defendants within the meaning of s. 77 of the Companies (Consolidation) Act, 1908. He thought that the case was covered by *Premier Industrial Bank, Ltd.* v. *Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.* (1), decided by PICKFORD, J. (now LORD STERNDALE). There are some differences between the facts in that case and the present, but in principle it cannot, in my opinion, be distinguished. In the present case, there is included in the objects for which the company is established in the memorandum of association, cl. 3, para. 13, "to draw, accept, endorse and negotiate . . . bills of exchange," &c. In the articles of association there is, under the head of "Managing Directors," art. 73, which gives power to the directors to appoint a managing director and give him power to exercise any duties which the directors could have exercised. Under the head "Powers of Directors," the directors, under art. 75, may exercise all such powers and do on behalf of the company all such acts as might be exercised and done by the company, subject to certain exceptions which do not apply in this case. It is clear, therefore, that anyone looking at the memorandum and articles of association would see that the managing director might have the power to draw and indorse this bill. It was the same in the case before LORD STERNDALE. This, being a decision of a single judge, is not binding on us, but we ought not to differ from it unless we can clearly see that it was wrong. It decided that a holder in due course bringing an action on a bill of exchange against a company as drawers, indorsers or acceptors must show that the person or persons who actually drew, indorsed, or accepted the bill was or were authorised in fact to do so by the company, although it purported to be, and was in fact, signed by the directors on behalf of the company in the form usually adopted by companies. If this be good law, it would certainly strike a blow against the negotiability of companies' bills. A holder in due course cannot, as a rule, be expected to know what goes on in the company's board room, and if he has to take the risk of its turning out that the persons signing had no authority, and much more so if he has to prove that they had authority, people in business would be very shy of dealing with such bills.

I will proceed to examine the grounds on which LORD STERNDALE founded his judgment. After setting out the facts and reading parts of the memorandum and articles of association, which, as I have said, do not differ in any important respect from those here, he deals with a number of cases which clearly show that, in the case of contracts, the law is otherwise. Persons dealing with companies are bound to look at what may be called "the outside position" of the company, but not at what may be described as their "indoor management": see the judgment of LORD HALSBURY in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (2) ([1895] 1 Ch. at p. 633). In *Biggerstaff* v. *Rowatt's Wharf, Ltd.* (3), where the question was whether an assignment of debt by the company to the plaintiff was valid, LINDLEY, L.J., says ([1896] 2 Ch. at p. 102):

> "It is said that the company are not bound by those orders because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bonâ fide. It is settled by a long string of authorities that, where directors give a security which according to the articles

they might have power to give, the person taking it is entitled to assume that they had the power. The hypothecations, therefore, are in my opinion valid."

And KAY, L.J., says (ibid. at p. 106):

"Each of these orders was in a form of a notice of hypothecation, signed on behalf of the company by Mr. Davy as managing director. Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognised as such. By the articles the directors were authorised to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing ultra vires of a managing director; and it would be extraordinary if a person dealing bonâ fide with the managing director of the company were bound to inquire whether the powers which the articles authorised the directors to give him had been formally delegated to him. There is a long string of cases showing that a person so dealing with an officer of a company has a right to presume that all has been done regularly."

I need not go through those authorities because counsel for the defendants frankly admitted that, if this were a contract and not a bill of exchange, the plaintiff would be entitled to succeed.

Now as to bills of exchange. In *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (4), the court had to deal with a claim on bills of exchange, and SELWYN, L.J., after reading s. 47 of the Companies Act, 1862, says (4 Ch. App. at p. 468):

"The question still remains, who is properly to be considered a person acting under the authority of the company, and that matter, I think, has been settled by the several decisions to which reference has been made, the effect of which is very concisely and clearly summed up by the present Lord Chancellor in *Fountaine* v. *Carmarthen Rail. Co.* (5). His Lordship says (L.R. 5 Eq. at p. 322):

'In the case of a registered joint-stock company all the world, of course, have notice of the general Act of Parliament, and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (6), the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of LORD CAMPBELL'S judgment in *Royal British Bank* v. *Turquand* (6). That case of *Royal British Bank* v. *Turquand* (6) may now, I think, be considered as a leading authority applicable to cases of this description, and, so far as I am aware, it has never been questioned'."

The lord justice, therefore, clearly holds that the principles laid down in the cases dealing with contracts apply also to bills of exchange. Having cited these authorities, LORD STERNDALE, in a very few sentences, holds, that they are not applicable because of the words of s. 47 of the old Act, now re-enacted as s. 77 in the Act of 1908, "in the name of the company . . . or . . . by or on behalf or on account of the company, by any person acting under the authority of the company." He says, after reading the section ([1909] 1 K.B. at p. 115):

"I think the words of the section, 'if accepted by any person acting under the authority of the company' must mean something more than a person who might by a certain delegation of power given to him have been authorised and have been thus acting under the authority of the company."

He gives no further reason. He does not deal with the judgment of SELWYN, L.J., in *Re Land Credit Co. of Ireland* (4), nor does he say why the case of contracts should be distinguished from those of bills. Counsel for the defendants made a great point of the fact that the words "express or implied" appear in the section dealing with contracts (s. 76 (1)), whereas there were no such words in the section dealing with bills. As a matter of history, it appears that, in the Joint Stock Companies Act, 1856, s. 43, which deals with bills, did contain the words "express or implied," and these words also appear in the contract section (s. 41). In the Act of 1862, the section dealing with bills is s. 47, and there the words "express or implied" are omitted. There is no section in that Act relating to contracts, but the contract section appears again in the same words as before in the Act of 1867 as s. 37. I do not think there is anything in the history of s. 77 to justify me in construing the word "authority" otherwise than according to its natural and ordinary meaning. An "authority" may be express, or implied, or apparent, and I can see no reason for inserting the word "express" before it in s. 77. It may be that, in the Act of 1862, it was thought better to omit the words "express or implied" as possibly limiting its meaning. It is to be observed that similar words are used in s. 91 (1) of the Bills of Exchange Act, 1882. I know of no decision on that section, but from the note in CHALMERS' BILLS OF EXCHANGE on this section it would appear that, before the Act, implied authority was sufficient. I think that the contention that, in reading s. 77, the word "authority" is to be construed as express authority fails. Against the authority of LORD STERNDALE is the authority of SELWYN, L.J., and GIFFARD, L.J., in *Re Land Credit Co. of Ireland* (4). The reasoning of these learned judges in that case is to me convincing, and I feel myself compelled to hold that LORD STERNDALE's decision was wrong, and that the decision of the master, which was founded on it, was wrong.

The question then arises whether we ought to enter judgment for the plaintiff, or whether we can only send the case back to the master to hear any evidence that the defendants desire to call. It was not suggested in the argument before us that any evidence could be given except to show that, in fact, the persons drawing and indorsing this bill had no authority to do so, and were in fact acting in fraud of the defendants. I will assume that they proved this, still I should hold that the plaintiff must succeed, it being admitted that he was a holder in due course without notice of the fraud. I think the appeal must be allowed and judgment entered for the plaintiff with costs here and below.

SANKEY, J., read the following judgment, in which he stated the facts, and continued:—The defendants contended that it was never drawn and indorsed within the meaning of s. 77 of the Companies (Consolidation) Act, 1908, because the managing director had not in fact, power to bind the defendants. The power of a managing director is contained in art. 73 of the articles of association of the defendants which is as follows: [His Lordship read the article, and continued:] It is, therefore, clear that a managing director could be invested with the powers which directors themselves could exercise, and by art. 75, coupled with para. 13 of cl. 3 of the memorandum of association, the directors had power to accept and draw bills of exchange. The trial was referred to a learned master, who decided in favour of the defendants, and from his decision the present appeal is brought.

The plaintiff relied on a number of familiar cases, including *Royal British Bank* v. *Turquand* (6), *Mahony* v. *East Holyford Mining Co.* (7), *Re Land Credit Co. of Ireland* (4), *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (2), and *Biggerstaff* v. *Rowart's Wharf Ltd.* (3), which lay down the law with regard to what persons dealing with directors must look to. LINDLEY, L.J., in *Biggerstaff* v. *Rowatt's Wharf Ltd.* (3) said ([1896] 2 Ch. at p. 102):

> "They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the

articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promisory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bonâ fide. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power."

The plaintiff then urged that, looking at art. 73 above referred to, it was clear that the managing directors might have been entrusted with the power to draw bills of exchange, and that, therefore, he, the plaintiff, was entitled to assume that the managing director signing on the defendants' behalf was duly authorised, and to succeed in his claim. The defendants relied on a decision of PICKFORD, J., in *Premier Industrial Bank, Ltd.* v. *Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.* (1).

They further drew attention to s. 76 and s. 77 of the Companies (Consolidation) Act, 1908, the first of which deals with contracts made on behalf of the company, and the second with bills of exchange and promisory notes accepted on its behalf, and pointed out that whereas, in the case of contracts, it is provided in s. 76 and s. 77 of the Companies (Consolidation) Act, 1908, the first of which deals with the contracts made on behalf of the company, and the second with bills of exchange and promisory notes accepted on its behalf, and pointed out that whereas, in the case of contracts, it is provided in s. 76 that the authority of a person acting on behalf of a company may be "express or implied," no such words are used in s. 77 dealing with bills of exchange, and that, therefore, the "authority" referred to in s. 77 can only mean "express" authority, which did not exist in the present case. To begin with, no point can be made that s. 77, which leaves out the words "express or implied," immediately follows s. 76, which contains them. In fact, the Act of 1908 was a consolidating Act, and s. 76 and s. 77 came next to one another by accident. Section 77 reproduces s. 47 of the Companies Act, 1862, and s. 76 reproduces s. 37 of the Companies Act, 1867. We therefore have to construe the words in s. 77 not necessarily by contrast to the words in s. 76. In my view, the word "authority" in s. 77 is capable of meaning express or implied authority, and it may well be that the draughtsman of the 1867 Act added the words "express or implied" in s. 37 of that Act out of greater precaution. Certainly up to the decision of PICKFORD, J., in the *Premier Bank Case* (1), the construction of the words "express or implied authority" in s. 37 of the 1867 Act had not been held to be different from that which ought to be placed on the word "authority" in s. 47 of the 1862 Act: see *Re Land Credit Co. of Ireland*, per SELWYN, L.J. [HIS LORDSHIP read the passage quoted by BRAY, J., and continued:] It is, in my view, impossible for us to distinguish that case on the ground that the directors there knew of and affirmed the bill transactions in question.

The real difficulty before us is the decision in *Premier Industrial Bank, Ltd.* v. *Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.* (1), and the problem we have to solve is whether we should follow the law to be gathered from that case, or from the earlier ones referred to above. I am of opinion that we ought to follow the earlier ones, and that the authority referred to in s. 77 may be either express or implied. If Parliament had desired to say that a bill of exchange could only be accepted by a person acting under the express authority of the company it would have been easy to say so. Beyond that, this construction seems preferable, because to hold otherwise would be to place bills of exchange of limited companies, which circulate on the market, in a less favourable position than ordinary contracts made by such companies and those other bills of exchange. The word "authority," as above suggested, is capable of including both express and implied authority, and

in s. 91 of the Bills of Exchange Act, 1882, where the word is also used, it is understood as extending to both: CHALMERS' BILLS OF EXCHANGE (8th Edn.), p. 321. The plaintiff, therefore, was entitled to assume that the signature of the managing director was duly authorised, and the construction to be placed on the word "authority" in s. 77 the same as that to be placed on "authority, express or implied," in s. 76.

In my opinion, the judgment of the learned master was wrong, and the appeal should be allowed. For the reasons given by my Lord, it is not necessary to send the case down for a new trial, and judgment must be entered for the plaintiff.

Appeal allowed.

Solicitors: *Bono & Nimmo; Lloyd, Richardson & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re BATTIE-WRIGHTSON. CECIL *v.* BATTIE-WRIGHTSON

[CHANCERY DIVISION (Astbury, J.), June 2, 3, 1920]

[Reported [1920] 2 Ch. 330; 89 L.J.Ch. 550; 124 L.T. 84; 36 T.L.R. 693; 64 Sol. Jo. 585]

Will—Evidence—Evidence to supply omission—Solution of ambiguity—Bequest of balance in "the said bank"—No bank named in probate—Erasure in original will—Right to look at original will.

By her will, a testatrix bequeathed a legacy to be paid out of the money standing to her credit at the N.P. bank and not out of any other moneys, and bequeathed the balance at "the said bank" to a specific legatee. Before the will was executed the words relating to the N.P. bank were erased, the erasure attested, and the will executed. The testatrix died and the will was proved, but the erased words were not admitted to probate and did not appear in the probate copy. At the date of the will and at her death, the testatrix had accounts at six other banks which were in credit.

Held: the original will was admissible in evidence in order to ascertain what bank was intended; alternatively, there was a latent ambiguity and the original will was admissible as extrinsic evidence of the testatrix's intention, which was that the legacy should be paid out of the balance at the N.P. bank.

Notes. As to evidence of a testator's intentions, see 34 HALSBURY'S LAWS (2nd Edn.) 165 et seq.; and for cases see 44 DIGEST 614 et seq.

Cases referred to:

(1) *Sanford* v. *Raikes* (1816), 1 Mer. 646; 35 E.R. 808; 44 Digest 542, *3591.*

(2) *Compton* v. *Bloxham* (1845), 2 Coll. 201; 63 E.R. 699; 23 Digest (Repl.) 243, *2950.*

(3) *Oppenheim* v. *Henry* (1853), 9 Hare, 802, n; 62 E.R. 742; 20 L.T.O.S. 291; 1 W.R. 126; 23 Digest (Repl.) 243, *2949.*

(4) *Manning* v. *Purcell* (1855), 7 De G.M. & G. 55; 3 Eq. Rep. 387; 24 L.J.Ch. 522; 24 L.T.O.S. 317; 3 W.R. 273; 44 E.R. 21, L.JJ.; 23 Digest 243, *2951.*

(5) *Child* v. *Elsworth* (1852), 2 De G.M. & G. 679; 42 E.R. 1038, L.JJ.; 44 Digest 550, *3680.*

(6) *Re Harrison, Turner* v. *Hellard* (1885), 30 Ch.D. 390; 55 L.J.Ch. 799; 53 L.T. 799; 34 W.R. 420, C.A.; 44 Digest 550, *2684.*

(7) *Shea* v. *Boschetti* (1854), 18 Beav. 321; 2 Eq. Rep. 608; 23 L.J.Ch. 652; 23 L.T.O.S. 137; 18 Jur. 614; 2 W.R. 281; 52 E.R. 127; 44 Digest 548, *3659*.

(8) *Gann* v. *Gregory* (1854), 3 De G.M. & G. 777; 2 Eq. Rep. 605; 23 L.T.O.S. 136; 18 Jur. 1063; 2 W.R. 484; 43 E.R. 305, L.C.; 44 Digest 312, *1448*.

(9) *Doe d. Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363; 2 H. & N. 54; 9 L.J.Ex. 27; 3 Jur. 955; 151 E.R. 154; 44 Digest 543, *3609*.

Also referred to in argument:

Doe d. Gord v. *Needs* (1836), 2 M. & W. 129; 2 Gale, 245; 6 L.J.Ex. 59; 150 E.R. 698; 44 Digest 639, *4741*.

Originating Summons.

By her will, dated Oct. 3, 1917, the testatrix, after appointing the plaintiffs and the defendant Battie-Wrightson as her executors and trustees, and after giving various legacies, including a legacy of £6,000 to Annie Middleton (now the defendant Annie Halliwell), proceeded:

"I give the following legacies [to be paid out of the money standing to my credit at the National Provincial Bank of England, Bishopsgate, E.C., and not out of any other moneys, namely—then followed certain small legacies amounting in all to £125] and I declare that all the said legacies shall be paid free from legacy duty. I give to the said Annie Middleton in addition to the legacy which I have already given to her the undisposed of balance which may be to my credit at the said bank after paying thereout the legacies lastly hereinbefore mentioned."

Then followed a gift to Annie Middleton of shares held by the testatrix in certain named companies in the hope, but without imposing any trust, that she would out of the income therefrom maintain a boy who was living with the testatrix until he should attain twenty-one years, and the testatrix declared that the receipt in writing of Annie Middleton "for the said balance and shares" should be a sufficient discharge to the executors. After certain specific devises and bequests, including a devise of the Wothorpe estate to Annie Middleton, the testatrix gave the residue of her real and personal estate to her trustees on trust for sale and conversion, and to hold the proceeds (after paying funeral and testamentary expenses, debts and legacies) upon trust for her son, the defendant Battie-Wrightson absolutely. On Oct. 3, 1917, before executing her will, the testatrix directed her solicitor to strike out the words in square brackets; this was done, and the erasure was duly attested. The will was then executed, and the testatrix, who was then in bad health, retained the document in her possession until her death on Oct. 29, 1917. The will was proved on Sept. 11, 1918, but the words erased were not admitted to probate and did not appear at all in the probate copy. At the date of her death, and also at the date of the will, the testatrix had accounts at several banks other than the National Provincial Bank, Bishopsgate; and at six of these her account was in credit. The question thus arose as to the meaning of the words "the said bank" in the bequest to Annie Halliwell as no particular bank was mentioned in the probate. The plaintiffs issued this summons to determine whether Annie Halliwell was entitled to the balance standing to the credit of the testatrix at her death at the National Provincial Bank, Bishopsgate, E.C., or to any and, if so, what balance.

P. F. Stokes for the plaintiffs.
Hildyard, K.C. and *H. B. Vaisey* for the residuary legatee.
Luxmoore, K.C. and *Roope Reeve* for the specific legatee.

ASTBURY, J., stated the facts, and continued: The question that has to be decided turns on two rules of construction, first, whether I can look at the original will and take into account the contents of the erased portion in order to ascertain what bank was pointed at by the words "the said bank," and, secondly, whether extrinsic evidence may be regarded for the purpose of defining the bank. At the date of her will, the testatrix had five or six different banking accounts in London, and she

had standing to her credit at the National Provincial Bank £1,977, which at the date of her death was £1,982. Her other banking accounts, with the exception of one, appear also to have been in credit at the date of her will. Whatever be the right construction to be placed on this altered document, it seems to be clear that an application can be made, if necessary, to the Probate Division to rectify the probate by admitting to probate instead of the present probate copy a copy of the original will showing the erased matter; and anything that I determine in this case must be without prejudice to the right of any party interested to apply for such rectification as they may be so advised.

Dealing with the first question whether the court, on a question of construction, can look at the original document and take into account the character of the erased portion, there are a number of authorities, with some of which I propose to deal, which are referred to in the text-books. In Jarman on Wills (6th Edn.), at pp. 44 and 45, the author says:

> "to determine the construction, the original will, both of real and personal property may be looked at. It was said, indeed, by Sir W. Grant [in *Sanford* v. *Raikes* (1)] that his decision on the construction of the will before him could not depend on the grammatical skill of the writer in the position of the characters expressive of a parenthesis: that it was from the words and from the context, not from the punctuation, that the sense must be collected. And there are, probably, few imaginable cases in which punctuation could exercise a very important influence upon the construction. But in recent times, the courts have without hesitation adopted the practice of examining original wills 'with a view to seeing whether anything there appearing—as, for instance, the mode in which it was written, how "dashed and stopped,"—could guide them in the true construction to be put upon it'."

In Hawkins on Wills (2nd Edn.), at pp. 11 to 13, the following appears:

> "Mr. Hawkins observes: 'Notwithstanding a dictum of Sir W. Grant in *Sanford* v. *Raikes* (1), it appears to be settled, that in construing a will marks of punctuation, as parentheses, stops, capital letters, &c., may be taken into consideration.' . . . 'In *Compton* v. *Bloxham* (2), Knight-Bruce, V.C., sent for and examined the original will, and decided on the ground that the words "my moneys" began an entirely new sentence. It would seem that marks of punctuation, as stops, capital letters, &c., in the original will may be adverted to, though not in the probate, and though the question relates to personal estate (*Oppenheim* v. *Henry* (3)). But the probate is conclusive as to what the *words* of the will are. In *Manning* v. *Purcell* (4), where the will, one of personalty, was a common printed form filled up by the testator, with parts of the form struck out, the original will was sent for, and Turner, L.J., in giving judgment, said: "In coming to this conclusion, I have not overlooked the effect to be given to the erasures, as they appear *on the original will.*" In *Child* v. *Elsworth* (5), . . . Cranworth, L.J., said: "It is only necessary to add, that we have caused the the original will to be examined, and it appears that the whole gift in question to the children and grandchildren of W. D., including the directions for the time of payment, is written continuously as one sentence, and is closed with a full stop" '."

Lastly, *Re Harrison* (6) is referred to, where Lord Esher, M.R., said (30 Ch.D. at p. 393): "I know of no rule that for the purpose of construing a will you may not look at the original will itself." In Williams on Executors (10th Edn.), at p. 445, the earlier authorities are examined, including *Shea* v. *Boschetti* (7), which I will refer to in a moment, and reference is made to the fact that, in the earlier editions of the work, Sir Edward Vaughan Williams doubted whether in strictness the Court of Chancery had not gone beyond its legitimate means for construing wills

where it had sought aid from appearances in the will itself not to found in the probate. After referring to that passage, the present authors say:

> "But the practice would seem to be to look at the original in such cases. The principle to be derived from the cases would appear to be that the original will may be looked at to assist the construction, but not to alter or vary or displace anything determined in the granting of the probate."

In *Manning* v. *Purcell* (4), the will was written by the testator filling up the blanks in a printed form. In the document as executed, the testator gave and devised to his wife all his money, furniture, plate, books, linen, wearing apparel, &c. Then the next sentence in the printed form read, "And as to all the rest, residue and remainder of my estate and effects." The testator struck out the words "as to" and the word "rest," leaving the sentence to read, "And all the residue and remainder . . . I give devise and bequeath . . . the same . . . unto my dear wife during the term of her natural life." The question was whether, having struck out the words "as to," so that the portion of the will following the gift of furniture and wearing apparel read all as one sentence, the wife's interest was cut down to a life estate in the earlier portion of the gift, namely, the furniture and wearing apparel, or whether she took those absolutely and a life interest only in the residue. KNIGHT-BRUCE, L.J., referring to TURNER, L.J.'s view, who was absent from the court, said (7 De G.M. & G. at p. 61):

> "He is of opinion, that the Vice-Chancellor's interpretation of the will is in this respect correct, thinking that a sufficiently strong inference to the contrary is not to be drawn from the erasure of the words 'as to,' especially when compared with other erasures."

TURNER, L.J., himself says (ibid. at pp. 65, 66):

> "I will only add to the observations which have been already made this remark with reference to the erasure of the words 'as to,' namely, that there are other words also struck out by the testator from the printed form in a way which shows that no reliance can be placed upon the erasures as having been deliberately and advisedly made with a view to alter the construction to be put upon the will. In coming to a conclusion upon this question, I have not overlooked the effect to be given to the erasures as they appear on the orginal will."

Now it is quite true that neither in that case nor apparently in any other reported authority were erased words used as an effective portion of the will in the sense of allowing them to give a different operation to other portions of the document than would have otherwise been the case. But I think it is quite clear from TURNER, L.J.'s, expressions that he was of opinion that if the erasure in the case before him had been sufficiently explicit, it would have been given effect to by him on the construction of the clauses following it.

In *Shea* v. *Boschetti* (7), the probate of a will originally granted without showing erasures was revoked and a new probate issued showing them. ROMILLY, M.R., said (18 Beav. at p. 325):

> "in my opinion, the fact of the Court of Probate granting a facsimile probate does not, in the slightest degree, affect the rules of construction, or the manner in which this court must deal with the case presented to it. The probate of the will performs its function by telling the court what the will consists of; but whether the Court of Probate grants a facsimile probate or not, I apprehend this court is bound to look at any thing in the original will itself, which may aid and assist it in coming to a correct conclusion, as to the construction to be put upon the contents of the will."

That means, if it means anything, that the erasures may be considered for the purpose of putting the true construction on what would otherwise be a doubtful passage in a portion of the will that was admitted to probate.

In *Gann* v. *Gregory* (8), certain legacies originally written in a draft will were crossed out by diagonal lines in ink. Lord Cranworth, L.C., during the argument (3 De G.M. & G. at p. 780), referring to the struck-out portions, said this:

> "They may be left to show the meaning of the testator; suppose for example a case of this kind,—a testator says, 'I give A. B. an annuity of £500, and I give him also £1,000,' and he then strikes out down to and including the words '£500'."

The Lord Chancellor does not answer his own conundrum, but it seems to me quite obvious that what he intended to convey was that in that case where the will would only contain the words "I give him also £1,000," the erased portion could be looked at for the purpose of finding out that "him" meant A. B. If that is the meaning, that is a view which is directly in point in the present case. In the judgment, Lord Cranworth throws some doubt on the right or duty of the court on every occasion to look at the original will, but I think from the authorities since that that doubt no longer exists.

In *Re Harrison* (6), a testatrix used a law-stationer's form of will which was printed with blanks, and, after directing her debts and funeral expenses to be paid by her executrix, she gave all her real and personal property "unto [blank] to and for her own use and benefit absolutely," and nominated, constituted and appointed her niece Catherine Hellard to be executrix. The name of the residuary devisee was left in blank, but there were the words "to and for her own use and benefit." Now the only antecedent to "her" was the "executrix hereinafter named." That proves to be Catherine Hellard, and the Court of Appeal held that, for the purpose of construing the will, the court was entitled to look at the original, and, having looked at it, they came to the conclusion that Catherine Hellard was entitled to the property in question. Lord Esher, M.R., said (30 Ch.D. at p. 393):

> "The main argument in this case is founded on there being a blank in the will, and how can you tell that there is a blank without looking at the will? I know of no rule that for the purpose of construing a will you may not look at the original will itself."

Baggallay, L.J., said (ibid. at p. 394):

> "I fully agree that for many purposes the first thing to be looked at is the probate copy of a will. But when I look at the probate copy in this case I find that there is a blank space in it. This is consistent either with an accidental omission to fill up the blank, or with an intention not to to fill it up. It then becomes very material to look at the original will. . . . The conclusion that the testatrix intended to fill up the blank at some future time would be inconsistent with her declared intention to revoke all former wills and make that her last will and testament."

There again it seems to me plain that the court looked at the original to find out whether the blank in the probate was a blank of a character which would induce them to believe that the testatrix had not yet made up her mind who should be her devisee, or whether it was of the contrary character.

Such being the general nature of the authorities, I have no doubt myself that it is not only the right but the duty of the court in this case to have regard to this erased portion of the will. That being so, it seems to me unarguable that the expression "undisposed-of balance which may be to my credit at the said bank" must mean the balance at the bank which was mentioned by name and which is the only bank mentioned by name in the passage which had been erased obviously for another purpose, and not, as has been contended for by the residuary legatee, for the purpose of rendering it doubtful which bank the testatrix is referring to, but for some totally different purpose, because it is perfectly obvious that she does intend to give a particular balance for a particular and for a specified purpose. That being so, I am prepared on that ground alone to hold, on the true construction

of this will and in the events which have happened, that the specific legatee is entitled to the undisposed-of balance at this particular bank after payment thereout of the legacies that are referred to.

There is, however, I think, another ground on which this case can be decided, although I prefer the one that I have already dealt with. The question on the second point is whether "undisposed-of balance at the said bank," no bank being mentioned by name, is, under the circumstances, a patent or a latent ambiguity. The testatrix gave, and I think unquestionably intended to give, a bank balance, and the only ambiguity arises as soon as evidence is admitted that the testatrix had more than one bank. The word "said" points, I think, to her having some particular balance in her mind, especially when evidence has been admitted that she had more than one balance standing to her credit. The particular extrinsic evidence which is necessary and sufficient is the original will, and I think that that is admissible under the extrinsic evidence rule as well as under the rule that I have attempted to deal with. Evidence to show what were the actual testamentary intentions of a testator is admissible only in exceptional cases, one of which is to determine which of several persons or things is entitled under the equivocal description. That is from HAWKINS ON WILLS (2nd Edn.), p. 14, and the same thing appears in the seventh proposition of WIGRAM ON EXTRINSIC EVIDENCE (5th edn.), p. 110. LORD ABINGER, in *Doe d.* v. *Hiscocks* (9), dealing with extrinsic evidence in these cases said (5 M. & W. at p. 368):

> "Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express."

Here it is contended that this is a patent and not a latent ambiguity, but I am unable to take that view. It is reasonably plain that the testatrix was pointedly referring to a particular fund, and the ambiguity is latent in that there is more than one bank to which she may have been intending to refer, and this, I think, may be cleared up by looking at the original to see what the antecedent was in the document which she in fact signed. For these reasons, the question must be answered in the manner I have indicated.

Solicitors: *Foyer, White, Borrett & Black; Routh, Stacey & Castle*, for *Stapleton & Son*, Stamford.

[*Reported by* F. PORTER FAUSSET, ESQ., *Barrister-at-Law.*]

MARTEN *v.* VESTEY BROS., LTD.

[House of Lords (Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Buckmaster), October 31, November 3, 1919, January 30, 1920]

[Reported [1920] A.C. 307; 89 L.J.K.B. 663; 122 L.T. 785; 36 T.L.R. 228; 14 Asp. M.L.C. 600; 25 Com. Cas. 175]

Insurance—Marine insurance—"Final port"—Final port of discharge—Form of policy—Words written into printed form to limit insurance—Reference to printed words to determine nature and character of adventure.

By a written clause in the ordinary form of Lloyd's policy of marine insurance, which was on the ship only and against total loss only, the ship was insured on a voyage "at and from any port or ports place or places on the River Plate . . . to any port or ports place or places in France and/or the United Kingdom (final port), excluding Mediterranean via any ports in any order." The ship loaded in the River Plate, sailed from Buenos Ayres to Dakar and was there ordered to discharge part of her cargo at St. Nazaire and the rest at Havre. From Havre she sailed for Barry for bunkers, and was totally lost on the way. In an action to recover from the appellant, a Lloyd's underwriter, his proportion of the amount covered by the policy,

Held: (i) on the true construction of the policy, "final port" meant the final port of discharge which could be either in the United Kingdom or in France; on the facts, it was Havre; and, therefore, the ship was not on the voyage insured at the time of her loss, and the appellant was not liable. (ii) (Lord Dunedin dissenting and Lord Buckmaster expressing no opinion), where, in a marine policy, use was made of a printed form into which written words were inserted so as to limit the insurance, the printed words of the policy might be looked at in order to determine the nature and character of the adventure.

Notes. As to the construction of marine policies, see 16 Halsbury's Laws (3rd Edn.) 15 et seq.; and for cases see 29 Digest 125 et seq.

Cases referred to:

(1) *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284; 46 L.J.Q.B. 409; 36 L.T. 382; 25 W.R. 499; 3 Asp. M.L.C. 393, H.L.; 29 Digest 198, *1581.*

(2) *Camden* v. *Cowley* (1763), 1 Wm. Bl. 417; 96 E.R. 237; 29 Digest 140, *922.*

(3) *Moore* v. *Taylor* (1834), 1 Ad. & El. 25; 3 Nev. & M.K.B. 406; 3 L.J.K.B. 132; 110 E.R. 1117; 29 Digest 141, *926.*

Appeal from an order of the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), reversing a judgment of Bailhache, J.

The action was brought by the respondents, who were frozen meat importers, against the appellant, an underwriter at Lloyd's, to recover the amount of his subscription to a policy of marine insurance on the steamship *Brodfield*. The policy, dated Sept. 16, 1916, was an insurance against total loss only on the ship and was in the ordinary form of a Lloyd's policy which is set out in the opinion of Lord Dunedin. The following provision was inserted in writing:

> "safe arrival of steamer only at and from any port or ports place or places on the River Plate and/or tributaries to any port or ports place or places in France and/or the United Kingdom (final port), excluding Mediterranean via any ports in any order."

The *Brodfield* loaded in the River Plate, and her cargo was discharged at St. Nazaire and Havre in accordance with orders given, and on Nov. 10, 1916, on completion of the discharge at Havre the steamer was completely free of cargo. She sailed from Havre for Barry for bunkers on Nov. 11, 1916, and stranded on the Scillies two days later, and was totally lost. The question at issue was whether the "final port" on the true construction of the policy was Havre, where the cargo from

the River Plate was discharged, or Barry, to which the steamer was proceeding for bunkers when she was lost. BAILHACHE, J., held that the voyage contemplated by the policy finished when the last parcel of cargo was discharged at Havre, and, therefore, gave judgment for the appellant. The Court of Appeal held that the expression "final port" was not confined to the port at which the cargo was completely discharged, and that the ship had not reached the final port at the time when she was lost. The policy, therefore, was in force at the time of the loss, and they gave judgment for the respondents for the amount of their claim.

Leck, *K.C.*, and *A. R. Kennedy*, *K.C.*, for the appellant.
MacKinnon, *K.C.*, and *R. A. Wright*, *K.C.*, for the respondents.

The House took time for consideration.

Jan. 30. The following opinions were read.

VISCOUNT HALDANE.—The question here is one simply of construction of the policy of marine insurance before us. I have come to the conclusion that the view taken of what the answer should be by BAILHACHE, J., is preferable to that of the Court of Appeal. It is agreed on all hands that, notwithstanding the wide words of the printed form used in its preparation, the introduction into this form of the words written in and appearing in italics is enough to limit the insurance to the vessel itself, and to exclude the interest in the cargo even of its owners. If it were not for the introduction of these words, it would be plain that the insurance extended to the cargo also. But the policy is drawn up with the limiting words inserted into a printed form which by usage they are held to govern, and it is agreed that, by the practice of Lloyd's, the limitation is so sufficiently expressed as to make the policy one concerning the vessel alone. That, however, does not seem to me to render all the words remaining in the printed form wholly negligible. They are retained in the print and belong to the framework on which the actual contract is grafted, and outside of that general framework there is no language which constitutes an agreement. They suggest that the policy, read as a whole, had reference to a voyage, and that expressions which refer to the general character of the adventure insured can hardly be excluded from notice. These expressions point to an adventure terminating so far as concerns the ship insured when she, with her goods and merchandise, have reached a port where the cargo has been discharged and landed. The insurance is to endure until the ship with her cargo shall be arrived at

> "any port or ports place or places in France and/or the United Kingdom (final port), excluding Mediterranean viâ any ports in any order,"

and the adventure is apparently not to terminate until arrival

> "as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed."

Now, unless the printed portion of the document is to be treated as wholly non-existent, I find it difficult to construe the meaning as being that the ship is to continue insured after she has discharged her cargo, and during an unlimited further period in which she may cruise from port to port, for instance along the coast of Ireland and in the Hebrides, picking up new freight. I cannot read it as meaning that the ship may turn herself into a tramp going about from port to port indefinitely round the United Kingdom, and still remaining insured although running heavy risks from submarines and otherwise, and yet with no increase of the single premium of 27s. 6d. per cent., which is all that is to be paid. It is difficult to see how terms so vague could define an agreement. I think that, however oddly drawn the document may be, there is one duty from which only an Act of Parliament can absolve judges who have to construe it, and that is to try to attach some significance to every expression that is at once appropriate and is yet not nullified by other and governing words within the four corners of the instrument.

If the practice of Lloyd's really militated against this principle, serious questions might arise. But I cannot think that it really does so. Applying the test, it appears to me that the words to which I have referred do indicate an intention, not excluded by any other expression in the policy, to make the voyage terminate with the discharge of the cargo. That took place in France, and there seems to me to be no reason for supposing that the voyage insured was to extend to an indefinite period following on this discharge. That is surely an interpretation which is as reasonable as it is natural. I may add that I agree with Scrutton, L.J., in his impression that the words "final port" are not limited to the United Kingdom. They seem to me as they stand in their context to apply to France as well. But, for the reason I have already given, I find it very difficult to take the expression "final port" so read as satisfied by "the last port in fact in the United Kingdom at which the vessel is." Like Bailhache, J., I draw the inference from reading the instrument as a whole, even while construing it as relating to the vessel alone, that what the parties had in view was a voyage policy. No authority has been cited which appears to hinder me from coming to this conclusion, and I think that the references in the policy to discharge and safe landing of goods and merchandises, even though these last are to be regarded as wholly excluded from the subject-matter insured, do afford some guide to what was in the minds of those who thought the printed form a proper one to use as that on which even this restricted contract of insurance might be written.

I am, therefore, of opinion that the judgment of the Court of Appeal ought to be discharged and that of Bailhache, J., restored.

LORD DUNEDIN.—The screw steamer *Brodfield* sailed from Buenos Ayres on Sept. 19, 1916, laden with a cargo consisting of frozen meat, frozen eggs, maize and horses. She arrived at Dakar, on the coast of Africa, on or about Oct. 5, where she called for orders. She was ordered to discharge the frozen meat and eggs and the maize at Havre; the horses she was to discharge at St. Nazaire. She proceeded to St. Nazaire and Havre and discharged as ordered, and on or about Nov. 10 she was completely free of cargo at Havre. At Havre, the master received orders to proceed to bunker in Cardiff. She sailed from Havre on Nov. 11 to proceed to Barry and was stranded and totally lost on the Scillies on her way there. All these facts are admitted. The question in the case is whether the owners of the ship can recover against the underwriters for the loss of the ship under a policy of insurance. The policy of insurance is dated Sept. 16, 1916, and was effected in London. It is in the well-known form known as a Lloyd's Policy. The policy consists of a printed form with blanks which are filled up in writing. The filled-up parts in this case, so far as material, are as follows:

> "Doth make assurance and cause themselves and them and every one of them to be insured, lost or not lost, at and from [so far all these words except 'themselves' were in print, but I have to quote them to make the sentence intelligible] any port or ports place or places on the River Plate and/or tributaries to any port or ports place or places in France and/or in the United Kingdom (final port), excluding Mediterranean viâ any ports in any order."

The policy then proceeds in the printed form as follows:

> " . . . beginning the adventure upon the said goods and merchandises from the loading thereof, aboard the said ship as above upon the said ship, &c., and shall so continue and endure, during her abode there, upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places

whatsoever or wheresoever and for all purposes without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at [then come the following written words] Seventeen thousand pounds on safe arrival of steamer only."

This is followed by another written clause as follows:

"This insurance is against total loss only to be paid in the event of the total and/or constructive and/or arranged total loss of the steamer. Warranted free of all average. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise. No claim to attach hereto for delay, deterioration and/or loss of market."

Then follow the printed words touching the adventures and perils, which it is unnecessary to quote, and the final portion ends with the ordinary N.B.:

"N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded, *sunk, burnt, on fire or in collision.*"

There are appended other clauses in writing dealing with war risks, which are also unnecessary to quote.

Now the question raised is very short and sharp. All are agreed that the vessel was covered till she discharged at Havre. The insurers say the risk ended when she had there discharged her cargo; the owners say she was still insured on her voyage from Havre to Barry. BAILHACHE, J., before whom the case was tried, found in favour of the underwriter. His judgment was reversed by the Court of Appeal, SCRUTTON, L.J., evidently considering the case one of considerable difficulty. I believe that we are unanimous in thinking that the judgment of BAILHACHE, J., was right and that the appeal should be allowed, but the appellant put forward an argument of far-reaching importance. The argument is that, in attempting to discover the duration of the risk which is insured against for the ship alone, you are at liberty to draw conclusions from the presence of the words in the printed form which refer to the insurance of goods. This is, in my humble opinion, so entirely inconsistent with the practice of nearly two centuries, and would be held to be such a disastrous innovation by the mercantile world, that I feel constrained to express my earnest dissent from it. The asseveration or denial of this argument is infinitely more far-reaching and more important than the decision on the merits of this particular case. The form known as "Lloyd's Policy" is a very ancient document. It undoubtedly owed its original form to the time, now long past, when the ordinary state of affairs was that the shipowner and the merchant were one and the same person. Like Antonio in "The Merchant of Venice," he sent out his argosy laden with his own goods to be disposed of in foreign lands and to bring back foreign goods in exchange.

The oldest policy known in England is of date 1613, a copy of it being preserved in the Bodleian Library at Oxford, and differs little from the policy of the present day; but the actual printed form of policy which we now have was arranged in 1779 at a general meeting of members of Lloyds, who undertook to establish a particular form of marine insurance policy and not to allow any alterations in that policy. With the exception of the introduction in 1874 of what is known as the "Waiver Clause," and the alteration in 1850 of the phrase at the commencement of the policy, "In the name of God, Amen," to "Be it known that," the printed policy at present is the policy of 1779. Now, undoubtedly it might have been better —it would have saved this and, perhaps, other controversies—if, when modern times had come, the underwriters had reformed this document and adopted a

separate form for insurance on ship, goods and freight respectively when the insurance was only to cover one of these three things. But they have not done so. Nay, more, they have not in practice even taken the trouble, when a policy is effected on one, to delete the phrases obviously only applying to the other two things which may be insured. But they leave blanks in the policy, and these blanks are filled up so as to fix what is the subject insured, and additional and special clauses are often written on the margin or affixed to the policy by gum. This may be a bad practice, but it is a universal practice, and I venture to say that no underwriter who has undertaken a risk on ship alone by reason of a voyage policy ever dreams that his undertaking is to be read in the light of what the printed form says about goods. After all, the question is, What was the contract made by the parties? and it is our business to decide that, and not to form rules as to how commercial men ought to conduct their business. And in face of the universal practice of underwriters to use the form in this way, it is, in my opinion, untrue to say that they have contracted that an insurance of ship alone shall be interpreted in the light of printed words which are only appropriate when the insurance is not effected on ship alone, but on goods.

In approaching this case I, therefore, disregard altogether the parts of the policy contained in the printed form which refer to an insurance of goods. Attempts to invoke the inappropriate parts of such a policy to construe the appropriate have been made before this. I quote the words of LORD PENZANCE in *Dudgeon* v. *Pembroke* (1) (2 App. Cas. at p. 293):

> "It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in courts of law, to permit of any such conclusion."

I may at once point out another circumstance which is, in my judgment, strongly in favour of that view. The learned counsel for the appellant, though I think somewhat invited by some of your Lordships, did not dare to say that, on this policy, the ship might not have proceeded in ballast from the River Plate; yet, if the clause as to merchandise is to be looked at for the purpose of deciding that this was a cargo-carrying ship, then a voyage in ballast would be contrary to the terms of the policy.

I now come to the consideration of the case. No one doubts that this is a voyage policy. The sole question, therefore, is, what is the voyage? The beginning is clear—"at and from the River Plate." What is the termination? All the authorities agree that the terminus ad quem in a voyage policy must be clearly specified, otherwise the policy is void. That does not mean that there may not be a group of ports designated, but it is available in consideration of one aspect of this case. There is a certain amount of authority, which, although not directly in point, touches the fringe of this question. Thus, in *Camden* v. *Cowley* (2), LORD MANSFIELD, after consulting a jury who had examined before them insurance brokers and others conversant with the trade, held that, on an insurance of a ship from London to Jamaica, insurance ended when she touched at the first port and delivered part of her cargo, though she had still on board some cargo to deliver at other ports of Jamaica. With that may be contrasted *Moore* v. *Taylor* (3), where the ship was chartered at and from the West India Islands, Jamaica and San Domingo excepted, to her port or ports of discharge in the United Kingdom, during her stay there and thence back to Barbados, and all or any of the West India Islands, Jamaica and San Domingo excepted, until the ship should be arrived

at her final port as aforesaid. She discharged her cargo substantially at Barbados, and was proceeding to Berbice when she was lost. It was held that she was not covered, because the jury had held that the cargo was substantially discharged at Barbados, and that final port must be taken as final port of discharge. Now, that case would be exactly this were it not for the fact that "as aforesaid" is added to the words "final port," and in the earlier part of the policy "port" is called "port of discharge." LITTLEDALE, J., puts his judgment on that fact, but PARKE, J., puts his judgment on broader grounds. He says (1 Ad. & El. at p. 29):

> " 'final port' must mean the port which is final with reference to the goods to be taken on board in the United Kingdom."

But it is particularly instructive to notice the argument of Sir James Scarlett, who was counsel for the owners. He is reported thus (ibid. at p. 27):

> "The owner could not decide, before her arrival at Barbados, at what place she should terminate the voyage, and commence a new adventure; and accordingly the words inserted in the policy are, 'arrived at her final port,' not 'her final port of discharge.' It could not be contended that, if she had sailed from Liverpol without any cargo at all, she would not have been protected by the policy to Barbados: it cannot, therefore, be held that the duration of the protection, in the present case, is to be measured by the time the cargo remains on board; for, as the policy is on the ship alone, its construction cannot be altered by the circumstance of her having, or not having, a cargo."

The argument, unsuccessful there, is really the same as the argument in this case.

It seems to me that the question of what is the voyage insured is a question of fact. It is to be gathered from the expressions in the policy, and nothing that was done could contradict them. If they are so vague as to be incapable of interpretation the policy is void. One necessity of defining a voyage consists of giving the beginning and end of the voyage. If, therefore, the policy defines in sufficiently precise language the terminus a quo and the terminus ad quem, nothing that was done in the actual voyage could affect the interpretation of the insured voyage, but where, as here, there is given a facultative terminus ad quem it is, I think, legitimate to see what was done in the voyage of the ship and to use that knowledge, not, perhaps, in the strict sense to interpret the words used, but to decide what is the application which falls to be given to the words used in the actual circumstances of the case. Now, here, what do I find? I find that the ship admittedly carried cargo and that she admittedly discharged all that cargo in France. I find also that the instructions to the master what he was to do after Havre, are contained in a letter produced in the following terms:

> "We have arranged for you to bunker in Cardiff, under contract with Messrs. Evans & Reid, sufficient to take the steamer out to the River Plate and back to Dakar, where you will replenish as on the last occasion."

In these circumstances, I hold that the expression "final port" in this policy was equivalent to "final port of discharge," and that the progress of the ship from Havre to Barry was not the finishing of the old voyage, but the preparation for the inception of a new voyage. I agree that the final port might have been in the United Kingdom, but once dissociate "final port" from "final port of discharge," then there seems to me no termini habiles to fix what is the final port. There need not have been finality at Barry, and, if that is so, there is no such proper determination of the terminus ad quem as will save the policy from vitiation on the ground of uncertainty.

I am, therefore, of opinion that the appeal should be allowed and that the judgment of BAILHACHE, J., be restored.

LORD ATKINSON.—The facts have already been sufficiently stated. During the argument of this case it was pressed on your Lordships that the underwriters

had, according to their inveterate custom, been unwise enough to use a printed form of policy suitable for an insurance covering both a ship and her cargo, while, in fact, all that was insured against was the loss of or injury to the ship. That, no doubt, is so. But the argument which, as I understood it, was based on this fact, was, in my view, fallacious. It was, it appeared to me, contended that, because of this clumsy way of doing business, the policy was to be construed as if all the printed matter dealing with goods and merchandise had been deleted from it. It may well be that, where a printed form is used containing words utterly inapplicable to the subject-matter of a contract, the contract should be construed as if those words were deleted; but that is emphatically not this case. Here the provisions as to goods and merchandise are not inapplicable to the contemplated adventure of the ship. They are, on the contrary, linked to it and affect it. The adventure is the voyage of this steamer from some port or ports, place or places, on the River Plate or its tributaries to any port or ports, place or places in France or the United Kingdom (final port). These are the termini of the voyage. But the adventure against loss in which the ship is insured does not begin till the goods and merchandise mentioned in the first paragraph of the policy have been loaded. The words in the second clause touching this point run as follows: "Beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship." Those words are in print, but there follow five words, the first two in writing and the following three in print. They run "*as above* upon said ship, &c." The etcetera evidently refers to the words in the earlier paragraph: "Body tackle, apparel, ordnance, munitions, artillery, boat and other furniture." The plain meaning of these words is that the adventure, both as to the goods and merchandise and as to the ship and her furniture, is to begin from the loading of the former on board the ship. That event affixes the beginning of the adventure for both. In no other way is it fixed. The reach of the policy, the loss it covers, is, no doubt, by the written words "safe arrival of ship only," restricted to the loss of or injury to the ship. The printed words referring to goods and merchandise cannot, of course, extend that risk; but the above words so limit the adventure that, in my view, they can be looked at solely to determine what the nature and character of that adventure was. Having that effect in this case, as I think they have, then, whatever be the inveterate practice of any commercial body, however eminent and distinguished, I am, I think, not only justified, but bound, on this question of law, the construction of this policy of assurance, to have regard to them. Though the loss of the steamer, and that alone, is insured against, it was, I think, clear that the intention of the parties was that the vessel should start on her voyage and complete a portion of it at least as a cargo-carrying ship. That this was what the parties contemplated is, in addition, clear from the written provision near the end of the policy. "No claim to attach hereto" for delay, deterioration or loss of market. It has been suggested that there is no provision in the policy prohibiting the sending of this steamer from and to the named ports in ballast. No doubt there is no provision prohibiting such an adventure in so many words; but, in my view, there is an implied provision prohibiting it, in this, that the adventure covered by the policy is one to begin with the loading of goods and merchandise, not ballast, on board the steamer. The statement of facts shows that the parties carried out that intention. She was loaded with a very miscellaneous cargo. Part of her cargo, consisting of the refrigerated meat and the maize, was consigned to Dakar for orders. On arriving there, she was ordered to discharge this maize, the frozen meat and the eggs she carried on to Havre, and the horses she carried on to St. Nazaire.

During the argument, I could not resist putting to myself, and, indeed, I fear to counsel, the question: If the voyage was not intended to end, and did not in fact end, at her final port of discharge, Havre, where was it designed to end? I concur with BAILHACHE, J., and, as I understand, SCRUTTON, L.J., in thinking that the so-called final port may, owing to the use of the words "and/or," be situate

either in France or in the United Kingdom. I assume for argument's sake, however, that the final port must be in the United Kingdom. There is nothing in the policy of assurance to fix the final port. I concur with SCRUTTON, L.J., in thinking that, if so, it can only mean the last port in the United Kingdom which the vessel enters. Well, the policy of insurance, in a clause partly in print and partly written, provides "that it shall be lawful for the said ship in her voyage to proceed and sail to and touch and stay at any ports or places whatsoever or wheresoever for all purposes." There is, therefore, in my view no escape from the alternative, either the voyage covered by the policy ended at the final port of discharge of the cargo, Havre, or it extended to any voyages her owners might send her on in the coasting trade of the United Kingdom, carrying cargo from port to port in England, Scotland or Ireland, until such time as she should pay her last visit to one of those ports, however numerous those coasting voyages might be, and whatever length of time she might be engaged in making them. There is nothing to show that Barry was intended to be the last port in the United Kingdom which she would enter.

It appears to me to be impossible to give to this policy of assurance a construction so wide as to cover the risk attending such coasting trading. And if that be so, as I think it is, then the only reasonable construction the policy can, in my view, receive is that which fixes the end of the voyage it covered, and was intended to cover, at Havre, the vessel's final port of discharge. I think the decision in *Moore* v. *Taylor* (3) is entirely consistent with this conclusion. In that case, as in this, the ship alone was insured. According to the headnote, the insurance was made at and from St. Vincent, Barbados, "and all or any of the West India Islands, to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back to Barbados, or all or any of the West India colonies, until the ship should have arrived at her final port." The vessel arrived at Barbados on Aug. 2, 1821; the whole of her cargo was, as the jury found, discharged at Barbados. She then made preparation to sail from Barbados on Aug. 11 on another voyage, but was wrecked in a hurricane on the night of the 10th. LITTLEDALE, J., in giving judgment, said (1 Ad. & El. at p. 29):

> "The only question for us is the construction of the policy. Now the first expression used in it relatively to the duration of the adventure, is 'port or ports of discharge and loading in the United Kingdom'; the words 'final port' do not occur till a later part of the instrument, and they must be interpreted by the aid of the earlier words. I am of opinion, therefore, that the risk was meant to end as soon as the substantial purpose of the voyage, that is, the delivery of the cargo, was completed; and I cannot agree that it was to continue while the empty ship was on a seeking voyage for a fresh cargo."

PARKE, J., said (ibid.):

> "It is contended that the adventure continued, not only till the cargo was discharged, but during all the time for which the vessel should be seeking a fresh cargo. But it seems to me impossible to put so wide a construction on the policy. 'Final port' must mean the port which is final with reference to the goods to be taken on board in the United Kingdom."

Just as it was considered impossible in that case to construe the policy of insurance so as to cover the risk while the empty vessel was on a "seeking voyage" for a new cargo, so here it is impossible, I think, to construe this policy as covering a voyage in ballast to Barry and the possible coasting trading of the ship insured from port to port in the United Kingdom. I adopt the only alternative left, as I conceive it, and construe the policy as intended to cover, and actually covering, the risk attending a voyage terminating at Havre.

I think that the decision of the Court of Appeal was erroneous and should be reversed, that the judgment of BAILHACHE, J., was right and should be restored, and that the appeal be allowed with costs.

LORD BUCKMASTER.—I concur. I agree in the conclusion that, according to the true effect of this policy of insurance, what was contemplated was a voyage that was to end with the vessel discharging her cargo, and this conclusion can, in my opinion, be reached without calling in aid the printed portions of the form which relate to a loaded vessel. It is, therefore, unnecessary to consider the extent to which the common structure of the policy affects the interpretation of the added words, and, on this question, I express no opinion.

Solicitors: *Parker, Garrett & Co.; Ballantyne, Clifford & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

ENGLAND *v.* INGLIS

[KING'S BENCH DIVISION (Salter and Roche, JJ.), April 27, 1920]

[Reported [1920] 2 K.B. 636; 89 L.J.K.B. 1062; 123 L.T. 576; 84 J.P. 198; 36 T.L.R. 558; 18 L.G.R. 407]

Local Authority—Councillor—Disqualification from membership—Share or interest in contract with council—Contract by son for supply of spectacles to schools controlled by council—Son employed by councillor—Municipal Corporations Act, 1882 (45 & 46 *Vict.*, *c.* 50) *s.* 12 (1) (*c*).

By s. 12 (1) of the Municipal Corporations Act, 1882: "... a person shall be disqualified for being ... a councillor, if and while he ... (c) has directly or indirectly, by himself, or his partner, any share or interest in any contract or employment with, by, or on behalf of the council ..."; and by s. 41 (1): "If any person acts in a corporate office ... after becoming disqualified, he shall for each offence be liable to a fine ..."

The defendant, who held a corporate office, carried on business as a jeweller, silversmith and optician. The optical department was managed by his son, who was not a partner in the business, but a paid employee. The son made a contract in his own name with the corporation for the supply of spectacles to children of schools controlled by the corporation. The contract was carried out by the son, who paid for the spectacles with his own cheque, received the corporation's payments in his own name, and paid those amounts into his own banking account. The business was done in the defendant's shop and in the defendant's time, and the establishment charges in respect of the contract were paid by the defendant. The spectacles were supplied in cases bearing the son's name, but the defendant's business address, and some of these cases were taken from the defendant's stock. The son alone derived the direct pecuniary profit from the contracts, but the defendant had a valuable advertisement for his shop, together with the bringing of business to the shop.

Held: "interest" within the meaning of s. 12 (1) (c) of the Act must be a pecuniary, or at least a material, interest, though it need not be a pecuniary advantage; on the facts, the defendant had an "interest" in his son's contract; and, therefore, he was liable to the penalty imposed by s. 41 (1) of the Act.

Notes. The Municipal Corporations Act, 1882, s. 12 and s. 41, were repealed by the Local Government Act, 1933, s. 307 and Sched. XI, Part II. The corresponding provision is now s. 76 of the Act of 1933.

As to disqualification of a member of a local authority for discussion and voting, see 24 HALSBURY'S LAWS (3rd Edn.) 447 et seq.; and for cases see 33 DIGEST 64 et seq. For the Local Government Act, 1933, s. 76, see 14 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to:

(1) *Nutton* v. *Wilson* (1889), 22 Q.B.D. 744; 58 L.J.Q.B. 443; 53 J.P. 644; 37 W.R. 522; sub nom. *Nulton* v. *Wilson*, 5 T.L.R. 439, C.A.; 33 Digest 10, *16*.

Also referred to in argument:

Le Feuvre v. *Lankester* (1854), 3 E. & B. 530; 2 C.L.R. 1426; 23 L.J.Q.B. 254; 22 L.T.O.S. 282; 18 J.P. 198; 18 Jur. 894; 2 W.R. 307; 118 E.R. 1241; 33 Digest 66, *400*.

Norton v. *Taylor*, [1906] A.C. 378; 94 L.T. 591; 33 Digest 68, *L*.

Laughton v. *Port Erin Comrs.*, [1910] A.C. 565; 80 L.J.P.C. 73; 103 L.T. 148, P.C.; 42 Digest 522, *858*.

Barnacle v. *Clark*, [1900] 1 Q.B. 279; 69 L.J.Q.B. 15; 81 L.T. 484; 64 J.P. 87; 48 W.R. 336; 33 Digest 11, *17*.

Todd v. *Robinson* (1884), 14 Q.B.D. 739; 54 L.J.Q.B. 47; 52 L.T. 120; 49 J.P. 278; 1 T.L.R. 44, C.A.; 33 Digest 16, *57*.

Appeal from the York County Court.

The plaintiff brought an action in the county court, claiming to enforce a penalty against the defendant under s. 41 (1) of the Municipal Corporations Act, 1882, on the ground that the defendant acted in a corporate office as an alderman of the city of York on and prior to June 2, 1919, he being at that time disqualified under s. 12 (1) (c) of that Act by reason of being interested in a contract with the corporation. The plaintiff was a young man carrying on business in York as an optician under the name of C. Ledsham & Co. The defendant had been prominent in the municipal life of the city for some years past, and carried on business as a jeweller and silversmith at 4, Coney Street, and as an optician at 6, Coney Street, trading under the name of "J. B. Inglis & Sons." He had two sons, Robert and Alexander. The former managed the jewellery shop while the latter managed the optician's shop. They were not partners in the business, but were paid employees of their father. The contract in question in these proceedings was one of a succession of such contracts made between Alexander Inglis and the education committee of the city council for the supply of spectacles to the children of the schools in the city controlled by the committee. In carrying out the contracts, the son attended at the school clinic, took instructions from the ophthalmic surgeon, and ordered the spectacles from his father's wholesale dealers in London in his own name, paid for them by a cheque on a banking account in his own name, received the corporation's cheques in payment made out to himself, and paid them into his own account. He also kept the accounts in a book of his own. The business was done from his father's shop in No. 4 or No. 6, Coney Street, and in his father's time. During his absence on military service, his duties were carried out by a female assistant in his father's shop and paid by his father. The spectacles were supplied in cases marked outside with the son's name, the address on the later cases being No. 6, Coney Street, York, and on the earlier ones, No. 4, Coney Street, York, and these cases were sometimes taken from his father's stock. The average number of pairs of spectacles supplied under the contracts during the last three years was about 200 per annum. When the spectacles got out of order the parents and children would take them to the Coney Street shop for repair. The defendant denied that he had any interest in the contract within the meaning of the statute and contended that it was made independently by his son on his own behalf, was executed by him alone, and that he, alone, obtained the profits from it. The county court judge found that the bringing of, or possibility of bringing, business to the shop was a benefit and the defendant had had a valuable advertisement for his shop; that the whole of the establishment charges in connection with the contracts were paid by the defendant, and formed part of the establishment charges of his business; the time in which the work was done was his, as was the shop and, at times, the spectacle cases provided; that the contracts, although in the name of his son who alone derived the direct pecuniary profit seemed to have been

inextricably mingled with the defendant's business. Therefore, the defendant was interested in the contract within the meaning of s. 12 of the Act. The judge gave judgment for the plaintiff for £50. The defendant appealed.

Richard Watson and *Vernon Wragge* for the defendant.

T. R. D. Wright for the plaintiff.

SALTER, J., stated the facts, and continued: Sect. 12 (1) of the Municipal Corporations Act, 1882, disqualifies from election and from being a councillor four classes of persons, namely, those who have a direct share, those who have an indirect share, those who have a direct interest, and those who have an indirect interest in any contract or employment with a corporation. The learned county court judge has found that the defendant fell within the fourth class, and had an indirect interest in a contract with the City of York Corporation, and that, while having that interest, he acted as an alderman of that city. It has been pointed out by LINDLEY, L.J., in *Nutton* v. *Wilson* (1) (22 Q.B.D. at p. 748), that the object of sections of this kind is obviously "to prevent the conflict between interest and duty that might otherwise inevitably arise." An "interest" within the meaning of the section must, I agree, be something more than a sentimental interest, such as arises from the natural love and affection of a man for his son. It must be pecuniary, or, at least, a material interest. But I do not see on what principle it must necessarily be a pecuniary advantage, because if a public man is likely to suffer pecuniary loss by his interest in any particular contract, his judgment is as likely to be deflected as where he is obtaining a pecuniary advantage from it. In this case it is clear that, in some ways, the defendant sustained loss by the contract in question. According to the evidence, as stated by the learned county court judge, the work was done in the defendant's shop; the establishment charges were borne by him; the son estimated his profit on the contracts at £4 in £20, and if the son had had to pay the establishment charges there would have been no profit; when the son was called up for military service, a female assistant who took his place and performed his duties had to be provided and paid for by the defendant; and, lastly, at least in some instances, the spectacle cases which the son had to provide under the contract were furnished at the expense of the defendant. In all these respects, therefore, the defendant had a pecuniary interest of an adverse kind in this contract. Again, there was, in my opinion, evidence on which the learned judge could properly find that the defendant had a pecuniary advantage, or a reasonable expectation of a pecuniary advantage, from the contract, which may be summed up in the one word "advertisement." The spectacles, which were supplied on a considerable scale in cases which bore the name, sometimes of Alexander Inglis and sometimes of Inglis & Sons, but with the defendant's business address, went into the homes of the parents of the children. That would, in itself, be a valuable advertisement, and the natural business result would be that the parents and their friends would have recourse to the defendant's shop to buy spectacles, and, being there, would probably buy other things. That is, in effect, the substance of the evidence, and it supports the judgment. I do not consider it necessary to define precisely within which of the four categories I have mentioned the defendant should be placed; nor do I say that I agree with everything said in the judgment below, but it is sufficient to say that, in my opinion, the learned judge did not misapprehend the law, and there was evidence on which he could properly find that the defendant had an interest in the contract.

On these grounds the appeal must be dismissed.

ROCHE, J.—I agree. In my opinion, the learned county court judge has not misdirected himself in law. The Municipal Corporations Act, 1882, in substance, requires that a person shall not have an interest, direct or indirect, in a contract with a corporation of which he is a member. The judge has defined "interest" as follows:

"The interest required by the statute must, I think, be a pecuniary or material

interest, not a mere sentimental interest, such as that which a father may have in the prosperity of a son."

That definition is, I think, amply warranted by the authorities, and, in my opinion, the facts found bring the present case within it. The evidence has been referred to in detail by SALTER, J., and, therefore, I need not recapitulate it at length. In substance, it was that a considerable portion of the expense of the contract was borne by the defendant, and that the advantage reaped by the son was reaped by him in the defendant's time, and when he was paid wages by the defendant. The lady assistant who took the son's place when he was called up for military service was paid by the defendant, who also provided the shop from which letters could be written and which was the business address. All this, as has been pointed out, is important with regard to the burden of the contract when one is considering the question of the defendant's interest in it. With regard to the benefit accruing to the defendant from its performance, the judge was, in my opinion, entitled to come to the conclusion that the burden was not sustained for nothing, and that there was the possibility, and even the probability, of an actual resulting benefit which has been summed up as useful advertisement of the defendant's business.

On these grounds, I am of opinion that the learned judge did not misdirect himself, and that he had, moreover, evidence before him which warranted the conclusion at which he arrived. That is sufficient to dispose of the case.

Appeal dismissed.

Solicitors: *Peacock & Goddard*, for *John Hague*, York; *Ridsdale & Son*, for *George Crombie & Sons*, York.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

LEAMAN *v.* R.

[KING'S BENCH DIVISION (Acton, J.), July 22, 23, 1920]

[Reported [1920] 3 K.B. 663; 89 L.J.K.B. 1073; 124 L.J. 159; 36 T.L.R. 835]

Crown—Action against—Right of soldier to recover arrears of pay.

Engagements between those in the military service of the Crown and the Crown give no right to an action by the servant in respect of an alleged contract of service. Therefore, **held:** a petition of right would not lie by a soldier for arrears of pay while serving in the army.

Per CURIAM: In this respect there was no distinction between the case of a private soldier or a non-commissioned officer and that of a commissioned officer.

Notes. Petitions of right were abolished by the Crown Proceedings Act, 1947 [6 HALSBURY'S STATUTES (2nd Edn.) 46], s. 23 and Sched. I.

Referred to: *Lucas* v. *Lucas and High Commissioner for India*, [1943] 2 All E.R. 110.

As to liability of Crown to be sued and as to recovery of pay by soldier see 11 HALSBURY'S LAWS (3rd Edn.) 3 et seq., and ibid., vol. 38 (2nd Edn.) 599, and for cases see 16 DIGEST 240, 39 DIGEST 326, 327.

Cases referred to:

(1) *Dunn* v. *R.*, [1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695; 60 J.P. 117; 44 W.R. 243; 12 T.L.R. 101; 40 Sol. Jo. 129, C.A.; 11 Digest (Repl.) 571, *85*.

(2) *De Dohse* v. *R.* (1886), 66 L.J.Q.B. 422, n.; 3 T.L.R. 114, H.L.; 11 Digest (Repl.) 571, *82*.

(3) *Mitchell* v. *R.* (1890), [1896] 1 Q.B. 121, n.; 6 T.L.R. 322, C.A.; 16 Digest 240, *357*.

(4) *Williams* v. *Howarth*, [1905] A.C. 551; 74 L.J.P.C. 115; 93 L.T. 115; 21 T.L.R. 670, P.C.; 39 Digest 326, *129*.

(5) *Smith* v. *Lord Advocate* (1897), 25 R. (Ct. of Sess.) 112.

Also referred to in argument:

R. v. *Secretary of State for War*, [1891] 2 Q.B. 326; 60 L.J.Q.B. 457; 64 L.T. 764; 56 J.P. 105; 40 W.R. 5; 7 T.L.R. 579, C.A.; 16 Digest 303, *1162*.

Macdonald v. *Steele* (1793), Peake, 175; 170 E.R. 140, N.P.; 39 Digest 326, *130*.

Gidley v. *Lord Palmerston* (1822), 3 Brod. & Bing. 275; 1 State Tr. N.S. 1263; 7 Moore, C.P. 91; 129 E.R. 1290; 38 Digest (Repl.) 56, *300*.

Gibson v. *East India Co.* (1839), 5 Bing. N.C. 262; 1 Arn. 493; 7 Scott, 74; 8 L.J.C.P. 193; 3 Jur. 56; 132 E.R. 1105; 13 Digest (Repl.) 307, *1200*.

Smyth v. *R.*, [1898] A.C. 782; 67 L.J.P.C. 129; 79 L.T. 199; 14 T.L.R. 559, P.C.; 42 Digest 658, *671*.

Grant v. *Secretary of State for India* (1877), 2 C.P.D. 445; 46 L.J.Q.B. 681; 37 L.T. 188; 25 W.R. 848; 11 Digest (Repl.) 572, *90*.

Petition of Right heard before ACTON, J.

The suppliant, Frederick Leaman, who was formerly a corporal in the R.A.S.C., claimed that he enlisted in Jersey on Sept. 15, 1914. The rate of pay then offered was 6s. per day. He was sworn in and signed his papers at St. Heliers, Jersey. He then went to Aldershot, where he was again sworn in and signed fresh papers. He was given a pay book showing that his pay was 6s. a day. On Nov. 5, 1914 he went to France and continued to draw pay at the rate of 6s. per day up to June, 1916. He was then informed by his commanding officer that he had been instructed that the suppliant was a time-serving soldier enlisted for seven years with the colours and five years with the reserve at 1s. a day, and that any other rate of pay had been paid to him in error, and that he was in debt to the extent of £120, as he had overdrawn his pay since Sept., 1914. His pay was then reduced and he was obliged by means of deductions to repay the debt of £120. The suppliant was discharged from the army on Jan. 6, 1920, and was given £7 19s. 10d. pay and gratuity on discharge. He prayed by the petition for payment at the rate of 6s. per day from the date when that rate of pay was stopped till the date of his discharge. The Crown demurred to the petition on the ground that there was no engagement of the suppliant except at His Majesty's pleasure; and that there was no redress for a soldier or ex-soldier by petition of right.

Merriman, *K.C.* and *O'Hagan* for the suppliant.

The Solicitor-General (*Sir Ernest Pollock*, *K.C.*) and *Branson* for the Crown.

ACTON, J.—This is a petition of right by one Frederick Leaman, the nature of which sufficiently appears from the petition itself. It is in substance a claim by a soldier for pay for military service rendered by him. The answer and plea of His Majesty's Attorney-General is prefixed by a demurrer, the important words of which are:

> "The petition of right is bad in substance and in law on the ground that the said petition does not disclose a sufficient or lawful or any agreement between His Majesty or anyone duly authorised on his behalf and the suppliant nor any engagement or service of the suppliant otherwise than at His Majesty's pleasure, nor any right of the suppliant to any sum of money, salary, pay or allowance, or any claim of the suppliant otherwise than upon His Majesty's bounty."

In support of that demurrer the Solicitor-General at the outset took his objection to the form in which these proceedings were commenced, saying that no claim of this kind could be sustained by petition of right. He relied on what he called a "stream of authority" adverse to the suppliant, and there is such a stream of authority in the sense that there is no case directly in support of such a claim as this. He cited *Dunn*

v. *R.* (1). As counsel for the suppliant has pointed out, the dates of decisions are of great importance in this case, and the decision in that case was given on Dec. 13, 1895. LORD ESHER, M.R., there referred to his decision in *De Dohse* v. *R.* (2) as to which there is a note, [1896] 1 Q.B. at p. 117. The date in that case was June 2, 1885 in the Court of Appeal, and Nov. 25, 1886 in the House of Lords. LORD ESHER said in that case:

> "It is said that it was lawful to make such an engagement with him (the suppliant) for seven years because the engagement offered and proposed was not an engagement of military service, it being admitted in argument that if the engagement was for military service as a soldier, whether as officer or private, it is contrary to public policy that any such contract should be made."

The Solicitor-General also referred to the decision in *Mitchell* v. *R.* (3) (May, 1890), and special attention was drawn to the opening sentence of LORD ESHER'S judgment. His Lordship said:

> "I agree with MATHEW, J., that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract."

Therefore, since counsel for the suppliant is relying on the provisions of the Acts of 1879 and 1881, he is driven to say that the law laid down in 1896 affirming with emphasis the law laid down in 1886 and 1890 is not good law as applied to a soldier as distinct from an officer. He says that those cases are distinguishable as they were claims by officers. But LORD ESHER'S words are comprehensive enough to cover both. Counsel for the suppliant argue that since 1879 a soldier as distinct from an officer enters into a contract with His Majesty. They referred to the Army Act, 1881, ss. 190, 136, 80 (1) and s. 78, and to the Army Discipline (Commencement) Act, 1879 and the Army Discipline Act, 1879. They also referred to a great number of authorities which I do not think I need review in detail. But I refer to two of them. The first is *Williams* v. *Howarth* (4). No question arose in that case as to the right of a soldier to enforce against the Crown payment for military service. The money had been paid, and the question was, as to payments already made by the Crown, whether the Colonial Government was entitled to the benefit of them. Secondly, in the Scottish case, *Smith* v. *Lord Advocate* (5) a soldier enlisted in 1851 and his service terminated in 1866, and so neither case is of any assistance.

Counsel for the suppliant in effect says: "I have shown the distinction between an officer and a soldier as defined in the Army Act, 1881. I have shown that, whereas it may be that an officer enters into no contract and has no contractual rights, a soldier does enter into a contract. That contract, he says, is with the Crown. The contracting parties are on the one side the recruit, and on the other, the Crown. He proceeds to argue that it follows that under the contract so entered into by the soldier, he acquires contractual rights enforceable by appropriate proceedings in a court of law, and such appropriate proceedings are in form a petition of right. It is at this point to my mind that the argument fails. It may be that the enlistment of the soldier is "a species of contract between the Sovereign and the soldier," to use the words cited from p. 189, s. 18, of the MANUAL OF MILITARY LAW (1914 Edn.) It by no means follows, however, that this species of contract is such as to vest in the soldier the right to enforce by proceedings in a court of law the payment of those sums to which he claims to be entitled for his services to the Crown as a soldier. There may be a contract or a kind of contract entered into between the Sovereign and the soldier, as one of his subjects, which still does not carry with it all those rights to enforce by process of law the corresponding obligations to those which the law attaches in the ordinary course to contracts made between one subject and another. Counsel for the Crown challenged the conclusion at which counsel for

A the suppliant sought to arrive, and said that even if it were conceded that this species of contract is entered into as between the Sovereign and the soldier on the enlistment of the latter, it is still one which the soldier cannot enforce in a court of law against the Sovereign by petition of right or at all. Incidentally attention was drawn to the fact that there is nothing about pay in the Army Act or in the attestation forms which purport to set out (to cite the words used) "the general conditions of the con-
B tract of enlistment that you," i.e., the recruit, "are about to enter into with the Crown." It was also pointed out that there was nothing repugnant to what is connoted in law by the word "contract" in such an interpretation of the word. Illustrations were given of contracts which might well be entered into where an analogous situation might arise from the creation of the contractional relationship.

In my opinion, the view put forward by the Solicitor-General of the relation set up
C between the Sovereign, and the soldier by reason of the species of contract entered into by the soldier is the correct one; and it would be impossible for me to hold otherwise without disregarding what has been in terms declared by authority binding on this court to be the settled law on this subject, and was so declared long after the Army Act, 1881 became law. It was contended on behalf of the suppliant that the dicta relied on by the Solicitor-General were merely obiter, that they were not
D necessary for the decision of those cases in which they occur, and that, taken in their context, they are not necessarily fatal to the suppliant's claim; but this seems to me too narrow a view to take of the considered pronouncement of very high authority in terms comprehending such a claim as the present, and delivered years after the Act of 1881 had been in operation. I hold, therefore, that the demurrer must be sustained, and that the suppliant's claims fails on the preliminary point
E taken by the Solicitor-General. The petition must accordingly be dismissed with costs.

Petition dismissed.

Solicitors: *C. H. Heddon; Solicitor to the Treasury.*

[*Reported by* FITZROY COWPER, ESQ., *Barrister-at-Law.*]

HERRINGTON *v.* SLATER

[KING'S BENCH DIVISION (Earl of Reading, C.J., Darling and Acton, JJ.) October 22, 1920]

[Reported 90 L.J.K.B. 265; 124 L.T. 272; 85 J.P. 83; 37 T.L.R. 51; 18 L.G.R. 840; 26 Cox, C.C. 670]

Food and Drugs—Milk—Deficiency in fat—Hot milk—Loss of constituent parts of milk through boiling—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.*, *c.* 63), *s.* 6—*Sale of Milk Regulations*, 1901, *reg.* 1.

The appellant, an inspector under the Sale of Food and Drugs Acts, bought at a café carried on by the respondent a glass of "hot milk." The milk was found on analysis to be deficient in milk fat to the extent of 25 per cent., and in non-fatty solids to the extent of 6·2 per cent. On the hearing of a summons taken out against the respondent for selling hot milk not of the nature, substance or quality of the article demanded, the public analyst stated in evidence that, although a change might take place in the milk through boiling, an analysis of genuine milk would not give the result obtained in this case. The justices dismissed the summons on the ground that, as the process of heating had caused the milk to lose some of its constituent parts, the appellant had got what a purchaser might reasonably expect under the designation of "hot milk." On appeal,

Held: the milk sold was deficient in milk fat; it was no defence that the deficiency was caused by the heating of the milk; and, therefore, the respondent was guilty of the offence charged.

Notes. The Sale of Food and Drugs Act, 1875, was repealed by the Statute Law Revision Act, 1953. The law on the subject is now governed by the Food and Drugs Act, 1955, and by regulations made or continued under that Act, particularly the Milk and Dairy Regulations, 1949 to 1954, and the Sale of Milk Regulations, 1939. Section 2 of the Act of 1955 corresponds to s. 6 of the Act of 1875.

As to the sale of milk see 17 HALSBURY'S LAWS (3rd Edn.) 534 et seq., and for cases see 25 DIGEST 88 et seq. and 127 et seq. For the Food and Drugs Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 91 and for the above mentioned regulations see 9 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to:

(1) *Lane* v. *Collins* (1884), 14 Q.B.D. 193; 54 L.J.M.C. 76; 52 L.T. 257; 49 J.P. 89; 33 W.R. 365; 15 Cox, C.C. 677, D.C.; 25 Digest 127, *490*.

Case Stated by justices sitting at Ryde, Isle of Wight.

An information was preferred by the appellant, Sidney J. Herrington, under s. 6 of the Sale of Food and Drugs Act, 1875 against the respondent, Carrie Slater, for that she on April 1, 1920, at the parish of Ventnor, in the Isle of Wight, sold an article of food, to wit a glass of hot milk, which was not of the nature, substance, and quality of the article demanded by the appellant, the purchaser thereof, i.e., it was not hot milk as demanded by the purchaser, but was deficient in milk fat to the extent of 25 per cent. and in non-fatty solids to the extent of 6·2 per cent. of the minimum under the Sale of Milk Regulations 1901, to the prejudice of the purchaser.

At the hearing of the information it was proved or admitted that on Thursday, April 1, 1920, at 2.40 p.m., the appellant, a police constable and an inspector under the Sale of Food and Drugs Acts, visited the Alexandra Café, Pier Street, Ventnor, owned and carried on by the respondent, and ordered from one Nellie Pressey, a waitress in the employment of the respondent, a glass of hot milk and a plate of bread and butter, with which he was supplied and for which he paid the sum of 7d. The inspector then informed her that he had purchased the milk for the purpose of analysis, and he thereupon divided it into three parts and otherwise complied with

A the requirements of the Sale of Food and Drugs Acts. The public analyst duly certified the result of his analysis to be as follows:

> I am of opinion that the same is a sample of adulterated milk. I am of opinion that the said sample contained the parts as under: Non-fatty solids, 7·97 per cent.; milk fat, 2·25 per cent.; ash, ·68 per cent. Specific gravity at 60 F., 1·0295. No preservatives.
>
> Observations.—This sample is deficient in milk fat to the extent of 25 per cent. and in non-fatty solids to the extent of 6·2 per cent. of the minimum quantity of milk fat and of non-fatty solids respectively which genuine milk contains according to the Sale of Milk Regulations, 1901. No change that would interfere with the analysis had taken place in the constitution of the article.

C The public analyst, who was called as a witness, admitted that a change might take place in the milk through boiling, and that it would lose a certain percentage of water, but he was unable to state how much, and he admitted further that some fat and other milk components might adhere to the vessel in which the milk was heated, but he said that these changes would not affect the rest of the milk detrimentally as regards the percentage composition of its fatty and non-fatty solids. D On the contrary, he said that these would be in a greater percentage than previously, as some of the water would be driven off and would disappear on heating. He added that genuine milk, when heated, would not give such a result as in this case. For the appellant it was contended that, the appellant having asked for hot milk, the respondent should have supplied him with milk which was in its natural condition and from which no milk fat or non-fatty solids had been abstracted, but E which had been made hot. For the respondent it was contended that no offence had been committed within the section, as the appellant, having asked for hot milk, got hot milk; that the milk had ceased to be milk in its ordinary commercial meaning inasmuch as it had been subjected to the process of boiling, which had altered its constituent parts, and it need not comply with the Sale of Milk Regulations, 1901. The justices dismissed the information, being of opinion (a) that what the purchaser F was supplied with was hot milk which had lost some of its constituent parts and was not other than what according to the ordinary use of the term the purchaser might reasonably have expected to get from the vendor under the designation of "hot milk" (*Lane* v. *Collins* (1)); (b) that by reason of the demand of the purchaser that the milk should be submitted to the process of boiling or heating it had thereby lost some of its constituent parts; (c) that the article was not one to which the G Act applied and it could not have been demanded by the appellant under s. 17, as he required that it should be submitted to the process of boiling or heating before delivery to him.

Barrington-Ward, K.C. (*H. du Parcq* with him), for the appellant.
The respondent did not appear.

H **EARL OF READING, C.J.**—This appeal must be allowed and the Case remitted to the justices, as they came to a conclusion which in my opinion was a wrong conclusion of law. The whole point is whether, when an intending purchaser asks for hot milk at a café or restaurant, and when that which is brought to him is adulterated milk to which heating has been applied, that is the delivery to him of an article of food of the nature, substance, and quality of the article demanded. I The purchaser is entitled to milk, and what was given to the purchaser in this case was not milk but milk which had been adulterated and which did not contain the prescribed percentages of milk fat and non-fatty solids. The evidence on that point is conclusive, for the analyst's certificate states:

> "I am of opinion that the same is a sample of adulterated milk. This sample is deficient in milk fat to the extent of 25 per cent. and in non-fatty solids to the extent of 6·2 per cent. of the minimum quantity of milk fat and of non-fatty solids respectively which genuine milk contains according to the Sale of Milk

Regulations, 1901. No change that would interfere with the analysis had taken place in the constitution of the article."

The justices were of opinion that what the purchaser was supplied with was hot milk which had lost some of its constituent parts and was not other than what according to the ordinary use of the term the purchaser might reasonably have expected to get from the vendor under the designation of "hot milk." They were led to that conclusion by *Lane* v. *Collins* (1), but since the date of that decision the Sale of Milk Regulations, 1901, have been made and there has been a series of decisions. It is enough to say that in this case beyond all question the percentages required by the regulations were not present in the milk for the reason that it had been adulterated. In those circumstances it is clear that what was supplied was not hot milk. The justices seem to have thought that what was supplied was the commercial article, but all the evidence is to the contrary. It is true that what must be supplied is the commercial article, but nevertheless it must be milk and not adulterated milk. The Case must, therefore, be remitted to the justices with a direction to convict.

DARLING, J.—I am of the same opinion. The justices have stated themselves out of court. They decided that there was no offence because what the appellant asked for was hot milk, although in their own words what was supplied to him was "hot milk which had lost some of its constituent parts." I cannot understand the justices' decision. It is plain that the Case must go back to them.

ACTON, J.—I agree.

Case remitted.

Solicitors: *W. J. Lake & Son*, for *Roach, Pittis & Co.*, Newport, Isle of Wight.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

KENNY *v.* COX

[KING'S BENCH DIVISION (Earl of Reading, C.J., Darling and Acton, JJ.), October 22, 1920]

[Reported 89 L.J.K.B. 1258; 124 L.T. 221; 85 J.P. 70; 37 T.L.R. 49; 18 L.G.R. 844; 26 Cox, C.C. 659]

Food and Drugs—Milk—Adulteration—Presence in milk of minute quantities of dirt swarming with bacteria—"Nature substance and quality of article demanded"—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.*, *c.* 63), *s.* 6—*Sale of Milk Regulations*, 1901.

The accidental presence in milk of minute particles of dirt swarming with bacteria not injurious to health does not constitute an act of adulteration, and the sale of such milk is not necessarily the sale of milk not of the nature, substance or quality of the article demanded, contrary to s. 6 of the Sale of Food and Drugs Act, 1875.

Notes. The Sale of Food and Drugs Act, 1875, was repealed by the Statute Law Revision Act, 1953. The law on the subject is now governed by the Food and Drugs Act, 1955, and by regulations made or continued under that Act, particularly the Sale of Milk Regulations, 1939, and the Milk and Dairies Regulations, 1949 to 1954. Section 2 of the Act of 1955 corresponds to s. 6 of the Act of 1875.

As to adulteration of milk see 17 HALSBURY'S LAWS (3rd Edn.) 534 et seq., and for cases see 25 DIGEST 127 et seq. For the Food and Drugs Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 91 and for the regulations see 9 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to in argument:

Goulder v. *Rook*, *Bent* v. *Ormesod*, *Lee* v. *Brent*, *Barlow* (*or Palmer*) v. *Noblett*, [1901] 2 K.B. 290; 70 L.J.K.B. 747; 84 L.T. 719; 65 J.P. 646; 49 W.R. 684, 701; 17 T.L.R. 503; 45 Sol. Jo. 504, 505; 19 Cox, C.C. 725, D.C.; 25 Digest 80, *96*.

Case Stated by justices sitting at Ryde, Isle of Wight.

An information was preferred by the appellant, George Kenny, under s. 6 of the Sale of Food and Drugs Act, 1875, against the respondent, Thos. Edward Cox, for that he, on Mar. 27, 1920, at the parish of Sandown, in the Isle of Wight, sold an article of food, to wit, one pint of new milk of good quality, which was not of the nature, substance, and quality of the article demanded by the appellant, the purchaser thereof, i.e., it was not new milk of good quality as demanded by the purchaser, but contained foreign ingredients, consisting of a considerable quantity of dirty debris, partly organic, such matter being likely to affect the sample detrimentally as an article of food, to the prejudice of the purchaser.

At the hearing of the information the following facts were proved or admitted: About 8 a.m. on Mar. 27, 1920, the appellant, an inspector under the Sale of Food and Drugs Acts, at Sandown, in the Isle of Wight, stopped one Frederick John Cox (a man employed by the respondent), who was delivering milk from a can. The appellant asked to be supplied with a pint of new milk of good quality, with which the man served him from the can, and for which the appellant paid him 4d. The appellant stated that he purchased the milk for the purpose of analysis, and that he divided the sample and otherwise complied with the requirements of the Acts. The public analyst for the county gave his certificate dated Mar. 30, 1920, in the following terms:

"I am of opinion that the said sample contained the parts as under and foreign ingredients as under:

	Per cent.
Non-fatty solids, including foreign ingredients	9·25
Milk fats	3·6

Specific gravity at 60 F.

1·0335.

No preservatives.

Observations.

The foreign ingredients consist of a considerable quantity of dirty debris, partly organic; such matter is likely to effect the sample detrimentally as an article of food, and it is, therefore, not a milk of good quality. No change has taken place in the constitution of the article which would interfere with the analysis."

It was admitted that the sample was, so far as the quantities of fatty and non-fatty solids were concerned, in excess of the requirements of the Sale of Milk Regulations, 1901. It was further proved by the public analyst that the microscope disclosed that the debris referred to in his certificate consisted of waste organic substance in a more or less advanced state of decomposition, mixed with particles of dung, cotton and wool fibres, fungoid growth, etc., the whole swarming with bacteria and other microscopic organisms; that such debris was in microscopical quantities; that one had to look very closely to find dirt in milk; that no standard of dirty milk was laid down; that the sample with reference to its commercial value, apart from the extraneous constituents, was good milk; and that it was possible to remove such debris, but it had not been removed in this case. The public analyst admitted that the quantity of debris in the sample was so small that it was impossible to weigh or measure it in terms which would be comprehensible to the ordinary lay individual, and he admitted that in very many other articles of food debris with bacteria was frequently found, and that no practicable and possible system of straining by the respondent would have strained all bacteria out of the milk. He declined

to name specifically any disease which would be likely to be contracted through the consumption of such a sample of milk, and he further admitted that the purest possible milk contained in its natural state a quantity of bacteria, although not the type of bacteria to which he had referred, and that some of the cotton and wool fibres in the sample might have been introduced into the milk by the act of straining it through the straining cloths.

For the appellant it was contended that as he asked for new milk of good quality the respondent should have supplied him with milk in its normal condition, and not with milk which contained dung and which was dirty and likely to be detrimental to health, and therefore unfit for human consumption. For the respondent it was contended that the prosecution was endeavouring to create an entirely new offence and to set up a standard of cleanliness which the Sale of Food and Drugs Acts did not contemplate, and for which provision had been made in the Milk and Dairies (Consolidation) Act, 1915, and that unless the milk was unfit for human consumption, if in all other respects it complied with the Sale of Food and Drugs Acts and the Sale of Milk Regulations, 1901, no offence was committed, and that, if it was held to be otherwise, no farmer or dairyman could carry on his business without being liable to prosecution, unless he first submitted his milk to analysis, which it would be impracticable and unreasonable to expect him to do. It was further contended for the respondent that the sample was, in fact, new milk of good quality, as it was new milk well over the standard fixed by the Sale of Milk Regulations, 1901; that "new milk of good quality" meant in law the lacteal fluid produced by and drawn from the cow; that the words "of good quality," used in the demand, added nothing to the obligations of the vendor; that there was in law no obligation on the respondent to strain milk when or after it was drawn from the cow and before sale, and that, even if there was any such legal obligation, the respondent had amply discharged the same by the precautions which he had taken, but as to the nature and extent of which there was no evidence; and that it was practically impossible for him to have adopted any other or better precautions to prevent the presence of such debris, dung, and bacteria as were complained of. It was also contended for the respondent that at the actual moment when milk was drawn from the cow it naturally contained bacteria, which were also present in practically every other commercial food, and consequently that the presence of debris and bacteria in milk was not an offence in law unless it was proved by the prosecution that such debris and bacteria were in fact detrimental to human health, and were introduced into the milk by some act or omission of the respondent, and to his knowledge or by his negligence, and unless such act or omission resulted in a liability which was imposed on the respondent by law, and for which he was legally responsible, and it was contended that these conditions had not been satisfied in this case.

The justices, being of opinion that the milk was good milk, and that the accidental presence in it of deletorious matter not injurious to health did not make it different in nature, substance, and quality from the article demanded by the appellant, dismissed the information.

By the Sale of Food and Drugs Act, 1875, s. 6:

> "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty not exceeding twenty pounds: provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say. . . . (4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."

Barrington-Ward, K.C. (*H. du Parcq* with him), for the appellant.

Disturnal, K.C. (*P. B. Morle* with him), for the respondent, was not called on to argue.

EARL OF READING, C.J.—This appeal must be dismissed. The Case raises no point of law at all. The decision of the justices is upon a question of fact. They came to the conclusion at the close of the case for the prosecution that upon the evidence given by the prosecution no case of an infringement of the Act had been made out against the respondent. The justices decided the case upon the facts, and they were clearly entitled to come to the conclusion at which they arrived, although, if they had come to a different conclusion, the matter would have been open to argument. But here their view commends itself to me as a sensible view on the facts, if I had to consider them. They came to the conclusion that the evidence in support of the allegation of the prosecution that there was an offence did not prove that allegation. They thought that it would be straining the law unduly if they attempted to give effect to the evidence for the appellant. I agree with them, and the result is that the appeal will be dismissed.

DARLING, J.—I am of the same opinion. The evidence was that the milk supplied was as it came from the cow, but that some attempt had been made to remove from it any impurities that might have been accidentally present, for the analyst admitted that the presence of bits of cotton and wool fibre was probably caused by straining the milk in order to make sure that no impurities should be present at the time of sale. The analyst's certificate as to the impurities sounds very dreadful, as though the respondent had supplied something of a horribly adulterated description. But when one looks carefully at what the analyst said, it appears that these impurities were accidentally present and their presence could not have been prevented. The analyst admitted that the quantity was so small that it would be impossible to weigh or measure it in terms which would be comprehensible to the ordinary lay individual. Is it to be said that the ordinary lay individual is to be fined or imprisoned because he sells milk containing impurities in a quantity which is so small that he cannot detect it, and that even a public analyst could not use terms which would convey to that individual the result of the analysis? There has been an attempt here to set up an impossible standard. The milk might possibly have been better milk, but the law only says that the milk must be of good quality and does not say that it must be of better or best quality. This case is simply an instance of the very valuable maxim that people will often lose what is good enough for the sake of getting something possibly better.

ACTON, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *W. J. Lake & Son*, for *Roach, Pittis & Co.*, Newport, Isle of Wight; *Church, Adams, Prior & Balmer*, for *P. W. Snelling*, Winchester.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

Re BENNETT. GIBSON *v.* ATTORNEY-GENERAL

[CHANCERY DIVISION (Eve, J.), January 14, 16, 20, 1920]

[Reported [1920] 1 Ch. 305; 89 L.J.Ch. 269; 122 L.T. 578; 84 J.P. 78; 64 Sol. Jo. 291]

Charity—Benefit to community—Gift "for benefit of schools and charitable institutions, and poor, and other objects of charity, or any other public objects." —"Any other objects"—Ejusdem generis rule.

The testatrix by her will devised and bequeathed her residuary estate to trustees to be applied by them in such manner as they should in their absolute and uncontrolled discretion think fit "for the benefit of the schools and charitable institutions, and poor, and other objects of charity or any other public objects in the parish of F."

Held: the particle "or" followed by the words "any other" was used, not disjunctively, but as a particle marking distribution at the end of a list of enumerated items over which the power of selection extended; the words "the other public objects" must be construed as ejusdem generis with the specified objects; and, therefore, the gift was not void for uncertainty, but was a valid charitable gift.

Dolan v. *MacDermot* (1) (1868), 3 Ch. App. 676, followed.

Notes. Referred to: *Re Tetley, National Provincial and Union Bank of England* v. *Tetley*, [1923] 1 Ch. 253; *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*, [1944] A.C. 341. As to alternative charitable or other purposes see 4 HALSBURY'S LAWS (3rd Edn.) 269–271, and for cases see 8 DIGEST (Repl.) 394 et seq.

Cases referred to:

(1) *Dolan* v. *MacDermot* (1868), 3 Ch. App. 676; 17 W.R. 3, L.C.; 8 Digest (Repl.) 399, *902*.

(2) *Houston* v. *Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, *889*.

(3) *Blair* v. *Duncan*, [1902] A.C. 37; 71 L.J.P.C. 22; 86 L.T. 157; 50 W.R. 369; 18 T.L.R. 194, H.L.; 8 Digest (Repl.) 394, *865*.

(4) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

(5) *Re Allen, Hargreaves* v. *Taylor*, [1905] 2 Ch. 400; 74 L.J.Ch. 593; 93 L.T. 597; 54 W.R. 91; 21 T.L.R. 662; 49 Sol. Jo. 671; 8 Digest (Repl.) 344, *258*.

(6) *Re Bridger, Brompton Hospital for Consumption* v. *Lewis*, [1894] 1 Ch. 297; 63 L.J.Ch. 186; 70 L.T. 204; 42 W.R. 179; 10 T.L.R. 153; 38 Sol. Jo. 111; 7 R. 78, C.A.; 8 Digest (Repl.) 377, *698*.

Also referred to in argument:

Re White, White v. *White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 41 W.R. 683; 37 Sol. Jo. 249; 2 R. 380, C.A.; 8 Digest (Repl.) 334, *150*.

Grimond v. *Grimond*, [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 21 T.L.R. 323, H.L.; 8 Digest (Repl.) 396, *882*.

Adjourned Summons.

The testatrix, Marianna Katharine Bennett, of Faringdon, in the county of Berks, by her will, dated Aug. 21, 1889, appointed the first plaintiff, the Rev. Herbert Favell Gibson, and two others executors and trustees, and, after making a certain release and giving specific legacies, gave all other her jewels, trinkets, and other ornaments of the person and her books and all the remainder of her effects of personal use or ornament, including articles of furniture, to her trustees upon trust for division as therein mentioned, and the testatrix devised and bequeathed all her real and personal estate not thereby or by any codicil thereto otherwise disposed of

unto her trustees upon trust to sell, call in, and convert into money the same, and out of the moneys produced by such conversion of such part of her personal estate as should not be applicable by law to the payment of legacies for charitable purposes and in priority to and in exoneration of such part as should be applicable for that purpose and out of such part as should consist of money and if such part should be insufficient out of the residue of the several moneys pay her funeral and testamentary expenses and debts and any pecuniary legacies bequeathed by codicil and invest the residue of the moneys to arise from such sale and conversion, with power to vary such investments and to stand possessed of the residuary trust moneys and the investments representing the same (thereinafter called the residuary trust funds) upon the trusts following (that was to say) in the first place to apply such parts thereof as were applicable by law to the payment of legacies for charitable purposes and the income thereof in such manner as they should in their absolute and uncontrolled discretion think fit for the benefit of the schools and charitable institutions and poor and other objects of charity or any other public objects in the said parish of Faringdon, and the testatrix declared that in so doing her trustees should have the fullest power either to retain and invest the last mentioned part of her residuary estate or any portion thereof for such periods as they should think proper and apply the income to the said schools, charitable institutions, and objects or to hand over the capital to the trustees, treasures, or governing bodies of the schools, charitable institutions, and objects, or otherwise deal with the same as they should in their uncontrolled discretion think proper. The testatrix confirmed her will by a codicil made in the year 1906, and died on Aug. 26, 1918. The originating summons taken out by two of the trustees asked the question whether the bequest of residue was a valid charitable bequest?

F. Trentham Maw for the trustees.

Austen-Cartmell for the Attorney-General.

Edward Clayton, K.C., and *C. E. Shebbeare* for the second defendant Butler, a residuary legatee under the testatrix's will.

P. Hewitt, K.C., and *Sheldon*, for next of kin.

EVE, J.—The testatrix died in August, 1918 having by her will dated in 1889 and confirmed by a codicil made in 1906, directed that her trustees in the events which have happened should stand possessed of her residuary trust funds upon trust in the first place to apply such parts thereof as are applicable by law to the payment of legacies for charitable purposes, and the income thereof is such manner as they should in their absolute and uncontrolled discretion think fit for the benefit of the schools and charitable institutions and poor and other objects of charity or any other public objects in the said parish of Faringdon, and she went on to declare in so doing that her trustees should have the fullest power

> "either to retain and invest the said last-mentioned part of my residuary estate or any portion thereof for such periods as they should think proper, and to apply the income or any portion of such income in aid of the said schools, charitable institutions, and objects, or any one or more of them either by way of subscription or otherwise or to hand over the capital or portions thereof to the trustees, treasurers, or the governing bodies of the said schools, charitable institutions, and objects or otherwise to deal with and dispose of the same as they shall in their absolute and uncontrolled discretion think proper, and without any liability on the part of my trustees to account for any such application."

The question that I have to decide is whether that bequest is a valid charitable bequest or is void for uncertainty. It is a question which has occupied a good deal of time in argument and is one I confess of great difficulty, but having arrived at a conclusion on the matter, I do not think any good purpose would be served by my further considering the arguments which have been addressed to me or the cases which have been cited. First, what is the proper construction of the words used by

the testatrix? They are, in my opinion, a direction to the trustees to expend or lay out the specified part of her residuary estate for such charitable or other public objects as they may think fit for the benefit of the parish of Faringdon, coupled with an enumeration of the charitable objects the testatrix particularly desires to benefit. Why is that not a good charitable gift? Because it is said the testatrix by the use of the disjunctive particle "or" between the words "objects of charity" and the words "any other public objects" has conferred upon the trustees a power of selection extending to objects not charitable and has thereby introduced an element of uncertainty rendering the whole gift void. To this it is answered that the particle "or," followed as it is by the word "other," is not used disjunctively, but properly as a particle marking distribution at the end of a list of enumerated items over which the power of selection extends, and that "the other public objects," must be ejusdem generis with the specified ones. I think this latter is the correct view, and that, in substance this is a gift for such charitable and other public objects for the benefit of the parish of Faringdon as the trustees may select. This construction, supported as it seems to me by the fact that the testatrix carefully limited the subject of the gift to that part of her estate which could at that time lawfully be applied for charitable purposes, and by the use, in the declaration, immediately following the gift, of the conjunctive "and" before the words "objects or any one or more of them" and later on before the word "objects," brings the case exactly within the language and decision of LORD CAIRNS in *Dolan* v. *Macdermot* (3 Ch. App. at p. 678), and unless his judgment is to be treated as overruled by the recent case of *Houston* v. *Burns* (3) in the House of Lords, I am bound to follow it. The gift in that case was a gift to trustees in trust to lay out the same "in such charities and other public purposes as lawfully might be in the parish of Tadmarton." That gift LORD CAIRNS construed as a gift to trustees of money to be laid out "in such charities and other public purposes as they think fit for the benefit of the parish of Tadmarton." After alluding in his judgment to the technical and legal meaning of the terms "charity" and "charitable" purposes, and pointing out that the testator when he used the word "charities" clearly did not mean private charities because he accompanied the term with the words "and other public" purposes thereby implying that the words first used meant "public charities," he proceeds as follows :

> "It therefore appears to me the reasonable and fair construction to be put upon this will—remembering always that in construing a will of this kind the court must not lean to the side of avoiding the will in order to gain money for the family, nor, on the other hand, strain to support the will to gain money for the charity, is that the testator directs his residue to be laid out for the benefit of the parish of Tadmarton 'in public charities,' using that term in the popular sense, 'and in other public purposes,' ejusdem generis, using those latter words as supplying and filling up a description of the purposes which, although within the Statute of Elizabeth and the technical doctrine of the court with regard to charities, are not within the popular meaning of the word 'charities.' By using these latter words the testator has simply given a description of all that is charity in the technical sense in which that word is used by the court, and he has, therefore, pointed out a charitable gift for the benefit of the parish of Tadmarton."

So in this case I come to the conclusion that the testatrix intended by her reference to "other public objects" to demonstrate that she intended to include in her area of selection, or, as it has been called, in her "ambit of choice" (see *Blair* v. *Duncan* (3) [1920] A.C. at p. 47) all purposes comprised in the word "charity" in the legal sense, and for these purposes I refer to the judgment of LORD MACNAGHTEN in the *Income Tax Special Purposes Comrs.* v. *Pemsel* (4) ([1891] A.C. 583), and this, in my opinion, brings the case within the reasoning and judgment of LORD CAIRNS in *Dolan* v. *Macdermot* (1).

A I have read very carefully what was said by Lord Finlay, from whose judgment none of the learned Lords dissented, in *Houston* v. *Burns* (2), and I cannot see that there is anything there to impugn the correctness of Lord Cairns' judgment. All that was said really was that Lord Romilly's dictum, when deciding the case in the first instance, that a gift for such public purposes as the trustees should select ceased to be void for vagueness or uncertainty if the public purposes were to be for B the benefit of a particular specified parish, was incorrect. *Houston* v. *Burns* (2) applies only to cases where the gift for public purposes or public objects is read disjunctively from the gift for charitable purposes; until this severance is imported into the construction of the instrument under consideration, the decision is not in point, but once read the gifts disjunctively, then an element of uncertainty is introduced which is not removed by the power of selection being restricted in exercise to a C particular parish. Beyond this the decision does not, in my opinion, affect anything that was said or decided in *Dolan* v. *Macdermot* (1), and inasmuch as on the matter of construction I do not read this gift disjunctively, I do not consider that this case is governed by the decision in *Houston* v. *Burns* (2). I think this case falls within *Dolan* v. *Macdermot* (1), and although no doubt the judgment in *Re Allen*, *Hargreaves* v. *Taylor* (5) is open to criticism, in so far as it proceeds D upon the acceptance as correct of Lord Romilly's dictum, much else survives to support the decision, and I regard it as still good law, and an illustration of the principle laid down in *Dolan* v. *Macdermot* (1).

The result is that, in my opinion, this is a good charitable gift unless there be introduced by the latter part of the declaration which follows the gift a general discretion authorising the trustees to apply the money for any general purposes they E choose. That would undoubtedly avoid it for uncertainty. But, in my opinion, the whole of the declaration following the gift is governed by the introductory words "in so doing," and the wide discretionary powers thereby conferred upon the trustees are limited in their application to the administration of the trust and do not affect its nature or scope. By the alteration which has been made in the law since the date of the will the whole residuary estate of the testatrix is now applicable F for charitable purposes (*Re Bridger*, *Brompton Hospital* v. *Lewis* (6)), and accordingly I direct an inquiry of what the residuary estate consists, and order a scheme for its application to be brought in.

Solicitors: *Francis & Calder; Treasury Solicitor.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

KINGS *v.* MERRIS

[King's Bench Division (Earl of Reading, C.J., Bray and Sankey, JJ.), July 27, 1920]

[Reported [1920] 3 K.B. 566; 90 L.J.K.B. 161; 124 L.T. 150; 85 J.P. 68; 18 L.G.R. 775; 26 Cox, C.C. 649]

Food and Drugs—Milk—Deficiency in non-fatty solids—Presumption that milk not genuine—Need for rebutting evidence to show that milk as cow gave it—Sale of Foods and Drugs Act, 1875 (38 & 39 *Vict.*, *c.* 63), *s.* 6—*Sale of Milk Regulations*, 1901, *reg.* 2.

Where milk is sold which is found on analysis to be deficient in fat or non-fatty solids as compared with the percentage fixed by the Sale of Milk Regulations the presumption created by the regulations that the milk is not genuine can only be rebutted by evidence that there has been no abstraction of fat or non-fatty solids, as the case may be, and no addition of water—in other words, that the milk is as the cow gave it; in the absence of such rebutting evidence, the court is bound to hold that the milk is not genuine.

Notes. The Sale of Food and Drugs Act 1875, was repealed by the Statute Law Revision Act, 1953. The law on the subject is now governed by the Food and Drugs Act, 1955, and by regulations made or continued under that Act, particularly the Sale of Milk Regulations, 1939 and the Milk and Dairy Regulations, 1949 to 1954. Section 6 of the Act of 1875 is replaced by s. 2 of the Act of 1955.

As to sale of milk see 17 Halsbury's Laws (3rd Edn.) 534 et seq., and for cases see 25 Digest 88 et seq., and 127 et seq. For the Food and Drugs Act, 1955, see 35 Halsbury's Statutes (2nd Edn.) 91, and for the regulations see 9 Halsbury's Statutory Instruments.

Cases referred to in argument:

Elder v. *Dryden* (1908), 99 L.T. 20; 72 J.P. 355; 6 L.G.R. 786, D.C.; 25 Digest 78, 77.

Harrison v. *Richards* (1881), 45 J.P. 552, D.C.; 25 Digest 78, 76.

Case Stated by justices for Worcestershire.

At a court of summary jurisdiction sitting at Halesowen an information was preferred by Ernest James Kings (hereinafter called the appellant), under s. 6 of the Sale of Food and Drugs Act, 1875, against William Merris, junior (hereinafter called the respondent), for that he did unlawfully sell to the prejudice of the said Ernest James Kings, the purchaser, a certain article of food, to wit, milk, which was not of the nature, substance, and quality demanded by the purchaser, contrary to the statute in that case made and provided. Upon the hearing of the information the following facts were proved or admitted:— The respondent was a retail milk dealer carrying on business at Blackheath, in the parish of Hill and Cakemore in the county of Worcester, and purchased his milk for retailing from three different farmers. On Feb. 2, 1920 the respondent was met in Belgrave-road, in the parish of Hill and Cakemore, by Police Constable Mattey and the appellant, delivering milk. The appellant purchased one pint of new milk for 5½d. and told the respondent it was purchased for the purpose of being analysed by the public analyst, and he divided the milk into three parts, one of which he handed to the respondent. The appellant on the following day conveyed one part to the public analyst. The analyst certified that the milk was deficient in non-fatty solids to the extent of ·64 per cent., the actual percentage being 7·95 instead of 8·5 per cent. as fixed by the Sale of Milk Regulations, 1901. A copy of the certificate was served on the respondent. Cecil Duncan, the public analyst, analysed the sample of milk and gave the following certificate:

"I, the undersigned, public analyst for the county of Worcester, do hereby certify that I received on the 3rd day of February 1920 from Police Constable E. J. Kings, a sample of milk labelled No. 5 for analysis (which then weighed 180

grammes) and have analysed the same and declare the result of my analysis to be as follows:—I am of opinion that the said sample contained the parts as under: Fat, 3·60 parts; non-fatty solids, 7·95 parts; water, 88·45 parts. The above is deficient in non-fatty solids to the extent of ·64 per cent. This opinion is based upon the facts that the sample contained 7·95 per cent. of non-fatty solids, whereas genuine milk should contain not less than 8·5 per cent.—Observations: No change had taken place in the constitution of the article that would interfere with the analysis.—As witness my hand this 16th day of February, 1920, (Signed) Cecil Duncan, Public Analyst for the County of Worcester.

Under the Sale of Milk Regulations, 1901, issued by the Board of Agriculture, where a sample of milk contains less than 3 per cent. of milk fat it shall be presumed for the purposes of the Sale of Food and Drugs Acts, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water. By the same regulations it is also provided that where a sample of milk contains less than 8·5 per cent. of milk solids other than milk fats it shall be presumed for the purposes of the Sale of Food and Drugs Acts, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk solids other than milk fat or the addition thereto of water. Cecil Duncan, public analyst for the county of Worcester, was called for the appellant in support of his certificate. No evidence was given on behalf of the respondent to show that the milk was in the same condition when sold as it was when it came from the cows; nor was any analyst's certificate put in evidence on his behalf.

For the respondent it was contended that although the milk was deficient to the extent of ·55 in non-fatty solids according to the Board of Agriculture standard, yet it was in excess of that standard as to the fatty solids to the extent of ·60; that the fatty solids were the more important; that the milk was genuine milk; and that the purchaser got a better article than he anticipated by reason of the excess of fatty solids; that the deficiency of non-fatty solids was so infinitesimal that the purchaser was not prejudiced, and that, without calling the respondent, the county analyst's certificate on the face of it did not show that the milk was not genuine milk. Paragraph (j) of the Case was as follows:

"For the respondent, Frank Harris Allcock, engaged for forty-five years in business as a pharmaceutical chemist at Birmingham, was called, and he stated that milk varied considerably without its being interfered with, that there were a dozen causes creating variability in milk, that it was not possible for non-fatty solids after leaving the cow to become fatty, that the standard of the Board of Agriculture was low, that the district where the respondent carried on his business was a manufacturing one and the pasture was affected by chemicals and would not produce a high-class milk, that accepting the county analyst's certificate as it stood there was nothing to show that the milk was not genuine, and that in his opinion, accepting that certificate, it was genuine."

The said Frank Harris Allcock was not allowed to speak as to his analysis of the sample handed to him by the respondent in the absence of the latter, as no one else could prove that it was the one handed to him by the respondent. The appellant contended that in the absence of evidence that the milk submitted to the public analyst was in the same state as when it came from the cows, and in the absence of any admissible evidence in support of the theory of the said Frank Harris Allcock, the presumption resulting from the certificate of the public analyst could not be disregarded, and that, therefore, the offence charged was proved against the respondent.

The justices were of opinion that the milk was deficient in none-fatty solids to the extent of ·55, but that it had an excess of fatty solids to the extent of ·60, that the deficiency in non-fatty solids was infinitesimal, that the milk was better than it might have been by reason of the excess of fatty solids, that upon the evidence the

milk was genuine milk, that the purchaser obtained an article of food of the nature, substance, and quality demanded by him, and that no offence against the statute had been committed.

R. A. Willes for the appellant.
Bronson Albery for the respondent.

EARL OF READING, C.J.—This appeal must be allowed and the Case remitted to the justices for their further consideration. It is not desirable to say much about the case, as further evidence may be given before the justices. It is, however, necessary to say that where there is, as in this case, evidence that there is a deficiency of fat or non-fatty solids as compared with the percentage fixed by the Sale of Milk Regulations, 1901, then, unless there is evidence to satisfy the justices either that there has been no adulteration or that there has been no abstraction of fat or non-fatty solids, as the case may be, in other words, that the milk is as the cows gave it, it is inevitable that there should be a conviction. It is, of course, open to the defendant in such a case to show that, notwithstanding the deficiency in fat or in non-fatty solids, nevertheless he has not adulterated the milk and has not abstracted fat or non-fatty solids but has sold the milk as it was obtained from the cow, in other words, that he has added nothing to it and taken away nothing from it. In that case, no doubt, the justices, if they believed that evidence, would be justified in coming to the conclusion that no offence had been committed, because the defendant would then have proved that the article which he sold was of the nature, substance, and quality of the article demanded.

I will only make one observation about the Sale of Milk Regulations 1901, which were made under the powers conferred by s. 4 (1) of the Sale of Food and Drugs Act, 1899, which is in these words:

> "The Board of Agriculture may, after such inquiry as they deem necessary, make regulations for determining what deficiency in any of the normal constituents of genuine milk, cream, butter, or cheese, or what addition of extraneous matter or proportion of water, in any sample of milk (including condensed milk), cream, butter, or cheese, shall for the purposes of the Sale of Food and Drugs Acts raise a presumption until the contrary is proved, that the milk, cream, butter, or cheese is not genuine or is injurious to health, and an analyst shall have regard to such regulations in certifying the result of an analysis under those Acts."

In pursuance of that enactment regulations were made, and reg. 2 provides:

> "Where a sample of milk (not being milk sold as skimmed, or separated, or condensed milk), contains less than 8·5 per cent. of milk solids other than milk fat, it shall be presumed for the purposes of the said Acts, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk solids other than milk fat, or the addition thereto of water."

What that means is that it shall be treated as if the evidence established primâ facie that the milk is not genuine, but this is only a presumption and, consequently, it may be rebutted, and if the defendant can prove "the contrary," i.e., that there has been no addition of water, and that there has been no abstraction, then, although the article does not contain the percentage fixed by the regulations, there could be no conviction. The difficulty in this case is that as the evidence stands there is upon the Case Stated, no evidence to prove "the contrary." It is said for the respondent that para. (j) of the Case contains some evidence on which the justices could come to the conclusion at which they arrived, that the milk was genuine. Of course, if there was some evidence the justices are the judges of fact. But unless there was some evidence, there was no material on which they could hold that the presumption was rebutted. In my opinion, as the evidence stands, the justices were bound to hold that the milk was not genuine. It would take much argument to convince me that a purchaser of milk is to be taken to be asking for

milk and water, or for milk with a less percentage of non-fatty solids than that fixed by the regulations as the minimum. I cannot see that a distinction can be allowed between commercial milk and genuine milk. What the legislature meant was that a purchaser should be protected, and that he should get real milk, genuine milk, and not milk to which water has been added or from which fats or non-fatty solids have been abstracted. The regulations were made in order to avoid the necessity of giving evidence of such addition or abstraction. This appeal must be allowed, and the Case remitted to the justices for further consideration.

BRAY, J.—I am of the same opinion. The evidence for the respondent was not evidence which proved "the contrary."

SANKEY, J.—I agree.

Appeal allowed and Case remitted.

Solicitors: *Buller, Cross & Jeffries*, Birmingham; *Dennison, Horne & Co.* for *E. H. Grove*, Halesowen.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

GEDDLING *v.* MARSH

[KING'S BENCH DIVISION (Bray and Bailhache, JJ.), January 15, 1920]

[Reported [1920] 1 K.B. 668; 89 L.J.K.B. 526; 122 L.T. 775; 36 T.L.R. 337]

Sale of Goods—Implied condition of fitness—Application to container of goods hired to purchaser of goods therein—Bottle containing mineral water—Sale of Goods Act, 1893 (56 *& 57 Vict., c.* 71), *s.* 14 (1).

The plaintiff, who kept a small general shop, was supplied by the defendant, a manufacturer of mineral water, with lime-juice and soda in bottles for re-sale to the public. The mineral water and the bottles were charged for separately, and the practice was that, if the plaintiff returned the bottles, the money paid for them was refunded. While the plaintiff was replacing a bottle of lime-juice and soda in a case after having served a customer, the bottle burst and the mixture and particles of the glass of the broken neck struck and injured the plaintiff. In an action by the plaintiff for damages for breach of warranty under s. 14 (1) of the Sale of Goods Act, 1893,

Held: the warranty under s. 14 (1) of the Act of 1893 that goods should be reasonably fit for the purpose for which they were supplied extended, not only to goods bought, but also to goods supplied under a contract of sale; as mineral water could not be sold except in bottles, the sale of the lime-juice and soda in a bottle was the subject of only one contract; that contract was a contract of sale even though there was a provision that the bottles should be hired and not sold; and, therefore, there was an implied condition that the bottles should be reasonably fit for the purpose for which they were supplied; on the evidence the bottle in question was not so fit; and the plaintiff was entitled to succeed.

Notes. As to meaning of contract of sale see 34 HALSBURY'S LAWS (3rd Edn.) 21–23, as to implied terms as to quality or fitness see ibid., pp. 51 et seq., and for cases see 39 DIGEST 360–362, 440 et seq. For the Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *Preist* v. *Last*, [1903] 2 K.B. 148; 72 L.J.K.B. 657; 89 L.T. 33; 51 W.R. 678; 19 T.L.R. 527; 47 Sol. Jo. 566, C.A.; 39 Digest 444, 727.

(2) *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K.B. 608; 74 L.J.K.B. 386; 92 L.T. 527; 53 W.R. 354; 21 T.L.R. 300; 49 Sol. Jo. 312, C.A.; 39 Digest 445, *733*. A

(3) *Hyman* v. *Nye* (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest 87, *211*.

Also referred to in argument:

Bates v. *Batey & Co., Ltd.*, [1913] 3 K.B. 351; 82 L.J.K.B. 963; 108 L.T. 1036; 29 T.L.R. 616; 39 Digest 459, *857*. B

Blakemore v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; sub nom. *Blackmore* v. *Bristol and Exeter Rail. Co.*, 27 L.J.Q.B. 167; 4 Jur. N.S. 657; 6 W.R. 336; 3 Digest 69, *111*.

Appeal from Barrow-in-Furness County Court. C

The plaintiff, Mrs. Geddling, kept a small general shop in which she sold, among other things, mineral waters, which she obtained from the defendant, who was the manufacturer. The mineral waters were supplied to her from time to time in bottles in the usual way. The defendant charged 3d. for the contents of each bottle and 1d. for the bottle, and the practice was that if the plaintiff returned the bottle she received the 1d. back, but if the bottle was not returned, owing to its being broken or lost, she forfeited the 1d. On April 13 the plaintiff was serving a customer with mineral waters, and as she was replacing a bottle containing lime-juice and soda, which had been supplied by the defendant, in its case, the bottle burst and seriously injured her. The plaintiff brought this action to recover damages from the defendant for the injuries thus sustained. The plaintiff's original particulars of claim were "for damages suffered through the bursting of a lime-juice and soda bottle, supplied to her by the defendant, at Hindpool Road, Barrow-in-Furness, on April 13, 1919. General damages, £100." This claim was amended by the addition of the words, "or damages for breach of warranty under the Sale of Goods Act, 1893." D E

The learned county court judge held that there was an implied condition under s. 14 (1) of the Sale of Goods Act, 1893, that the lime-juice and soda was reasonably fit for the purpose for which the defendant sold it, and, if so, there was a breach of the said condition, and it is immaterial whether or not the defect was discoverable by the defendant at the time of sale to the plaintiff: *Preist* v. *Last* (1), *Frost* v. *Aylesbury Dairy Co.* (2). He, therefore, gave judgment for the plaintiff for the amount claimed. The defendant appealed. F

By the Sale of Goods Act, 1893, s. 14 (1): G

"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose." H

Wingate-Saul, K.C., and *Percival Smith* for the defendant. I
Claughton-Scott for the plaintiff.

BRAY, J.—This is an action to recover damages for personal injuries sustained by the plaintiff by the bursting of a bottle in which mineral waters had been supplied by the defendant. Certain particulars were delivered by the plaintiff, but the point on which the case finally turned was this: The plaintiff alleged that there had been a breach of the warranty under s. 14 (1) of the Sale of Goods Act, 1893.

A The plaintiff kept a small shop for the sale of mineral waters, which she obtained from the defendant. He supplied her from time to time with mineral waters in bottles which were delivered in cases. The course of business was for the defendant to charge 3d. for the contents of each bottle and 1d. for the bottle, and the practice was that, if the plaintiff returned the bottle, she got the 1d. back, but if the bottle was broken or she failed to return it she forfeited the 1d. We must take it, owing B to the finding of the learned county court judge, that no actual sale of the bottles took place. He found that the accident may have arisen from one or more of a number of causes, one of which was that the bottle was either improperly manufactured or had some flaw in it. We must, I think, take it that the accident in fact arose not from any defect in the liquid contained in the bottle, but in the bottle itself. The question, therefore, to be decided is whether the defendant is liable C for any defect in the bottle. That depends on what was the contract as to the bottle. The learned county court judge finds that there was no sale of the bottle to the plaintiff, but he says that that is immaterial. The question is, was he right?

The case for the plaintiff is that it is immaterial whether in fact the property in the bottle passed or not, because, in either case, whether there was a sale or a bailment, the case comes within the provisions of s. 14 of the Sale of Goods Act, D 1893. . . . There is only one contract here. The plaintiff applied to the defendant to supply her with mineral waters, that must mean mineral waters in bottles because mineral waters cannot be supplied except in bottles. Therefore she was asking to have mineral water supplied to her in bottles. That undoubtedly is a contract of sale, and I assume that there may be a condition of that contract that the bottles are not to be bought, but hired; but the question which the learned E county court judge had to consider was whether these bottles were supplied under a contract of sale. This was a contract of sale, and none the less a contract of sale because there was a particular provision with regard to the bottles. In my opinion, therefore, these bottles were supplied under a contract of sale, and it follows that there was an implied condition that the bottles should be reasonably fit for the purpose for which they were supplied; they were not in fact reasonably F fit. The contention on the defendant's behalf is that the implied warranty as to the fitness of the goods supplied applies only to the goods actually bought. It seems to me that the common-sense meaning of sub-s. (1) of s. 14 is that the warranty extends to goods not only actually bought, but to goods supplied under a contract of sale. In my opinion, the bottles were supplied under a contract of sale, and that, therefore, the warranty applies. I desire to add a words as to the point taken G by counsel on behalf of the plaintiff that the obligation of a bailor is the same as that of a vendor. I think *Hyman* v. *Nye* (5) does not support that contention. I do not, however, decide the case on that point, but on the interpretation of s. 14 (1) of the Sale of Goods Act. The appeal must be dismissed.

H **BAILHACHE, J.**—I agree. I think that the argument of counsel for the defendant as to the difference between the warranty implied on a contract of bailment and the warranty implied on a contract of sale is sound. In my opinion they are not the same. But I think the learned county court judge decided this case upon precisely the right ground, namely, that the bottles were goods supplied under a contract of sale. Where a wholesale manufacturer is selling mineral waters I to a retailer, it is impossible for him for business purposes to deliver the mineral water unless he delivers it in bottles. Not only the mineral water, but the bottles themselves are necessarily supplied under the contract of sale of the mineral water, it cannot be supplied except in some kind of container, and the common container is a bottle. I think, therefore, that not only the contents, but the bottles themselves, even if the property in the bottles does not pass under the contract, were goods supplied under the contract of sale. If one pursues this a little further, I think the judgment of the learned judge can be supported on another ground. The warranty is that the goods shall be reasonably fit for the purpose for which

they are sold. Now the evidence showed that this bottle was properly handled, that it was not dropped or knocked against anything; it had been taken out of its case and was being put back carefully, under these circumstances this bottle would not have burst unless some effervescence of gas had taken place within the bottle. The bottle cannot burst unless the gas is too strong for it. I am therefore of opinion that mineral water is not reasonably fit for the purpose for which it is sold if it generates gas to such an extent that the bottle bursts. It seems to me therefore that if we confine the warranty under the section to the condition of the mineral water itself, it was not reasonably fit for the purpose for which it was sold. I agree, however, that the bottle was supplied under the contract of sale.

Appeal dismissed.

Solicitors: *Church, Adams, Prior & Balmer*, for *Cobbett, Wheeler & Cobbett*, Manchester; *Janson, Cobb, Pearson & Co.*, for *Wright & Dixey*, Lancaster.

[*Reported by* L. H. Barnes, Esq., *Barrister-at-Law.*]

R. *v.* MINISTER OF HEALTH. Ex parte EAST RIDING OF YORKSHIRE COUNTY COUNCIL

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), April 30, May 5, 6, 1920]

[Reported [1921] 1 K.B. 1; 90 L.J.K.B. 1; 123 L.T. 802; 85 J.P. 49; 18 L.G.R. 543]

Local Authority—Financial adjustments between authorities—Re-adjustment—No financial relations between authorities when original adjustment made—Inequitability of original adjustment—Matter for Minister—Local Government Act, 1888 (51 *& 52 Vict., c.* 41), *s.* 32 (1) (6).

An equitable adjustment respecting the distribution of the proceeds of local taxation licences and probate duty grant and all other financial relations between a county council and a county borough included in Sched. 3 to the Local Government Act, 1888, can be made under s. 32 (1) of the Act even though at the time of the passing of the Act no financial relations existed between the county council and the county borough, each being financially independent of the other, and, accordingly, at any time after the end of five years from the date of such adjustment the appropriate government Department [now the Minister of Housing and Local Government] can, if satisfied that the adjustment has become inequitable and that the councils are unable to agree on a new adjustment, appoint an arbitrator to make a new equitable adjustment. It is for the Minister in his discretion, and not for the court, to decide whether or not the original adjustment has become inequitable.

Notes. The functions of the Local Government Board were transferred to the Minister of Health under the Ministry of Health Act, 1919, s. 3 (1) (a), and in 1951 from him to the Minister of Housing and Local Government under S.I. 1951 No. 142 and 1900. Section 32 (6) of the Act of 1888 was repealed by the Local Government Act, 1929, so far as related to grants discontinued by that Act: see Sched. 2 to the Act.

As to financial adjustments between local authorities see 24 Halsbury's Laws (3rd Edn.) 430 et seq., and for cases see 33 Digest 25–28. For Local Government Acts, 1888, 1894 and 1929, see 14 Halsbury's Statutes (2nd Edn.) 171, 226, 259.

Appeal from an order of a Divisional Court (Earl of Reading, C.J., Avory and Sankey, JJ.) discharging a rule nisi calling on the Minister of Health to show

cause why a writ of prohibition should not issue to prohibit him from appointing an arbitrator under s. 32 (6) of the Local Government Act, 1888, to make a re-adjustment of the financial relations between the county council of the East Riding of Yorkshire, the county borough of Kingston-upon-Hull, and the county of the city of York. The ground of the application for the rule was that there was no jurisdiction to make a re-adjustment, there being no financial relations between the said areas and no facts under which the distribution of the Exchequer grants could or had become inequitable.

The position taken up by the East Riding County Council in the matter appeared from a letter written by them to the Local Government Board on Jan. 25, 1918, which was as follows:

> "The county borough of Kingston-upon-Hull and the county borough of York have never for administrative purposes formed part of the East Riding. They were, before the passing of the Local Government Act, 1888, and apart altogether from that Act, have continued to be and still are, counties of themselves, and would not, even if that Act had never been passed, have 'remained' in the East Riding. Consequently, the East Riding Council are advised and are of opinion that the financial relations ordinarily existing between a county and county boroughs situate therein do not exist, and that, accordingly, the provisions of the Act as to re-adjustments are altogether inapplicable and there is no jurisdiction or power to make such a re-adjustment."

By s. 32 of the Local Government Act, 1888:

> "(1) An equitable adjustment respecting the distribution of the proceeds of the local taxation licences, and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in [Sched. III to the Act] as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement by the commissioners appointed under this Act. . . . (6) Provided that at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable, and that the councils are unable to agree on a new adjustment, the Board shall appoint an arbitrator; and such arbitrator shall proceed to make a new equitable adjustment as if he were the commissioners under this Act, and the provision of this Act shall apply accordingly. . . ."

The Divisional Court discharged the rule, and the county council appealed.

Disturnal, *K.C.*, and *W. J. Jeeves*, *K.C.*, for the county council.

The Solicitor-General (*Sir Ernest Pollock*, *K.C.*) and *Branson* for the Minister of Health.

R. M. Montgomery, *K.C.*, and *William Allen* for the county borough of Hull.

F. T. Villiers Bayly for the city of York.

BANKES, L.J.—This is an appeal from a decision of the Divisional Court discharging a rule nisi for a prohibition directed to the Minister of Health, to prohibit him from appointing an arbitrator under s. 32 (6) of the Local Government Act, 1888, to make a re-adjustment of the financial relations between the county council of the East Riding of Yorkshire, the county borough of Kingston-upon-Hull, and the county of the city of York.

The Local Government Act, 1888, made a great change in reference to moneys which were granted by the State in aid of certain local expenditure. Before that Act the system adopted had been for the Treasury to make grants in aid of the local expenditure in respect of certain objects, and we are told that the amount of those grants in aid was regulated by the amount of the local expenditure upon

those objects, and that, as a matter of practice, the amounts that were paid were dealt with in the yearly Appropriation Act, but, be that as it may, it appears clear that the amount of these grants in aid was regulated by the amount of the local expenditure in respect of the objects for which grants in aid were made by the Treasury. The Local Government Act, 1888, abolished those grants in aid altogether, and substituted for them certain contributions from certain specified sources, which are described in the Act as the local taxation licences and the probate duty, and by the Local Taxation Act, 1890 [repealed by Local Government Act, 1929] there was added what is ordinarily known as the "whiskey money," and moneys from those three sources were substituted for grants in aid. The statute defined what those moneys should consist of, and how they should be distributed.

Section 20 of the Act of 1888 dealt with the local taxation licences, and it directed that the Commissioners of Inland Revenue should pay into the Bank of England to an account, to be referred to as the "local taxation account," such sums as may be ascertained in manner provided by the regulations to be the proceeds of the duties collected by the commissioners in each administrative county in England and Wales on certain licences referred to in the Act as "local taxation licences." In sub-s. (2) the Act provided for the distribution of those amounts. It enacted that:

> "The amount ascertained as aforesaid to have been collected in each county in respect of duties on local taxation licences shall from time to time be certified by the Commissioners of Inland Revenue, and paid under the direction of the Local Government Board out of the local taxation account to the council of such county."

So much for the local taxation licences. With regard to the probate duties, s. 21 fixed the amount of the probate duties which should be dealt with in aid of local expenditure. Section 22 provided for the distribution of that amount in those words:

> "The sums paid in pursuance of this Act to the local taxation account, in respect of the proceeds of the probate duties (in this Act referred to as the 'probate duty grant') shall, until Parliament otherwise determine, be distributed among the several counties in England and Wales in proportion to the share which the Local Government Board certify to have been received by each county during the financial year ending the 31st day of March next before the passing of this Act out of the grants heretofore made out of the Exchequer in aid of local rates, which will cease to be granted after the passing of this Act."

So that, so far as the distribution of the local taxation licences is concerned, the distribution was to be local, having reference to the areas in which the licences were collected; with regard to the probate duties, and afterwards, the whiskey duties, the distribution was to be with reference to the amounts which were paid in the preceding year out of grants in aid to the different local authorities. If the statute had stopped there, nothing more would have had to be done, and nothing more could have been done in reference to the distribution of these sums of money except to follow the provisions of the Act of Parliament to which I have just referred. But s. 32 of the Act provides for an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant. These are the matters which had already been dealt with specifically by Parliament in the way that I have indicated. There is to be an equitable adjustment respecting the distribution of those moneys

> "and respecting all other financial relations, if any, between each county, and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county."

Pausing there for a moment, the section deals with an equitable adjustment. The moneys to be equitably adjusted are the proceeds of the local taxation licences and probate duty. An equitable adjustment had to be made respecting those moneys and respecting all other financial relations, if any, and the adjustment is to be made as between each county and each county borough specified in the said schedule [Sched. III] as being deemed, for the purposes of this Act, to be situate in the county. So that the distribution which is to take place is limited to distribution between each county and each county borough specified in the said schedule as being deemed, for the purposes of the Act, to be situate in that county.

The two county boroughs which are concerned in this dispute are York and Kingston-upon-Hull. They are both included in the schedule. They are both, by the terms of the Act and the schedule, deemed, for the purposes of this Act, to be situate in that county, and that, although they differ materially from other county boroughs created by the Act and existing in the county owing to the fact that they are themselves, each of them, counties of cities. It cannot be disputed that the Act contemplates an equitable adjustment as between the East Riding and each of these two county boroughs. The Act provides that this equitable adjustment is to be made by commissioners appointed under the Act. Counsel for the county council commenced his argument by saying that, there being no financial relations between these two county boroughs and the East Riding at the time of the passing of the Act, no adjustment ought to have been made at all between them, because there was nothing to adjust. I disagree with the learned counsel's contention on that point, having regard to the terms of the Act of Parliament, because it seems to me that, whatever the relations may be between any county and county borough specified in the schedule which is to be deemed to be within the county, the section is mandatory, and it requires that, unless there is an agreement between the council and each county and each borough, there must be an adjustment by the commissioners in order to fix the amounts which will be payable respectively to the county and to the county borough. And I disagree with the learned counsel's suggestion that the only ground upon which an equitable adjustment can be made is assuming that there are financial relations between the county and the county borough. I ought to add that, by s. 61 of the Act, the commissioners are given an absolute discretion in the matter of making these equitable adjustments.

What happened in the case of the East Riding and these two boroughs was this. The commissioners did make an equitable adjustment, and it is dated Nov. 11, 1891. They recited in their adjustment that there were no financial relations between the county of the East Riding of Yorkshire and the county boroughs of Kingston-upon-Hull and York in respect of which an adjustment was required. They go on to say "other than the distribution of the proceeds of the local taxation licences and probate duty grant." Counsel for the county council relied upon that as part of his argument that there was nothing then to adjust, and there is nothing now to adjust, and, therefore, the Minister of Health can have no jurisdiction to appoint an arbitrator. As I have already pointed out, it appears to me that it is not essential to justify the original adjustment, or any further equitable adjustment, that there should be what are described in the Act as financial relations between the county and the county borough other than such financial relations in reference to the distribution of the local taxation licences, probate duty grant, or whiskey money. Then we are told that the basis on which the commissioners proceeded to make these adjustments, and other adjustments, after the passing of the Act was that they took the amount of the grants in aid which had been made in the year prior to the passing of the Act and provided that the available amounts from these new duties should be distributed in proportion to the amount of those previously existing grants in aid, and that any surplus should be divided and paid in proportion to the rateable value of the areas with which they are dealing. The county council say that they had no right to do that, no jurisdiction to do it, and that it was contrary to the provisions of the Act of Parliament. It does not seem

to me that, in considering the particular application before us we have any need to inquire into that. They made this adjustment which proceeded on the basis which I have just described, and that has remained in force, and was acted upon, down to the present time.

In November, 1917, the county borough of Hull made application to the secretary of the Local Government Board, for a re-adjustment, and in the letter making the application the ground upon which it was alleged that the existing adjustment was inequitable, and a re-adjustment was required, was the difference in the figures represented by what are called in the letter the priority payments as existing in the year 1888 and in the year 1916, and in the difference between the rateable values of the areas in question in 1899 and 1916. The statute, in sub-s. (6) of s. 32, provides for a re-adjustment after the expiration of five years from the date of the original adjustment. On that application being made, the Local Government Board directed a local inquiry in order that they might satisfy themselves whether or not the original adjustment had become inequitable. That inquiry was held on June 28, 1918, at which all parties were represented, and at which an elaborate argument was presented to the inspector based upon the figures which were contained in the town clerk's letter of Nov. 22, 1917, the arguments upon which were elaborated, and there were also put forward the points upon which the borough relied, which were founded on those figures, but were not necessarily apparent from the figures themselves without explanation. They were laid fully before the inspector. As a result, as appears from the affidavit of Sir Aubrey Symonds, filed on behalf of the Minister of Health: "The Local Government Board having fully considered the [evidence given by the town clerk of Kingston-upon-Hull before the inspector] are satisfied that the adjustment has become inequitable, and, therefore, decide, in pursuance of what they conceive to be their duty, to appoint an arbitrator."

It was against the appointment of the arbitrator that the East Riding authorities protested in the form of an application to the Divisional Court for prohibition. In my opinion, the remedy was quite inappropriate for the complaint, because the court will only grant a prohibition where they find an individual or authority usurping a jurisdiction which is not legally vested in it, and the argument on behalf of the county council that the Minister of Health was usurping a jurisdiction which he had not really got by appointing an arbitrator is founded upon the suggestion that there were no materials before him upon which he could legally come to a conclusion that he was entitled to decide that the original adjustment had become inequitable. Counsel has advanced several arguments, but they all resolve themselves into this: He says that there can be no re-adjustment here because there is nothing to adjust, because there were no financial relations and are no financial relations between these county boroughs and the East Riding, and he says that these county boroughs ought to be regarded in the position of individual counties, if I may use that expression, and that there can be no such re-adjustment as between independent counties. With regard to this latter point, it is enough, I think, to say that, whether the position of these two county boroughs is, from many points of view, the same as what I have called an independent county, the statute expressly provides that as between the East Riding and these two county boroughs there has not only had to be an adjustment in the first instance, but there may be, under sub-s. (6) of s. 32, when the circumstances justify it, a re-adjustment.

With regard to the question whether or not there is anything to adjust, that seems to me to be entirely a matter for the Minister in the exercise of his discretion to consider, and to say that the Minister has no jurisdiction to appoint an arbitrator when it is pointed out to him that the original adjustment, proceeding upon a certain basis, produced a certain result, and that, applying the same basis to the present conditions, an entirely different, and, from the point of view of Kingston-upon-Hull, a very inequitable, result is being produced—to say that, in those circumstances, there is no evidence upon which he is entitled, as a matter of law, to come to the

conclusion that the matter ought to be re-considered seems to me to be an argument which is quite impossible for the court to accept. For these reasons, in my opinion, the county council entirely fail to satisfy me that the Minister of Health was acting without jurisdiction in coming to the conclusion that the facts placed before him permitted him and allowed him to come to the conclusion that the adjustment had become inequitable. For these reasons, in my opinion, the appeal fails.

SCRUTTON, L.J.—If I were the arbitrator laying down the basis of equitable re-adjustment and the distribution of the proceeds of the local taxation licences and probate duty grant between the East Riding of Yorkshire and York and Kingston-upon-Hull, I should want to know a good deal more about the facts than I know at present. But, fortunately for me, that is not my position. What this court has to decide is whether the East Riding is right in trying to prohibit the Minister of Health, the successor of the Local Government Board, from appointing an arbitrator to consider that question at all. Parliament thought right, in the Act of 1888, in respect of county boroughs to provide for an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant and respecting all other financial relations. It also contemplated that that equitable adjustment might, by lapse of time, become inequitable; it, therefore, provided that, after five years from the date of the original award adjusting the financial relations, if the council of either the county or borough satisfied the Local Government Board that the adjustment had become inequitable the Board should appoint an arbitrator. The East Riding apply to us to prohibit the Minister from appointing an arbitrator, which can only be on the ground that there was no ground upon which he could be satisfied. The question is not whether we should be satisfied, the person to be satisfied is the Minister of Health, the successor of the Local Government Board, and if there was any ground on which he could possibly come to the conclusion that he was satisfied positively and reasonably, the question is one for him and not one for us. It is difficult to illustrate the distinction in view of the very wide words used: "equitable re-adjustment," without making an absurd supposition, but if it were possible to suppose that the Ministry of Health said: "We are satisfied that the original adjustment is inequitable between Kingston-upon-Hull and the East Riding because the Dutch government has not interned the late Kaiser in the East Indies," you would have a case where this court might prohibit an authority that arrived at that stage of lunacy from further proceeding with the arbitration, but in a case where the grounds put before the Minister appear to have some relation to the conclusion to which they have come, it is extremely difficult, in my view, for a court to grant a prohibition stopping the arbitrator even starting with the question of the principle of re-adjustment.

I have done my best to follow the very able argument of counsel for the county council on a rather complicated matter, and the way in which the matter strikes me is this. Before 1888 the Exchequer made certain grants in aid to counties and county boroughs which in the Appropriation Act of each year, but originally ascertained and divided among the persons who received them in a way having, at any rate in some cases, some relation to the amount of work done in the area of the authority which received those grants. The Act of 1888 made this difference: it provided certain funds which were to be distributed among the new county authorities. One of them was the revenue received from licences, and, as to that, Parliament said, in s. 20, that the proceeds of the licences should be distributed among the authorities under certificates of the amount actually collected in the areas; that is, the local taxation licences. Another source from which the funds that were going to be distributed among the counties came were the funds in s. 21, described as four-fifth parts of one-half of the proceeds of the probate duties, now, I believe, the estate duty, to which was added, by the Act of 1890, the proceeds of certain excise duty commonly referred to as the "whiskey money." That part of

the revenue which was going to be distributed among the counties was not distributed according to the actual amount certified in each year to be received in the area, as in the case of the licence duties, but were distributed by a conventional, and somewhat arbitrary, rule, that the amount received generally in each year was to be cut up among the various counties in proportion to the grants in aid which they had received in the year before the passing of the Act. That, as will be seen at once, made the sum distributed in one year depend upon the amount which had been received in a year that might be long preceding, and had been settled by the amount of work done in a long preceding year, and it might very well, therefore, be, that Parliament might say: "We are dividing this sum in proportion to the work done in a preceding year." But it might be that the proportion of work done in the preceding year had completely changed in a later one, and one can conceive that Parliament would have to consider whether or not they should vary that proportion which had been originally fixed by a past state of things. As between county and county, apparently, Parliament gave no means of varying that proportion. But when the Act of 1888 was establishing new county government it also dealt with certain large boroughs, and certain ancient boroughs which it found in the counties. In s. 31 it established county boroughs made up of two classes, each of the boroughs named in the third schedule being a borough which either had a population of not less than 50,000, or was a county in itself, so that you get two classes of boroughs, one of which, up to that time, had not had separate government as distinguished from the county, but had a population of more than 50,000, and other boroughs which, for ancient and historical reasons, had been counties in themselves, counties of cities, or counties of boroughs, separate from the counties in which, geographically, they were situate. The Act provided for all those boroughs becoming county boroughs. It provided in the schedule in which county they should be deemed to be situate, and, having made this provision, it went on to do what it had not done as between county and county—provide for a means of dividing the proceeds of the local taxation licences and probate duty grant between county and boroughs in the counties, county boroughs, and providing, which it had not done between county and county, for a way of varying the re-adjustment.

If I understand counsel's argument on behalf of the county council, he admits that as to boroughs which had not been counties in themselves before the Act of 1888, you could make equitable adjustments of the distribution of the local taxation, licences and probate duty grant, and, of course, could re-adjust if the circumstances became changed. But his argument, as I understand it, is though you could do that with the county boroughs which had not had separate existence up to the time of 1888, you cannot do it as to the old county boroughs, the old boroughs that were counties before the Act of 1888, because they were quite independent of the counties before, and received separate grants. I could understand that Parliament might have said: There is this difference, and we will only deal in this provision about adjustments with the new county boroughs, but, in my view, Parliament has used words which clearly apply both to the new county boroughs and to the old boroughs which were counties in themselves before the Act of 1888. The equitable adjustment is to be made between each county, and each county borough specified in the said schedule as being deemed, for the purposes of this Act, to be situate in the county. Those words exactly cover York and Kingston-upon-Hull; they were not in the county before, but are deemed, under this Act, to be situate in the East Riding by the express provision of the schedule, and, in my view, Parliament has expressly provided, in the case of these county boroughs, the old boroughs that were counties, that the distribution of the proceeds of the local taxation licences and the probate duty grant may be equitably adjusted between the borough and the county, and that that equitable adjustment may be revised on terms stated in the Act if the Local Government Board, now the Ministry of Health, is satisfied that the division is inequitable, and, if I follow the argument, there never ought to have been an original award between Kingston-upon-Hull and the East Riding, because the

argument that he has used to us would have applied equally when the first awards were made between the year 1890 and the year 1900. That, however, was not the case. I agree that that ought not to make any difference to the construction of the Act. One is accustomed to find local authorities putting forward a construction of an Act most favourable to their financial relations at the time. I do not see any objection to their changing their view if they find it suits their pockets, but I should have expected, if this was the true construction of the Act, it would have been put forward at the time when, in the case of not only this borough, but also of some fifty other boroughs in counties, the financial relations had to be adjusted between 1890 and 1900.

What I understand the Ministry of Health has done is to say: Arguments are put before us to show that the burden of work done, which would have determined the grant in aid before 1888, a matter which would have affected the amount granted in the year before the Act, which was the original standard for determining the distribution of the probate duty, has very materially altered since the old adjustment was made, and that being so we are satisfied that an adjustment which was made, on the original basis, which has now materially changed, has become inequitable, and we appoint an arbitrator to say what is equitable. As I said, it is not necessary for this court to say that it would have come to the same conclusion; it is enough that there is a matter which is a legitimate matter, as it is, in my view for the Minister of Health to consider, and, if so, they have full discretion to appoint an arbitrator. For these reasons I agree that the appeal should fail.

ATKIN, L.J.—This case arises out of a dispute between the administrative county of the East Riding, the administrative county of the borough of the city of Kingston-upon-Hull, and the administrative county of the city of York as to the shares they shall respectively receive from the contributions made by the Exchequer in aid of the expenses of local government. Those contributions took two forms. First of all, there is what is called the local taxation licences. The proceeds of the local taxation licences are, by s. 20 of the Act of 1888, to be distributed among the counties in proportion to the amount collected in each county, and in s. 21 I think it is plain that what is meant by "county" is a county other than that which was going to be situate within a county, namely, a county borough; it meant an existing administrative county. The other contribution is what may be called for short the probate duty, which consists now of a different duty, and has had added to it a certain share of an excise duty, and it is convenient to call it the probate duty, and the share of the probate duty is, by s. 22 of the Act, divided among the then existing administrative counties in proportion, not to the amounts collected in each area, but to the amount that each administrative county received of the old grants in aid from the Exchequer. No doubt that bore some relation to the proper expenses of administration in each county, but the proportion was a fixed proportion, and is based upon the amount that each administrative county received in the financial year ending in March, 1888. That being settled, the amount has been fixed from that date to this.

It is said by the county council, as I understand the argument, that these sections determined, and determined finally, the amount which the county boroughs created by the Act were entitled to receive, because in Part 2 of the Act, which created county boroughs, by s. 34 (1) the mayor, alderman and burgesses of each new county borough are to be entitled, subject to the provisions of the Act as to adjustment between counties and county boroughs, to receive the like sum out of the local taxation account as in the case of county councils, and counsel says, therefore, that he is entitled to receive as his share of the local taxation licences the amount that is certified to be collected in his area in, say, Kingston-upon-Hull and York, and as to the probate duty, an amount proportionate to the amount which each of these administrative units, namely, the East Riding of York, and Kingston-upon-Hull, received in respect of grants in aid in the financial year ending March, 1888. The

answer that is made to that is: No, that is not the position in relation to the East Riding of York and these boroughs which, for the purposes of the Act, are deemed to be situate in the East Riding of York; in respect of the relations between those bodies the distribution of the proceeds of local taxation licences and probate duty is the subject-matter of an equitable adjustment; and the whole controversy arises in respect of the meaning of s. 32 (1). According to the county council, there is no room for any equitable adjustment in the particular circumstances of these counties and these county boroughs, because the relation between these bodies before the Act was one of complete independence, Kingston-upon-Hull and York, being counties of themselves. They had no financial relations of any kind with the East Riding, and, so far as the East Riding was concerned, they were in precisely the same position as though they had been situate in another geographical county, or had themselves formed another geographical county altogether. According to this argument, the only case where there arises matter for adjustment is where, before the Act, there have been either joint assets or joint liabilities, and the assets have to be divided, and the liabilities have to be borne separately. In such a case it is said there can be an adjustment, but, if no such relations existed before the passing of the Act, there is nothing to be adjusted, and each county has to receive, in accordance with the Act, that share from the Exchequer which the Act of Parliament says it is to receive.

I think it cannot be disputed but that in the great majority of cases the Act of Parliament, by s. 32, was contemplating the existence of former relations, including the possibility of there being joint assets and joint liabilities, and some such adjustment as has been mentioned. The argument, I think myself, is a formidable argument which has got to be met. It is met in this way. It is said that the section itself specially provides for a county borough situate in a county, and provides that an equitable adjustment respecting all the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations between each county and county borough which are specified in the schedule, shall be made by agreement, or by award. It is said: Here is a county; here is a county borough deemed for the purposes of the Act, to be situate in the East Riding; here are the proceeds of the local taxation licences and probate duty grant; they have to be distributed, and an equitable adjustment, according to the Act, must be made. I am bound to say that the argument is, I think, a forcible argument, and I think the answer is also a very formidable answer. It is pointed out that the burden as between the county borough and the particular county in which it is situate may vary from time to time, and that it would be fair and just that the contributions of the Exchequer should vary according to the respective burdens. The answer that is made by the county council, and, no doubt, made with some force, is that that is an answer which would equally apply to financial relations between independent county and independent county, and, as far as they are concerned, there can be no question but that, however the burdens may vary as between two independent counties, the contributions still remain the same, and inasmuch as there never was any common liability in this particular case, so there is no reason for differentiating in the contribution that they may receive.

I do not propose to give a final answer in respect of that question, because I think it is a difficult question. In the present case it cannot be disputed that that which purported to be an equitable adjustment regarding the distribution of the proceeds of the local taxation licences and probate duty grant was made under the Act of 1888 in the year 1891, in accordance with these provisions of s. 32 (6):

> "Provided that at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable, and that the councils are unable to agree on a new adjustment, the Board shall appoint an arbitrator. . . ."

In the present case you have an award adjusting the financial relations of a county and a borough and five years have elapsed since its date. It seems to me that you have all the conditions here necessary to the appointment of an arbitrator. There has been been an adjustment; five years have elapsed; and the Local Government Board are satisfied that that adjustment has become inequitable. If that is so, it seems to me that it is impossible to say that the Local Government Board has no jurisdiction to appoint an arbitrator. The county council appear to me to be in a dilemma. If the adjustment was made on any valid ground the Local Government Board is entitled to say that they are satisfied that that adjustment was made upon grounds which have now ceased to exist, or have altered and become inequitable. If the adjustment was not made on any valid ground, it appears to me that in the same way the Local Government Board are entitled to say that there has been an adjustment between the parties which was not properly made—that circumstances were taken into consideration which ought not to have been taken into consideration at all—and there ought to be an arbitration to determine what the true rights of the parties are. So far as I am concerned, I see no reason why the arbitrator is bound to accept the former basis, or the principle upon which the former award was made. I am far from saying that he need depart from it; he probably will have to consider the contention raised by the county council that there is no room here for an adjustment at all, but that the parties must be left to their strict legal rights. But I am satisfied that there is no ground for saying that the Local Government Board has exceeded its jurisdiction. All the facts exist in this case which give them jurisdiction under sub-s. (6) of s. 32, and, therefore, it appears to me that this application must fail, and I think that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Bockett, Stunt & Bockett*, for *J. R. Procter*, Beverley; *Sharpe, Pritchard & Co.; Sharpe, Pritchard & Co.*, for *H. A. Learoyd*, Hull; *Sharpe, Pritchard & Co.*, for *P. J. Spalding*, York.

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

A

Re BECKER SHILLAN & CO. AND BARRY BROS.

[KING'S BENCH DIVISION (Rowlatt and McCardie, JJ.), November 11, 1920]

[Reported [1921] 1 K.B. 301; 90 L.J.K.B. 316; 124 L.T. 604; 37 T.L.R. 101]

Arbitration—Costs—No award made as to the general costs of parties to reference —No presumption that umpire intended to make no order as to costs— Remission of award to umpire for re-consideration—Arbitration Act, 1889 (52 & 53 *Vict., c.* 49), *s.* 2 *and Sched. I.*

B

Where an umpire in making his award deals with the costs of the award including the expenses of the hire of the room for the arbitration and the shorthand notes, but makes no order as to the general costs of the parties to to the reference, the court will not presume that he has exercised his discretion to make no order as to costs or that he has left them to be borne by the parties who incurred them, but will conclude that the question of costs has not been dealt with at all, and, therefore, will remit the award to him for re-consideration.

C

Notes. The Arbitration Act, 1889, ss. 2, 10 (1), and Sched. I (i) have been replaced by the Arbitration Act, 1950, ss. 6, 8 (1) and (2), 12 (1) and (2), 14, 15, 16, 18 (1), s. 22 (1) and s. 18 (1) and (2) respectively.

D

Considered: *Bradshaw* v. *Air Council*, [1926] Ch. 329. Referred to: *Larrinaga* v. *Société Franco-Americaine des Phosphates de Medulla* (1922), 92 L.J.K.B. 45.

As to discretion of an arbitrator or umpire to award costs and as to remission of award to them for re-consideration, see 2 HALSBURY'S LAWS (3rd Edn.) 47, 48, and 56 et seq., and for cases see 2 DIGEST (Repl.) 738 et seq., 695 et seq. For the Arbitration Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 89.

E

Cases referred to:

(1) *Williams* v. *Wilson* (1853), 9 Exch. 90; 23 L.J.Ex. 17; 21 L.T.O.S. 229; 1 C.L.R. 921; 156 E.R. 38; 2 Digest (Repl.) 740, *2501.*

(2) *Re Baxters and Midland Rail. Co.* (1906), 95 L.T. 20; 70 J.P. 445; 22 T.L.R. 616, C.A.; 2 Digest (Repl.) 654, *1740.*

F

(3) *Richardson* v. *Worsley* (1850), 5 Exch. 613; 19 L.J.Ex. 317; 15 L.T.O.S. 282; 155 E.R. 268; 2 Digest (Repl.) 738, *2486.*

(4) *Greenwood & Co.* v. *Brownhill & Co.* (1881), 44 L.T. 47, C.A.; 2 Digest (Repl.) 654, *1739.*

(5) *Allen* v. *Greenslade* (1875), 33 L.T. 567; 2 Digest (Repl.) 654, *1738.*

G

(6) *Warburg & Co.* v. *McKerrow & Co.* (1904), 90 L.T. 644; 2 Digest (Repl.) 739, *2494.*

Motion to remit award.

In July, 1918, Messrs. Becker Shillan & Co. (hereinafter called the sellers) entered into a contract to sell to Messrs. Barry Bros., Ltd. (hereinafter called the buyers) 1,500 cases of Australian honey at the price of 180s. per cwt., payment to be made net cash against documents on presentation. Differences arose between the parties, and it was agreed that the dispute should be referred to arbitration. Arbitrators were appointed by the parties, and on their failing to agree an umpire was duly appointed. The hearing before the umpire lasted five days. He found all the matters in dispute in favour of the buyers, Messrs. Barry Bros., and awarded them the costs of the award, including his own fees, the expenses of the shorthand notes, and the hire of the arbitration room, but did not deal with the party and party costs of the reference. The buyers moved that the award be remitted to the umpire on the ground that he had not dealt with the costs of the reference. By the Arbitration Act, 1889:

H

I

"Section 2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisons set forth in the first schedule to this Act, so far as they are applicable to the reference under the submission.

Section 10 (1). In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the consideration of the arbitrators or umpire.

Schedule 1 (i). The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid. . . ."

W. A. Jowitt for the buyers.

J. N. Buchanan for the sellers.

ROWLATT, J.—This is a motion to remit an award to an umpire on the ground that he has not dealt with all the matters referred to him. He has awarded in favour of the buyers, and has made an award with regard to the costs of the award, including the expenses of the hire of the room for the arbitration and the shorthand notes. It is said that he has not made any award with reference generally to the costs of the parties to the reference. The case was an important one. It was attended by counsel on either side, and it involved the examination of a number of documents. It was not a trade arbitration depending upon the inspection of goods. It was a litigation extending over five days, and the costs of the parties to the reference must have been very considerable. That being so, I do not think that, upon the terms of the award, one can read it as having dealt with the costs by leaving them where they fell. I think the award must be read as not having dealt with these costs at all. In these circumstances it seems to me that we are bound by authority to say that the umpire has not adjudicated on all the matters referred to him. He was governed by the terms comprised in Sched. 1 to the Arbitration Act, 1889, which incorporated those terms in the agreement of reference. One of the terms was that the costs of the reference and award should be in the discretion of the arbitrator. That does not mean that it is in his discretion whether he will deal with them or not, but that he must deal with them by exercising his discretion upon them, if he likes, by saying that he leaves them to be borne by the parties who incurred them, and making no order that either party should pay the other. But he must exercise his discretion. I think that we are bound to hold that upon express authority, because the clause in the first schedule of the Arbitration Act, 1889, exactly reproduces the clause in the agreement of reference which formed the subject of several decisions in the Court of Exchequer in 1850 and thereabouts, culminating in *Williams* v. *Wilson* (1), where the Court of Exchequer took time for consideration and gave a very careful judgment by the mouth of PARKE, B., in the anticipation that the point might be taken to a court of error, and where the decision was given, notwithstanding that the court felt that a hardship was involved. PARKE, B., in construing this clause in the reference, said (9 Exch. at p. 99):

"We think it clear that it was intended that he [—that is, the arbitrator—] should exercise his discretion on the question of the costs, not whether he would award upon that question or not at his option or discretion."

That is really what I have already said.

If the matter stopped there, I think we should be plainly bound to send this case back to the umpire and to treat him as not having exercised his discretion and decided all the matters in dispute. But counsel for the sellers cited a case which he says displaces that view—*Re Baxters and Midland Rail. Co.* (2). I do not think that the case affects this point. It was a peculiar case. It was an arbitration under the Light Railways Act, 1896, then a new Act. That enactment, though it provided for compensation cases being tried by arbitration, had introduced the terms of the Arbitration Act, 1889, putting the costs in the discretion of the arbitrator, instead of leaving them to follow the event under the Lands Clauses Consolidation Act, 1845. In these circumstances the parties went before the arbitrator (and the arbitrator conceived the position to be the same) upon

the footing that the costs followed the event. Therefore, he did not deal with them, and everyone concerned was party to that mistake. That being so, it was clear that neither party could move the Divisonal Court and say that the arbitrator had not exercised his discretion, when they themselves were parties to the mistake. What they did was to go to the court and say in effect: "Everybody has made a mistake, and the award ought to go back to the arbitrator to put it right." The Divisional Court declined to do this, because they said they could not take the statement from one of the parties; but in the Court of Appeal the arbitrator himself came before the court, and said in effect: "We all made a mistake; neither party mentioned the costs, and I thought it was under the Lands Clauses Act, 1845." Then the court said: "The arbitrator comes and says there was a mistake, and it is clear that the matter must go back to be dealt with by him in the only way which the statute authorises. He must deal with the costs." I do not think that that case touches this point at all. I think that this case must go back to the umpire.

McCARDIE, J.—I agree. The buyers and the sellers agreed to submit to the umpire all matters in dispute between them with reference to a contract for Australian honey. No express reference to costs was made in the submission. The arbitration proceeded and occupied five days. Heavy correspondence was put in, counsel were employed, and the costs were heavy. The umpire has delivered his award and by it he has dealt with certain costs which I may call his personal costs, together with the costs of the arbitrators, the cost of the shorthand writer, who no doubt had given him a copy of the notes, the hire of the arbitration room, and the expenses of the award; in other words, he dealt with the minor or personal costs of the reference, but with the serious matter of the costs of the parties he did not deal at all. The sellers were successful; the buyers recovered nothing against them. The sellers now seek to remit the award to the umpire in order that he may consider whether they ought not to receive the costs. The ground upon which the award must be remitted to the arbitrators is that an award, in order to be valid, must deal with all the matters referred. The point here taken by counsel for the buyers is that the umpire has failed to carry out that requirement. The submision did not expressly refer to the question of costs; but it was, of course, a submission under s. 2 of the Arbitration Act, 1889, which provides that a submission shall, unless the contrary is stated, include the provisions of the first schedule, and the schedule says that the costs of the reference and award shall be in the discretion of the arbitrator or umpire, and the result is that the terms of that schedule must be read into the submission between the parties here. Now, if that is done, it is at once obvious that the well-known decisions in former days apply, because in *Richardson* v. *Worsley* (3) the parties, in their submission, stipulated that the costs of the agreement of reference and award should be in the discretion of the arbitrator. The arbitrator, in his award, failed to deal with the costs. Upon that ground it was held by a strong court that the award was bad. A similar view was taken by an equally powerful court presided over by PARKE, B., in *Williams* v. *Wilson* (1) where, upon words substantially similar to those in the former case, PARKE, B., said (9 Exch. at p. 99): "We think it clear that it was intended that he should exercise his discretion upon the question of costs"; and inasmuch as the arbitrator's discretion was not exercised at all, it was held that the award was invalid. It seems to me that the principle of those cases must apply here, unless counsel can satisfy us that the umpire has dealt with the costs.

In my view, it would be most unsatisfactory to infer from his silence that he has dealt with them. Upon the face of the matter it is clear that the successful sellers should primâ facie get their costs. They had had vast expense, and had defeated a claim for over £8,000. Can it be supposed that the umpire is to deprive them of costs by mere silence? I cannot think so. In my view it is reasonably clear that the umpire has not dealt at all with the question of the successful seller's costs.

A It was suggested that we were precluded from remitting this award because of the decision in *Re Baxters and Midland Rail. Co.* (2). In my view, that case is obscure, but at all events, it only decides that, upon an affidavit by the arbitrator himself that he had made a mistake, the Court of Appeal thought that they should remit the award for his consideration upon the question of costs. The mistake in that case had been general, all parties believing that the proceedings were governed B by the Lands Clauses Act, 1845, and not by the Arbitration Act, 1889. But, in my view, that decision in no way negatives the power of the court to remit on other grounds, and it is to be observed that the points which have been taken here, based upon s. 2 of the Act and *Richardson* v. *Worsley* (3) and *Williams* v. *Wilson* (1) were not presented to the court in that case. In my view *Baxter's Case* (2) is one which is special in its circumstances. I should like to say that the C older authorities referred to by counsel are well treated by Moulton, L.J., in that case. He said, in referring to *Greenwood & Co.* v. *Brownhill* (4) and *Allen* v. *Greenslade* (5), that those cases only showed the principles which had guided the court in the exercise of its jurisdiction from time to time, and though they might afford valuable guidance, they did not restrict the duty of the court to look at the facts in each particular case. Then he added: "In the present case I think that D in the interests of justice we ought to send the matter back to the arbitrator. I think that in this case, in the interests of justice, this matter should be referred back to the umpire to decide this question of costs as a matter of judicial discretion. In my view it is reasonably clear that we are justified in remitting it under s. 10 (1), of the Act of 1889, and in so doing we incidentally approve of the view taken by Moulton, L.J., in *Warburg & Co.* v. *McKerrow & Co.* (6). The award must be remitted to the umpire.

Award remitted.

Solicitors: *Coward & Hawksley, Sons & Chance; Thomas Cooper & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

WISE *v.* LANSDELL

[CHANCERY DIVISION (Astbury, J.), November 11, 12, 1920]

[Reported [1921] 1 Ch. 420; 90 L.J.Ch. 178; 124 L.T. 502; 37 T.L.R. 167; [1920] B. & C.R. 145]

Bankruptcy—Trustee in bankruptcy—Disclaimer of onerous property—Shares—Power to disclaim—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s. 54—Companies (Consolidation) Act*, 1908 (*8 Edw. 7, c. 69*), *s.* 24 (2).

A trustee in bankruptcy may disclaim unsaleable encumbered shares, or such shares which are not readily saleable, held by a bankrupt, especially if there be difficulty and probable expense in ascertaining whether the equity of redemption is of any value.

Re Levy; Ex parte Walton (1) (1881), 17 Ch.D. 746, applied.

Company—Shareholder—Bankruptcy—Right to vote—Companies (Consolidation) Act, 1908 (*8 Edw. 7, c. 69*), *s.* 24 (2).

A bankrupt is entitled to vote in respect of shares which he holds in a company at the company's meetings, if his trustee in bankruptcy has disclaimed the shares, so long as his name remains on the register of shareholders, but he must exercise his vote in accordance with the directions of the persons entitled to the beneficial interest in the shares.

A shareholder mortgaged his shares in a limited company. Later he was adjudicated bankrupt, and his trustee in bankruptcy disclaimed all his interest in the shares. The mortgagees did not apply for a vesting order, and the shareholder's name remained on the register as a member of the company. At an extraordinary general meeting of the company the shareholder voted against a resolution, but his vote was refused on the ground that his shares had vested in his trustee, and that, therefore, he was no longer a member of the company.

Held: the shareholder was entitled to vote at the meeting, and the resolutions purporting to have been passed thereat were therefore invalid.

Notes. The Companies (Consolidation) Act, 1908, has been repealed, but the provision formerly contained in s. 24 (2) thereof is now made by s. 26 (2) of the Companies Act, 1948.

As to effect of act of bankruptcy on bankrupt shareholders' right to vote see 2 HALSBURY'S LAWS (3rd Edn.) 449 and ibid., vol. 6, p. 339–340; as to disclaimer of shares by a trustee in bankruptcy see 2 HALSBURY'S LAWS (3rd Edn.) 457–460, and for cases see 5 DIGEST (Repl.) 1008, and 9 DIGEST (Repl.) 427, 428; as to cessation of membership of a company see 6 HALSBURY'S LAWS (3rd Edn.) 233, and for cases see 9 DIGEST (Repl.) 197, 203, 204. For the Bankruptcy Act, 1914, and the Companies Act, 1948, see 2 and 3 HALSBURY'S STATUTES (2nd Edn.) 321 and 452 respectively.

Case referred to:

(1) *Re Levy, Ex parte Walton* (1881), 17 Ch.D. 746; 50 L.J.Ch. 657; 45 L.T. 1; 30 W.R. 395, C.A.; 5 Digest (Repl.) 1010, *8151*.

Also referred to in argument:

Re Cannock and Rugeley Colliery Co., Ex parte Harrison (1885), 28 Ch.D. 363; 54 L.J.Ch. 554; 53 L.T. 189, C.A.; 5 Digest (Repl.) 1035, *8368*.

Evans v. *Wood* (1867), L.R. 5 Eq. 9; 37 L.J.Ch. 159; 17 L.T. 190; 15 W.R. 476; 16 W.R. 67; 9 Digest (Repl.) 411, *2653*.

Action by Arthur Wise and his wife against William Lansdell and his wife, for a declaration that a resolution passed at a meeting of Wise and Lansdell, Ltd., was invalidated by a refusal to allow the male plaintiff to vote.

The facts are stated in the judgment.

Luxmoore, *K.C.*, and *G. G. Solomon* for the plaintiffs.
Micklem, *K.C.*, and *Cecil W. Turner* for the defendants.

ASTBURY, J.—This is an action which raises a number of troublesome and difficult points which arise largely by reason of the bankruptcy of the plaintiff, Arthur Wise. The defendant company, Wise and Lansdell, Ltd., was incorporated in 1910, the capital of the company being £2,000, divided into 1,996 ordinary shares of £1 each, and sixteen founders' shares of 5s. each. At the relevant dates the plaintiff Arthur Wise held 473 ordinary shares, the defendant Lansdell 324 ordinary shares, his wife and two other persons holding thirty ordinary shares. Of the founders' shares Mrs. Wise held nine, and Mrs. Lansdell seven. In 1915 the plaintiff Arthur Wise charged his ordinary shares and his wife's founders' shares, which had been made the subject of a blank transfer to himself, in favour of one Williamson, and a blank transfer was executed by the male plaintiff of his shares and his wife's shares in favour of the mortgagee. A second charge was subsequently executed by the male plaintiff, and a third charge at a later date. No evidence has been called in this action from which I am able to ascertain what the total liability in respect of these various charges amounts to, the third, as I understand it, being for an indeterminate sum in respect of an indemnity. In August, 1917, a bankruptcy petition was presented against the male plaintiff, and he was adjudicated bankrupt in the following October, and a trustee was appointed in the bankruptcy. The male plaintiff thereupon ceased to hold the office of director in this company, which he had previously held since its incorporation. In November, 1917, the male defendant appointed his wife a director of the company.

Under the articles of association of this company, which consist partly of special articles and partly of Table A., it is provided in art. 14 that:

> "No member shall be entitled to transfer any share otherwise than in accordance with the provisions immediately following."

Clauses (a) and (b) provide that a member desirous of selling his shares shall give notice to the company, fixing the price which he is willing to accept for his shares, and then certain machinery is provided, and if within twenty-one days he shall not receive notice that his offer to sell is accepted, he may within six months sell the shares to any other person, provided that such sale be at a price not less than the price named in the notice of sale. The object of that, of course, is to keep these shares in the hands of the members, the company being a private one. Clause (d) provides:

> "If any person shall become entitled to any share by reason of the bankruptcy of any member, he shall be bound forthwith to offer the same for sale to the members of the company at a fair price, such fair price to be determined by agreement between such person and the directors, or, in default of agreement, by a single independent arbitrator, who shall be appointed by the directors but shall be paid by such person. The fee payable to such arbitrator shall not exceed five guineas, and, as soon as the said fair price shall have been determined, the said person shall give to the secretary a notice of sale containing, as the price he is willing to accept, the said fair price, and the same results shall follow as in the case of a notice of sale voluntarily given. If the said person shall fail to give such notice of sale the directors may, as his agents, give the same."

Then the machinery referred to in cl. (a) is to come into operation. Under art. 15 the directors may, except in certain specified instances, in their absolute and uncontrolled discretion and without assigning any reason, decline to register any proposed transfer of shares. By art. 22 of Table A:

> "Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be

registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy."

By art. 23 of Table A :

"A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company."

On May 2, 1919, the company, purporting to act under the special art. 14 (d), called upon the trustee in bankruptcy of the male plaintiff to offer his shares for sale to the members of the company, failing which he was informed that the directors might make such offer, it being provided in the subsection that if such person shall fail to give such notice of sale the directors may, as his agents, give the same. Certain correspondence then passed, part of which has been read, and ultimately the trustee in bankruptcy, by a notice dated June 27, 1919, disclaimed all his interest in the 473 ordinary shares in question, "of which shares the above-named Arthur Wise is to the best of my information and belief the registered holder," as is stated in the notice of disclaimer. On July 15, 1919, the defendants gave notice to the mortgagees of these shares that they intended to apply to the county court for a vesting order. It is difficult to see what possible right they had to do anything of the kind, but they did so apply, and on Oct. 14 of the same year their application was dismissed with costs. On Feb. 19, 1920, notice of the annual general meeting was given on behalf of this company in the ordinary way by its secretary, and the male plaintiff, who still remained on the register as shareholder in respect of these ordinary shares, was duly served with notice of that meeting. The agenda was : To receive the directors' report, to elect a director, Mrs. Ellen Lansdell retiring but being eligible for re-election, and other business. The directors' report shows that this company with its small capital had made during the past year a profit of £2,784, which it was proposed to allocate by declaring a 10 per cent. dividend on the ordinary shares, and a dividend of £50 per share on the founders' shares. Mrs. Wise, therefore, became entitled to nine-sixteenths of £800 in respect of the dividend on the founders' share, and it was proposed to carry over £1,902. A notice was also given, contemporaneous with the last, that on the same date and subsequently to the ordinary meeting, an extraordinary general meeting would be held for the purpose of winding-up the company voluntarily. These meetings took place on Feb. 28 last. The plaintiffs Mr. and Mrs. Wise, who respectively had received notices of the meetings, attended. The voluntary winding-up resolution was proposed, and the plaintiffs voted against it. The chairman, the male defendant, declined to accept the male plaintiff's vote, and the resolution was declared carried. The same thing took place with regard to the re-election of Mrs. Lansdell as a director. On Mar. 4 the writ in this action was issued for the purpose of questioning the validity of these resolutions. Subsequently an interlocutory motion came before P. O. Lawrence, J., who held on the balance of convenience that no order should be made, he having previously offered to allow the motion to stand over with a view to seeing whether the mortgagees of these shares of the male plaintiff could be brought before the court or obtain a vesting order under the Bankruptcy Act, 1914. In the statement of claim, in addition to leading up to and asking for the relief that I have referred to, the plaintiffs have set up a case founded upon some resolution said to have been passed by them on Feb. 15, 1919, appointing the male plaintiff general manager

of the company at £4 per week. I have heard nothing further about this except that it has not been pressed, and it is clearly a matter in respect of which no relief can be given, and no relief ought to have been asked.

The action simply depends on the question, which is the only one I have to determine, whether these resolutions passed on Feb. 28, 1920, under the circumstances that I have mentioned, are valid or not. By s. 24 (2) of the Companies (Consolidation) Act, 1908:

> "Every other person [—that is, other than a subscriber to the memorandum—] who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."

The male plaintiff agreed to become a member, and his name has throughout remained upon the company's register. By s. 38 of the Bankruptcy Act, 1914, it is provided:

> "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, . . . shall comprise the following particulars: (a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice. . . ."

At the date of this bankruptcy the male plaintiff was entitled to encumbered ordinary shares in this company. He had executed a blank transfer which the mortgagees, to whom it was handed, could at any time have filled up and have prevented the trustee in bankruptcy from obtaining registration as a member of this company. The male plaintiff himself, prior to his bankruptcy, had the right to vote beneficially in respect of his shares. The right to place himself in a position to exercise that voting power, subject to the rights of the mortgagees, passed to the trustee, although he clearly could not exercise the same, or attempt to do so, unless and until he had the name of the bankrupt removed from the register and his own name inserted in its place. By s. 48 (3) of the Bankruptcy Act, 1914, it is provided:

> "Where any part of the property of the bankrupt consists of stocks, shares in ships, shares, or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt."

It is plain, therefore, that, subject to the restrictions contained in these articles, and subject to the mortgagees' rights, the trustee in bankruptcy obtained the further right to transfer the bankrupt's shares.

The disclaiming section of the Bankruptcy Act, 1914, is s. 54, which, together with its predecessors, has been the subject of a great quantity of litigation. Subsection (1) provides:

> "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stocks in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, or such extended period as may be allowed by the court, disclaim the property."

The corresponding section (s. 23) of the Bankruptcy Act, 1869 (32 & 33 Vict., c. 71), referred to unmarketable shares, the present section, following s. 55 of the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), substitutes the words "shares or stock in companies." By sub-s. (2):

> "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights of liabilities of any other person."

I have heard a considerable argument as to whether fully paid stocks, or shares in respect of which there is no liability or onerous characteristic, fall within this section. I do not propose to embark on any general question of that kind, but in my view, especially having regard to the method of construction referred to by JESSELL, M.R., in *Re Levy, Ex parte Walton* (1) (17 Ch.D. at pp. 750, 753), a trustee in bankruptcy is at least able to disclaim unsaleable or non-readily saleable encumbered shares held by the bankrupt, especially if there be difficulties in ascertaining, and probable expense in doing so, whether the equity of redemption, if I may so describe it, of the shares is of any value.

The question that I have to determine turns very largely upon the meaning of sub-s. (2) of s. 54. Primâ facie, a trustee can only disclaim property for the purpose of getting rid of onerous burdens and liabilities, and no disclaimer, except so far as is necessary for the purpose of releasing the bankrupt, his property, and the trustee, from liability, is to affect the rights and liabilities of third persons. Now, in the present case there were mortgagees of these shares, whose rights the trustee appears to have thought exhausted their value; hence his disclaimer. The mortgagee who held the blank transfer was entitled, as against the trustee in bankruptcy, at any time after the bankruptcy, to fill in the transfer and prevent the trustee from coming upon the register in respect of the shares. The bankrupt's interest, as far as it was a beneficial interest, in these shares has ceased to exist, but he still, as between the real owners of the shares and the other shareholders in the company, had left in him a voting power by reason of being on the register, which was exercisable at the dictation of those entitled to the beneficial interest in the shares which the bankruptcy of the mortgagor in no way affected. I have no evidence as to what instructions, if any, were given to the male plaintiff prior to the meeting in February last, when the votes which he tendered were refused. It appears to me, although I think the question is a difficult one, that machinery was open to the mortgagees under which they could have obtained the right to vote directly in respect of these shares, although whether they would, in the circumstances, have been wise in coming upon the register may possibly be doubtful. It may very well be that prior to, or instead of, putting that machinery into operation they made use, or were entitled to make use, of the voting power of the male plaintiff as a registered member for the purpose of maintaining their rights. The defendants have not satisfied me that the vote given by the male plaintiff in February last was, as far as any rights in them are concerned, having regard to these circumstances, a vote which they were entitled to disregard, and, in my judgment, Mrs. Wise, as a plaintiff shareholder, is entitled to take that point and to rely on it in her own interest. The male plaintiffs' right to take the point and rely upon it depends, I think, upon whether he acted as agent for the mortgagees, in respect of which I have no evidence, and, therefore, I express no opinion.

It has been contended on behalf of the plaintiffs—and throughout in referring to them I rely more especially on Mrs. Wise, who is entitled to be and sue as a plaintiff—that art. 14 (d) is invalid as against the trustee in bankruptcy by reason of its preventing the trustee from realising the bankrupt's property as beneficially

A as he could have realised it himself had it not been for the bankruptcy. I do not think it is necessary to determine that point. It was further said that the reason the mortgagees did not take advantage of the offer of P. O. LAWRENCE, J., to obtain registration in their own names was because they feared that if they did so they would have been bound to offer the shares for sale to the members of the company at a fair price under the provisions of cl. (d). I am not concerned to discuss the B point, but I am bound to say that if they had any such fear, it was, in my opinion, groundless. They were, however, advised that so long as the name of the male plaintiff remained on the register as a member, and he was willing to act at their dictation, it was not necessary to accept the offer made to them by the learned judge. I am not prepared to dissent from the wisdom or propriety of the view they so took. Finally, it was contended by the defendants that the effect of the C disclaimer was to disclaim the shares as such. I do not quite follow how a trustee in bankruptcy can disclaim an encumbered share in such a way as to destroy the share. All that he is entitled to disclaim is the interest of the bankrupt in the property in question, which in this case was subject to the rights of the mortgagees, not only under the charge, but also under the transfer in blank. I think the trustee in bankruptcy was right, and that he acted wisely in confining, as he did, and that D he acted wisely in confining, as he did, his disclaimer to the interest in these shares which had passed to him by reason of the bankruptcy. The trustee had at that time no right to vote, as he was not upon the register. The only effect of his disclaimer was to destroy the beneficial interest which, at the time of the disclaimer, the bankrupt had held, and the trustee at the time of the disclaimer did hold, in these E encumbered shares. If anybody is to blame for the trouble and difficulty that this case has caused, I think at least the defendants cannot escape, as no steps have been taken by them to remove the male plaintiff's name from the register of members, and the voting power exercisable or obtainable in respect of the shares on behalf of those beneficially interested in them has not been destroyed by anything that has taken place in the bankruptcy. The result, therefore, is that I make a declaration that the resolutions purporting to be passed at the meeting of Feb. 28, F 1918, were invalid.

Solicitors: *Savage, Cooper & Wright; James, Mellor & Coleman*, for *Percy W. Snelling*, Winchester.

[*Reported by* J. B. B. MACMAHON, ESQ., *Barrister-at-Law.*]

GOULD *v.* SOUTH EASTERN AND CHATHAM RAIL CO.

[KING'S BENCH DIVISION (Atkin and Younger, L.JJ., sitting as additional judges of the Division), March 17, 1920]

[Reported [1920] 2 K.B. 186; 89 L.J.K.B. 700; 123 L.T. 256]

Carriage of Goods—Railway—Damage to goods—Improper packing—Knowledge of railway company—Liability.

The owner of a glass showcase wrote to a railway company asking them to collect the showcase and other goods and carry them from Ramsgate to London. The railway carman who collected the showcase did not have a form of consignment note with him, so at his suggestion the owner wrote out a list of the goods, with his name and the address to which he wished to send them, together with the words "carriage forward" and handed it to the carman. The carman pointed out that the showcase was not properly packed, and that, it being of glass, it would probably be charged at a higher rate than the other goods. The owner then asked the carman to do the best he could for him, which the carman understood to be a request to complete and sign an appropriate consignment note. The carman subsequently completed, and signed with the owner's name, a "consignment note for damageable goods when not properly protected by packing at owner's risk." Subsequently the owner paid for carriage at owner's risk rate without objection. The showcase was damaged in transit due to its not being properly packed. On a claim by the owner against the railway company for damages, the company contended that the consignment note was binding on the owner as a special contract within s. 7 of the Railway and Canal Traffic Act, 1854, and that the goods were, therefore, carried at owner's risk, while the owner contended that there was no such contract and that the company carried the goods as common carriers.

Held: the company were not liable because (i) the goods were carried under a special contract at owner's risk as on the facts the owner had authorised the carman to consign the goods for him at owner's risk, and to fill up and sign the consignment note for him accordingly: *Ireland* v. *Livingston* (1) (1871), L.R. 5 H.L. 359, applied; (ii) a common carrier is not liable for damage caused by improper packing before consignment, even though he knows that the goods are not properly packed when he accepts them: *Barber* v. *South Eastern Railway* (2) (1876), 34 L.T. 67, applied; *Stuart* v. *Crawley* (3) (1818), 2 Stark. 323, explained and distinguished.

Per YOUNGER, L.J.: In any event by paying for the goods at owner's risk rate without objection the owner ratified the carman's completion of the owner's risk consignment note for him. As the owner told the carman to take the goods after the carman had pointed out the improper packing, the carrier was in the same position as if he had had no notice of the improper packing.

Notes. All that is now necessary to incorporate the statutory owner's risk conditions in a contract of carriage of goods by rail is a request by the owner in writing for the owner's risk rate (British Transport Commission (Railway Merchandise) Charges Scheme, 1957, para. 12 (a)); or, if the goods consigned include merchandise which the undertakers have given public notice that they will carry only at owner's risk, such public notice (ibid., para. 12 (b)).

Distinguished: *Silver* v. *Ocean Steamship Co., Ltd.*, [1929] All E.R. Rep. 611.

As to a common carrier's liability when goods are improperly packed, see 4 HALSBURY'S LAWS (3rd Edn.) 144, as to a railway's liability in such circumstances see ibid., vol. 31 p. 754, and for cases see 8 DIGEST (Repl.) 23, *130–134*. As to signature of special contracts of carriage of goods by rail see 31 HALSBURY'S LAWS (3rd Edn.) 747, and for cases see 8 DIGEST (Repl.) 60-62, *394–404*. For the Railway and Canal Traffic Act, 1854, see 19 HALSBURY'S STATUTES (2nd Edn.) 695.

Cases referred to:

(1) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp. M.L.C. 389, H.L.; 1 Digest 428, *1206.*

(2) *Barbour* v. *South Eastern Railway* (1876), 34 L.T. 67, D.C.; 8 Digest (Repl.) 23, *133.*

(3) *Stuart* v. *Crawley* (1818), 2 Stark. 323; 2 Digest (Repl.) 364, *450.*

(4) *Blower* v. *Great Western Rail Co.* (1872, L.R. 7 C.P. 655; 41 L.J.C.P. 268; 26 L.T. 883; 36 J.P. 792; sub nom. *Great Western Rail. Co.* v. *Blower,* 20 W.R. 776, C.P.; 2 Digest (Repl.) 364, *455.*

Also referred to in argument:

Aldridge v. *Great Western Rail. Co.* (1864), 15 C.B.N.S. 582; 33 L.J.C.P. 161; 143 E.R. 913; 8 Digest (Repl.) 60, *395.*

Hart v. *Baxendale* (1867), 16 L.T. 390; 8 Digest (Repl.) 154, *969.*

Richardson v. *North Eastern Rail. Co.* (1872), L.R. 7 C.P. 75; 20 W.R. 461; sub nom. *North Eastern Rail. Co.* v. *Richardson and Sisson,* 41 L.J.C.P. 60; 26 L.T. 131; 2 Digest (Repl.) 364, *451.*

Appeal from the Southwark County Court.

In September, 1919 the plaintiff, who was then carrying on business at Ramsgate, desired to remove to London, and wrote to the defendants requesting them to send and collect his goods for carriage on their railway. The defendants sent a carman named Perry with a van, and on his arrival at the plaintiff's premises the plaintiff asked him for a form of consignment note. Perry had not one with him, but said that he could make a consignment note on anything. The plaintiff then made out on a postcard a list of the goods, which consisted of seven packages, including a glass showcase, wrote on it his name with the address to which the goods were to be sent, together with the words "carriage forward," and handed it to Perry. Perry pointed out to him that the show case was improperly packed, and told him that being glass it would probably have to be paid for at higher rate than the other goods. Thereupon the plaintiff asked Perry "to do his best" for him, which Perry understood to mean that the plaintiff wished him to fill up and sign for him the form of consignment note which was applicable. Perry took the goods away in the van, and on arriving at the railway station filled up a printed form of consignment note with the list of goods to be carried and signed it with the plaintiff's name. The form bore the heading "Consignment note for damageable goods when not properly protected by packing at owner's risk," which is the only form that the company have applicable to that class of goods. Subsequently the owner paid for the carriage at owner's risk rate without objection. During the transit to London the showcase was damaged, and for that damage the present action was brought. The defendants contended that the consignment note was binding on the plaintiff as being a special contract signed by the owner within s. 7 of the Railway and Canal Traffic Act, 1854; and, secondly, that even if the goods were carried by them as common carriers and not at owner's risk they were not responsible for the damage which was occasioned by the plaintiff's neglect to pack the goods properly.

By the Railway and Canal Traffic Act, 1854, s. 7:

> " . . . no special contract, between [railway undertakers] and any other parties respecting the receiving, forwarding, or delivery of any . . articles, goods, or things . . . shall be binding upon or affect any such party unless the same be signed by him, or by . . . "

The county court judge held (i) that there was not sufficient evidence of Perry's authority to sign an "owner's risk" note on the plaintiff's behalf and that consequently the goods must be treated as having been carried by the defendants as common carriers. And (ii) that even if the showcase was damaged as the result of improper packing it was a good answer that the defendants knew of the insufficiency at the time they received the goods for carriage; and for that he relied on a ruling

of LORD ELLENBOROUGH in *Stuart* v. *Crawley* (3). He, therefore, gave judgment for the plaintiff. The defendants appealed. A

C. Ince for the railway company.
Bickmore, for the plaintiff.

ATKIN, L.J.—This is an appeal from the judge of the Southwark County Court, who gave judgment for the plaintiff in an action brought against a railway company for damage done to a showcase while in transit on their railway from Ramsgate to London. The first defence of the railway company is that the case was carried at owner's risk on a special contract made in pursuance of s. 7 of the Railway and Canal Traffic Act, 1854. That contract was contained in a consignment note which purported to be signed by the plaintiff. His signature, however, was in fact affixed by the vanman Perry who was in the employment of the defendants, and the question is whether Perry had the authority of the plaintiff to sign on his behalf. That depends on the proper conclusion to be drawn from the facts. [HIS LORDSHIP stated the facts as set out above and continued:] The plaintiff was unable to decide on what terms the goods should be carried; he knew there might be some objection to their being carried at all, or certainly to their being carried at the company's risk, and he left it to Perry to do the best he could for him. It seems to me clear that the authority he gave to Perry was expressed in such ambiguous terms that Perry might reasonably suppose he had authority to sign a consignment note on the terms of "owner's risk," and under those circumstances the plaintiff cannot be heard to say that he had not given Perry the authority which Perry thought he had received. If there is any necessity for an authority for that proposition I may refer to *Ireland* v. *Livingston* (1). The only way in which Perry could "do his best" for the plaintiff in order to get the goods conveyed at all was to consign them on an owner's risk note. The idea that a railway company would be willing to carry imperfectly packed goods at company's risk is inconceivable, and I am driven to the conclusion that Perry in fact received the plaintiff's authority to procure the goods to be carried at owner's risk. B C D E F

That is enough to dispose of the case. But assuming that I am wrong in holding that Perry had authority to make the special contract on the plaintiff's behalf, there remains for consideration the other point discussed—namely, whether the defendants, assuming that they carried the showcase on the terms of the liability of common carriers, are precluded from setting up as a defence that the damage was due to improper packing, on the ground that they carried it with full knowledge of its condition. The learned judge in the county court held, that as the carriers knew of the condition of the packing at the time they received the article, they could not disclaim their liability as insurers. That gives rise to an important and interesting question of law. The rule as to the duty of a common carrier is thus stated in STORY ON BAILMENTS, s. 429*a*: G

> "Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God, or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or H I

acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases."

That passage is cited by WILLES, J., in *Blower* v. *Great Western Rail. Co.* (4) as an accurate statement of the law, and thus is a sufficient authority for me to act on without more. Does it make any difference that the faulty packing which caused the damage was manifest to the carrier at the time that the goods were delivered to him to be carried? By analogy to the exception of inherent vice it would seem that it does not. The inherent vice or natural tendency of certain kinds of goods to depreciate or become damaged may be perfectly apparent to the carrier, and in most cases would be quite manifest when he received the goods, nevertheless he is not responsible for the damage resulting from such cause, and it appears to me that there is no reason for treating the exception of damage caused by defective packing in any different way. But this case is not without authority, because in *Barbour* v. *South Eastern Railway* (2) (34) L.T. at 68) a similar question arose. There the plaintiff wished to send furniture by the defendants' railway. He made inquiries of the defendants for rates, and they when quoting their rates informed the plaintiff that one of the conditions of the carriage was that they were not to be responsible for damage if the goods were not properly packed. The goods, which had been lying at a depository, were eventually carried by the defendants' railway, and owing to insufficient packing were damaged. The facts are thus stated in the judgment of CLEASBY, B.:

"At the depository where this furniture was there were haybands and matting at hand which might have been used for the purpose of protecting it, but the plaintiff deliberately chose not to make it safe. The carman could not use the haybands, because had he done so he would have been acting in violation of the company's regulations. The plaintiff, therefore, voluntarily left them in the condition they were in, and by doing so took upon himself the risk of anything happening to them. The real question is, whose duty was it to pack? No doubt it was the plaintiff's duty to pack. What caused the damage? Why, it was occasioned by the furniture not being properly packed. No person is entitled to claim compensation from others for damage occasioned by his neglect to do something which it was his duty to do." Further on he says: "But here the goods were delivered in a manifestly unsafe condition, and, as I have said before, the plaintiff chose to have them go in the condition they were in, and the damage was the consequence. I think, therefore, he is not entitled, under the circumstances, to recover."

And FIELD, J., says the same thing:

"I also think the county court judge was quite right in the conclusion he arrived at in this case. I base my judgment entirely on the finding in the case, that the damage complained of was caused by improper packing."

That is a case where goods were handed to common carriers, they were manifestly in an unsafe condition, the damage arose from their being in that condition, and it was held that the plaintiff could not recover. The facts in the present case are precisely the same, and the same result must follow.

The only doubt that has been thrown on this proposition arises from *Stuart* v. *Crawley* (3). There the plaintiff's servant took a valuable greyhound with a string round his neck to the warehouse of the defendant, a carrier, to be carried from London to Harefield Lock. The defendant's book-keeper, to whom the dog was delivered, gave a receipt for it. The dog was tied by the string in a watch-box, but shortly after slipped from the noose and was not afterwards heard of. LORD ELLENBOROUGH held that the defendant was responsible. He said:

"The case was not like that of a delivery of goods imperfectly packed, since there the defect was not visible, but in this case the defendant had the means of seeing that the dog was insufficiently secured. . . . After a complete delivery to the

defendant, he became responsible for the security of the dog, the property then remained at the risk of the defendant, and he was bound to lock him up, or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for its security."

It seems to me that that case is sufficiently supported by the consideration that even if goods are delivered to a carrier imperfectly packed, the carrier is nevertheless under an obligation to take reasonable care of them in that state, and the judge there was of opinion that the defendant in only availing himself of the meagre means of confining the dog provided by the plaintiff was not discharging his duty of taking proper care of it, and was, therefore, liable. That case is, I think, no authority for the proposition that, where goods are handed to a common carrier imperfectly packed, the carrier accepts full responsibility if he knows that this is the case. If it is an authority for that it seems to me inconsistent with *Barbour* v. *South Eastern Railway Co.* (2), and I doubt much whether LORD ELLENBOROUGH meant to lay down any such proposition of law. In my view the defendant's knowledge of the improper packing in the present case did not make them responsible, and the plaintiff, even if he is right in his first contention, still cannot recover. The appeal must be allowed, and judgment entered for the defendants.

YOUNGER, L.J.—I am of the same opinion on both points. When one bears in mind the conversation that took place between the plaintiff and Perry as regards the absence of a consignment note, it seems quite plain that the plaintiff authorised Perry to make out a proper consignment note on his behalf with respect to these goods, and I further think that the inference is irresistible that the consignment note so authorised was, as Perry himself inferred, to be a note at owner's risk. I should myself have thought so even if the goods had been consigned to some person other than the plaintiff. But in the present case they were consigned to the plaintiff himself, carriage forward; they were received by him, and he paid for them without objection at owner's risk rate. It seems to me that the plaintiff authorised Perry at the beginning of the transaction to consign the goods for him at owner's risk, and also that at the end of the transaction he ratified Perry's action by accepting the terms on which they had, in fact, been carried.

With regard to the second point, while accepting with deference what my lord has said on the question of law arising on this branch of the case, I will pass it by for the moment to point out that the plaintiff's contention is not supported by the facts. I will assume that the contention of counsel for the plaintiff is right, that a railway company are not absolved from responsibility for the safe carriage of goods imperfectly packed if at the time they received the goods the fact of the improper packing was brought to their notice by the consignor; but that contention is entirely displaced by what took place between Perry and the plaintiff. When the goods were tendered to Perry it was not the plaintiff who pointed out to Perry that they were improperly packed, but Perry who pointed out that fact to the plaintiff; the proper inference from which is that the plaintiff in substance said to Perry: "Whether they are well packed, or badly packed, take them as they are." If that is the effect of what took place between them, the railway company are, to my mind, in exactly the same position as if they had had no notice of the improper packing. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Herbert H. Groves; Edgar & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

WOODWARD *v.* SAMUELS

[King's Bench Division (Bailhache and Sankey, JJ.), February 13, 1920]

[Reported 89 L.J.K.B. 689; 122 L.T. 681; 84 J.P. 105]

Rent Restriction—Apportionment—Need of—Dwelling-house divided into separate flats—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 *Geo.* 5, *c.* 97), *s.* 2 (3).

In 1919 the landlord of a house, which, on Aug. 3, 1914, was let at a rent of £45 per annum, divided it into three flats and let them at various rents amounting in all to about £153 per annum. The tenant of one of the flats applied under s. 2 (3) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, for the apportionment of the rent of the house in order to determine the standard rent of the flat, claiming that the amount he was paying was in excess of the standard rent allowed by that Act.

Held: the tenant was entitled to have the rent of the house apportioned in order to determine the standard rent of the flat since the flat was the "dwelling-house" and the undivided house was the "property" within the meaning of s. 2 (3) of the Act of 1915.

Notes. The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, was repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3) of the Act of 1915 being replaced by s. 12 (3) of the Act of 1920. That subsection has been amended as to England and Wales, but not Scotland, by the Rent Act, 1957, by the repeal of the references therein to standard rent, the section now being limited to apportionment of rateable value.

Considered: *Sinclair* v. *Powell*, [1921] All E.R. Rep. 379; *Sutton* v. *Begley*, [1923] All E.R. Rep. 388. Referred to: *Barrett* v. *Hardy Bros.* (*Alnwick*), *Ltd.*, [1925] All E.R. Rep. 139; *Phillips* v. *Potter* (1925), 94 L.J.K.B. 819.

As to apportionment of rateable value, see 23 Halsbury's Laws (3rd Edn.) 724–726; and for cases see 31 Digest (Repl.) 685–688. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3), see 13 Halsbury's Statutes (2nd Edn.) 1011.

Appeal from Marylebone County Court.

The respondent, Mr. Samuels, had been the tenant of a three-storied house at No. 5, Dean Road, Willesden Green, for some time prior to Aug. 3, 1914, at a rental of £45 per annum, the rates amounting to about £30. In 1919 he bought the house and executed certain alterations for the purpose of letting each of the three floors as separate tenements. He had gas and water laid on to each floor, and sinks and gas-cookers installed on each floor. He then proceeded to let the three floors as separate dwelling-houses, the ground floor at 23s. a week, the first floor at 22s., and the top floor at 13s. 6d., making a total annual rent of about £153. He paid the rates and taxes. In June, 1919, the appellant, Mr. Woodward, became tenant of the first floor, and he claimed that the 22s. he was paying was more than the standard rent allowed by the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. He applied to the county court judge under s. 2 (3) of that Act for the apportionment of the rent of the house for the purpose of determining the standard rent of the flat. Section 2 (1) (a) of the Act defines "standard rent" as

> "the rent at which the dwelling-house was let on Aug. 3, 1914, . . . or, in the case of a dwelling-house which was first let after the said Aug. 3, the rent at which it was first let."

Section 2 (2) provides:

> "This Act shall apply to a house or a part of a house let as a separate dwelling . . . where either the annual amount of the standard rent or the rateable value of the house or part of the house does not exceed"

£70 in the London district. Section 2 (3) provides: A

"Where, for the purpose of determining the standard rent or rateable value of a dwelling-house to which the Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed or the rateable value of the property in which that dwelling-house is comprised, a county court may, on application by either party, make such apportionment as seems just . . ." B

The county court judge held that, as the part of the house occupied by the tenant was let for the first time in June, 1919, the rent of 22s. at which it was then let was the standard rent, and that no case for apportionment had been made out. The tenant appealed. C

A. E. Woodgate for the tenant.
D. H. J. Hartley for the landlord.

SANKEY, J., stated the facts, and continued: Whether the judgment of the learned judge is right or not depends, in my opinion, on the true construction of the section which gives him jurisdiction. It is somewhat obscure and difficult D to construe, and my mind has fluctuated considerably during the hearing of the case. Ought we to hold that the standard rent of this building—as I will call it to avoid using a technical term—is the rent of £45 existing on Aug. 3, 1914, or ought we to hold, as the learned county court judge did, that the standard rent of this particular flat is the rent fixed in June of last year, and that, therefore, this is not a case for apportionment at all. It is quite easy to put cases on one side E or the other, it is quite clear that, if the house remains exactly the same, the standard rent is the rent on Aug. 3, 1914; on the other hand, if the house is pulled down and a new one built, then the standard rent is the rent fixed when the new building is first let. The facts here, however, are different from either of those cases. We must look closely at s. 2 (3), and ask ourselves what is the property in which this dwelling-house is comprised. Undoubtedly the flat is made by F the Act to be a dwelling-house, and, in my view, it is a dwelling-house which is comprised in some other property, namely, the whole undivided dwelling-house as it was before Aug. 3, 1914, and, therefore, reading the facts of the present case into the subsection, it reads as follows:

"Where, for the purpose of determining the standard rent of a dwelling-house [the tenant's flat] it is necessary to apportion the rent [£45] at the date G in relation to which the standard rent is to be fixed [Aug. 3, 1914] of the property in which that dwelling-house is comprised [the undivided house, No. 5, Dean Road] a county court may make such apportionment as seems just."

It seems to me that this is just one of those cases which the section is obviously intended to meet. The property is the undivided house, and the dwelling-house H is the flat, and the county court judge, therefore, had to apportion the rent of the undivided dwelling-house. To hold otherwise would lead to very strange results. We asked counsel for the landlord to give us some case, other than the present one, which would come within the subsection, and he felt himself in the same difficulty that we did in imagining any such case, although he did suggest the case of two adjoining flats being altered by taking one room from one flat and I letting it with the other. Such a case might come within the subsection, but it is much more clear that the present case does come within it. One of the results of holding otherwise would be that a landlord might retain one or two rooms of a house for his own use and let off the remainder as a separate dwelling at a greatly increased rent, although he would be unable, by reason of the Act, to increase the rent of the whole house.

It may be said that it is a hard case for the landlord who would be left without any remuneration for his outlay, but for the provisions contained in s. 1 (1) (ii):

"Where the landlord has since the commencement of the present war incurred, or during the continuance of this Act incurs, expenditure on the improvement or structural alteration of a dwelling-house (not including expenditure on decoration or repairs), an increase of rent at the rate not exceeding six per cent. per annum on the amount so expended shall not be deemed to be an increase for the purposes of this Act."

He is, therefore, not left entirely without remedy. I must say, in conclusion, that it is a matter of considerable difficulty, and one on which it is not easy to state absolutely conclusive reasons one way or the other; but, having regard to the facts of the case, I think the appeal must be allowed.

BAILHACHE, J.—I agree.

Appeal allowed.

Solicitors: *F. W. Perkins; O. L. Richardson.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

CALLAGHAN *v.* BRISTOWE

[KING'S BENCH DIVISION (Lush and Shearman, JJ.), May 18, 19, 1920]

[Reported 89 L.J.K.B. 817; 123 L.T. 622; 84 J.P. 250; 36 T.L.R. 841; 18 L.G.R. 442]

Rent Restriction—"Separate dwelling"—Garage with living rooms above—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 *Geo.* 5, *c.* 97), *s.* 2 (2)—*Increase of Rent and Mortgage Interest (War Restrictions) Act*, 1919 (9 *Geo.* 5, *c.* 7), *s.* 4.

The plaintiff, who was the owner of a garage with living rooms over it, let the premises under a written agreement to the defendant, whose chauffeur occupied the living rooms with his family. The plaintiff agreed to pay all rates except extra water rate charges for non-domestic purposes which the defendant undertook to pay. The defendant agreed not, without the consent in writing of the plaintiff, to use the premises for any other purpose than that of a garage for private occupation, and also to keep the interior of the premises in good and habitable repair and to execute necessary repairs to the living rooms on taking possession, and to deliver up the premises at the expiration of the term in a good state of repair. The defendant claimed the protection of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919.

Held: the letting was of both the garage and the rooms above it, and those rooms were let as a separate dwelling within the meaning of the Acts.

Dictum of BANKES, L.J., in *Epsom Grand Stand Association, Ltd.* v. *Clarke* (1), [1919] W.N. at p. 171, applied.

Notes. The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, were repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. For s. 2 of the Act of 1915 and s. 4 of the Act of 1919, see now s. 12 (2) of the Act of 1920 (which has been amended as to England and Wales, but not to Scotland, by the Rent Act, 1957, by the repeal of the reference therein to standard rent).

Referred to: *Gidden* v. *Mills*, [1925] All E.R. Rep. 123.

As to houses used partly for business or professional purposes, see 23 HALSBURY'S LAWS (3rd Edn.) 746–748; and for cases see 31 DIGEST (Repl.) 640 et seq. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 1004.

Case referred to: A

(1) *Epsom Grand Stand Association, Ltd.* v. *Clarke*, [1919] W.N. 170; 35 T.L.R. 525; 63 Sol. Jo. 642, C.A.; 31 Digest (Repl.) 704, *7935*.

Also referred to in argument:

National Steam Car Co., Ltd. v. *Barham* (1919), 122 L.T. 315, N.P.; 31 Digest (Repl.) 658, *7602*. B

Appeal from Brompton County Court.

The plaintiff claimed to recover possession of the garage and premises known as No. 26, Kinnerton Street, Wilton Crescent, which were let by the plaintiff's predecessor in title to the defendant under an agreement dated Jan. 29, 1913, on a yearly tenancy. The benefit of the agreement was vested in the plaintiff, and the defendant had attorned tenant to the plaintiff. The tenancy was duly determined by notice to quit, expiring on Feb. 8, 1920. By the agreement, the landlord agreed to let and the tenant to take the premises on a yearly tenancy at a rent of £60 per annum, payable in equal quarterly payments. The landlord agreed to pay all the rates and taxes, with the exception of extra water rate charges for non-domestic purposes. The tenant agreed not, without the landlord's consent in writing, to use the premises for any other purpose than that of a garage for private occupation, not to underlet or assign, and to keep the interior of the premises in good and habitable repair and to execute the necessary repairs to the living rooms on taking possession, and to deliver up the premises at the expiration of the term in a good state of repair. The premises consisted of a single building, on the ground floor of which the defendant's motor cars alone were accommodated. On the floor above, there were four rooms and a scullery, occupied by the defendant's chauffeur and his family. C D E

The county court judge held that the defendant was tenant of the rooms as a separate dwelling and that, therefore, the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, applied to the premises, and the tenant was entitled to protection of those Acts. F

The plaintiff appealed.

By the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 2 (2):

"This Act shall apply to a house or part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwelling-house and a garden or other premises within the curtilage of the dwelling-house, and where either the annual amount of the standard rent or the rateable value of the house or part of the house does not exceed—(a) in the case of a house situate in the metropolitan police district, including therein the City of London, £35. . . ." G

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, s. 4: H

"As from the passing of this Act, the principal Act and the enactments amending that Act shall extend to houses or parts of houses let as separate dwellings where such letting does not include any land other than the site of the dwelling-house and a garden or other premises within the curtilage of the dwelling-house, and where—(a) in the case of a house situated in the metropolitan police district, including the City of London, both the annual amount of the standard rent and the rateable value of the house exceed £35, and neither exceeds £70. . . ." I

Edgar Foà for the plaintiff, the landlord.

Spokes for the defendant, the tenant.

LUSH, J.—I must confess that I have considerable difficulty in coming to a decision in this case, and have some hesitation in arriving at the conclusion at which I have arrived. I have certainly not arrived at it with the ease with which

my learned brother has arrived at his conclusion. The case is one of great importance and many others may depend on it. [HIS LORDSHIP stated the facts, and continued:] The real question is whether this building, including the garage and rooms over it, was let as a separate dwelling within the meaning of s. 2 (2) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. It is obvious that the word "separate" was put in because the Act deals both with a house and with part of a house. No doubt these premises partly consist of a dwelling-house, but they also consist of a garage, the purpose for which they were mainly constructed. It was let for a double purpose, to put motors into the garage and the chauffeur into the rooms above. That being so, were they let as garage or dwelling-house? The county court judge held that they were let for a double purpose; that

> "the defendant was tenant of the rooms as a separate dwelling. The defendant was not bound to dwell personally in the rooms, and it was not contemplated that he should do so. . . . It is true that the chauffeur was not a tenant. . . . Nevertheless, the rooms were being dwelt in by the chauffeur for the purpose for which they were let with the garage, namely, as a dwelling-place, and until his employment is terminated the defendant cannot lawfully require him to cease to live in them. I am of opinion, therefore, that the Acts apply to this case."

The question cannot be treated as a mixed question of law and fact; it must depend on the facts. In *Epsom Grand Stand Association, Ltd.* v. *Clarke* (1), the question related to a public-house and BANKES, L.J., said ([1919] W.N. at p. 171):

> "The only conditions are that the premises must be a house or part of a house and let as a separate dwelling. If they fulfil these conditions and others relating to value then they are to be deemed to be a dwelling-house to which the Act applies. . . . If an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say they were let as a dwelling-house."

That is one case, but there are others in which no one could say that the premises were let as a dwelling-house, e.g., that of a large warehouse containing a couple of rooms only, with a small room for a caretaker. It is plain that such premises would not be let as a dwelling-house. There are cases between the two extremes. Therefore, it is a question of fact, what is the substantial purpose for which the building was let. Looking at it in that way, we cannot disturb the judgment below, unless we find that there was no evidence on which the judge could find as he did, or that he asked himself the wrong question. We cannot say that there was no evidence here, though I am far from saying that I should have arrived at the same conclusion as the learned judge did, for there is great force in the contention of counsel for the landlord that the real purpose was a garage for motor cars, and that the dwelling-rooms above were merely ancillary. We know that the four rooms above were necessary for the use of the building as a garage, and their use as a dwelling-house must be a question of degree and fact. The point that gives rise to the greatest difficulty is whether the judge has asked himself the right question. I have great doubt whether the question was not put on the wrong basis, and whether it ought not to have been: "Who was the tenant of the rooms?" My doubt, however, is not strong enough to make me differ from my brother SHEARMAN, and, therefore, the judgment below must prevail.

SHEARMAN, J.—In my opinion, the county court judge was perfectly right. The question was whether these premises were let as a dwelling-house. I think the letting was both of the garage and the rooms above, and that the rooms were let as a separate dwelling-house. In the agreement they are described as "the garage and premises known as No. 26, Kinnerton Street, Wilton Crescent," and

the agreement goes on to say that the tenant is to pay the extra water rate charges for non-domestic purposes, that the premises shall not be used for any other purpose than that of a garage for private occupation, and that the tenant is to repair the living rooms. It is clear to me that this was a letting of garage and rooms not for one purpose at all, but for two purposes, the first being for a garage and the second for a dwelling-house. The chauffeur, in his evidence, said that he had been employed by the tenant over two years and had occupied the four living rooms over the garage with his family; that he did not pay rent, but received less wages. What rises before my mind are the old mews for horses and carriages, which were common in London before the days of motor cars, in which the coachman lived in rooms over the stable and coachhouse. When motor cars came into use, the stables and coachhouses were converted and turned into the modern garage with rooms above. Large sums have been spent in this manner, and there are thousands of such buildings in the West End of London.

Looking at the agreement, we must assume that the tenant took this garage in order to put his motor cars in the garage, and his chauffeur into the rooms above. I think that comes within the operation of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, and I think also that such a letting comes within the dicta of BANKES, L.J., in *Epsom Grand Stand Association, Ltd.* v. *Clarke* (1). I agree, therefore, that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Hicks, Arnold & Bender; Frederick Walker & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re THOMSON'S MORTGAGE TRUSTS. THOMSON *v.* BRUTY

[CHANCERY DIVISION (Eve, J.), February 19, 25, 1920]

[Reported [1920] 1 Ch. 508; 89 L.J.Ch. 213; 123 L.T. 138; 64 Sol. Jo. 375]

Limitation of Action—Interest—Action for recovery—Mortgage—Sale—Sale by first mortgagee—Surplus—Rights of second mortgagee—Recovery of interest for more than six years—Real Property Limitation Act 1833 (3 *& 4 Will.* 4, *c.* 27), *s.* 42—*Conveyancing Act*, 1881 (44 *& 45 Vict., c.* 41), *s.* 21 (3), *s.* 22.

On Jan. 23, 1905, the mortgagor mortgaged his freehold farm by four legal mortgages ranking one after the other. On Oct. 22, 1909, the second mortgagee, with the privity of the mortgagor, sub-mortgaged the principal sum and the security on the second mortgage to W. with power to recover and give receipts for the same. No interest had been paid under the second and the fourth mortgages, but interest had been paid to W. under the sub-mortgage up to April 22, 1918. In November, 1918, the first mortgagee sold the mortgaged farm under the statutory power of sale, and after payment of the principal, interest, and costs of the first mortgage there remained a surplus in his hands. On the question whether the surplus was held upon trust to pay to W. the amount due under the second mortgage with interest from the date of the mortgage,

Held: (i) the first mortgagee was under a statutory obligation under s. 21 (3) and s. 22, of the Conveyancing Act, 1881, to pay the surplus proceeds to W. as the person entitled to repayment under the second mortgage; (ii) the action was in substance an action by a beneficiary for the execution of the trust of the surplus proceeds which involved the payment of all arrears of interest, and was not an action or suit for the recovery of interest in respect of money

charged on land within s. 42 of the Real Property Limitations Act, 1833, which imposed a limit of six years for the recovery of interest on money so charged.

Notes. The Conveyancing Act, 1881, s. 21 (3) and s. 22, have been replaced by s. 105 and s. 107 of the Law of Property Act, 1925: see 20 HALSBURY'S STATUTES (2nd Edn.) 668, 671. The Real Property Limitation Act, 1833, s. 42 (so far as it refers to interest) has been replaced by s. 2 (4) of the Limitation Act, 1939: see 13 HALSBURY'S STATUTES (2nd Edn.) 1161.

Considered: *Young* v. *Clarey*, [1948] 1 All E.R. 197. Distinguished: *C. & M. Matthews, Ltd.* v. *Marsden Building Society*, [1951] 1 Ch. 758.

As to application of proceeds of sale of the mortgaged property and the satisfaction of claims of subsequent mortgagees see 27 HALSBURY'S LAWS (3rd Edn.) 310, 311, and for cases see 35 DIGEST 513, 514. As to limitation of actions where interest is claimed on redemption see 24 HALSBURY'S LAWS (3rd Edn.) 276, and for cases see 32 DIGEST 482. As to the meaning of "action" see 1 HALSBURY'S LAWS (3rd Edn.) 5.

Cases referred to:

(1) *Re Lloyd*, *Lloyd* v. *Lloyd*, [1903] 1 Ch. 385; 72 L.J.Ch. 78; 87 L.T. 541; 51 W.R. 177; 19 T.L.R. 101; 47 Sol. Jo. 128, C.A.; 32 Digest 424, *1007*.

(2) *Edmunds* v. *Waugh* (1866), L.R. 1 Eq. 418; 35 L.J.Ch. 234; 13 L.T. 739; 12 Jur. N.S. 326; 14 W.R. 257; 32 Digest 423, *1006*.

(3) *Re Stead's Mortgaged Estates* (1876), 2 Ch.D. 713; 45 L.J.Ch. 634; 35 L.T. 465; sub nom. *Re Stead's Settlement Trusts*, 24 W.R. 698; 32 Digest 424, *1008*.

Also referred to in argument:

Charles v. *Jones* (1887), 35 Ch.D. 544; 56 L.J.Ch. 745; 56 L.T. 848; 35 W.R. 645; 35 Digest 694, *4370*.

Re Fawsitt, *Galland* v. *Burton* (1885), 30 Ch.D. 231; 55 L.J.Ch. 568; 53 L.T. 271; 34 W.R. 26, C.A.; 1 Digest 5, *12*.

Ex parte Dewdney, *Ex parte Seaman* (1809), 15 Ves. 479; 2 Rose, 59 n.; 33 E.R. 836, L.C.; 32 Digest 512, *1713*.

Re Fleetwood and District Electric Light and Power Syndicate, [1915] 1 Ch. 486; 84 L.J.Ch. 374; 112 L.T. 1127; 31 T.L.R. 221; 59 Sol. Jo. 383; [1915] H.B.R. 70; 10 Digest (Repl.) 1064, *7383*.

Adjourned Summons.

On Jan. 23, 1905, Edward David Thomson, mortgaged his freehold farm known as Brickhouse Farm, South Fambridge, Essex, to raise £1,750 by four legal mortgages ranking one after the other—namely: (i) to William Ward Duffield and the defendant William John Bruty jointly to secure £900; (ii) to Helen Thomson to secure £200; (iii) to Thomas William Offin to secure £300; (iv) to Helen Thomson to secure £350. By a deed dated Oct. 22, 1909, Helen Thomson sub-mortgaged the principal sum of £200 owing on the second mortgage and the security for it to the plaintiff, James George Wood, to secure a loan of £100 to the then mortgagor who entered into a personal covenant for repayment. On Sept. 23, 1912, a receiving order was made against the mortgagor and he was afterwards adjudged bankrupt. Helen Thomson died on May 4, 1916, having by her will appointed the plaintiffs, Isabella Helen Thomson and Henry Fraser Thomson, executors. No interest was ever paid on the second mortgage or the fourth mortgage. But the interest on the sub-mortgage to the plaintiff James George Wood was duly paid down to and inclusive of April 22, 1918. Nothing had ever been paid in respect of any of the principal sums secured by the second mortgage, the fourth mortgage, and the sub-mortgage respectively. Thomas W. Offin died in 1916 and the defendants Anne Elizabeth Offin and Benjamin Offin and Benjamin Moss were the executors of his will. They claimed that certain money was due to them under the third mortgage. William Duffield died in 1918, but before November, 1918, when the

defendant William J. Bruty sold the farm under the statutory power of sale conferred by the first mortgage for the sum of £1,500 and such sale was subsequently completed on Feb. 5, 1916. The solicitors acting for the defendant William J. Bruty, and the executors of Thomas W. Offin furnished the solicitors for the executors of the second mortgage and sub-mortgagee with an account showing that after payment of all principal and interest owing under the first mortgage and the costs of the defendant William J. Bruty as first mortgagee there remained in his hands a balance of £497 16s. 8d. The second mortgagees claimed £343 10s. 11d., being £200 principal, £126 9s. 4d. for interest less tax from Jan. 23, 1905 to Mar. 10, 1919, and £17 1s. 7d. costs. This summons asked whether the balance in the hands of the first mortgagee was held upon trust to pay to James G. Wood, the sub-mortgagee, the amount due under the second mortgage on the footing that interest was computed from Jan. 23, 1905, to the date of payment.

J. K. Young for the first two plaintiffs, second mortgagees.
P. F. Wheeler for the defendant executors of the third mortgagee.
A. M. Begg for the first mortgagee.

Cur. adv. vult.

Feb. 25. **EVE, J.,** read the following judgment: On Jan. 23, 1905, Edward David Thomson raised a sum of £1,750 on the security of a freehold farm in Essex by four legal mortgages ranking one after the other for £900, £200, £300 and £350 respectively. In 1918 the defendant Bruty, the survivor of the lenders on joint account of the £900, sold the property under his statutory power, and, after satisfying his claims as first mortgagee, he has in hand a balance of rather less than £500 available for the subsequent incumbrancers. The first two plaintiffs are the legal personal representatives of the second mortgagee; the plaintiff Wood is a sub-mortgagee of their mortgage. No interest was ever paid on the second mortgage and there is owing on that security the principal sum of £200 and interest for twenty years at five per cent. No question under the Statute of Limitations arises as, for one thing, there was a sufficient acknowledgment of the debt when the sub-mortgage to Wood was executed in 1909. The defendants Offin and Moss are the legal personal representatives of the third mortgagee. Bruty is an assignee of this mortgage by way of sub-mortgage to secure a sum largely in excess of the amount owing on the mortgage; he is, therefore, for all practical purposes in the position of the third mortgagee. In these circumstances Bruty, who does not dispute that he, a trustee of the surplus proceeds for the subsequent incumbrancers, refused to pay to the plaintiffs more than six years' arrears of interest on the £200, relying in support of his refusal on the Real Property Limitations Act, 1833, s. 42, which provides that no arrears of rent and interest can be recovered for more than six years. With this amount the plaintiffs refused to be satisfied, and on Oct. 30 last, after various attempts to obtain payment of interest for the whole period of the mortgage, they issued this summons, whereby they ask for the determination of the question whether the balance in Bruty's hands is held upon trust to pay thereout in the first place, and in priority of all other claims thereon to the plaintiff Wood, as the person entitled to give a receipt for the same under the sub-mortgage, the amount due for principal, interest, and costs under the second mortgage, on the footing that such interest is to be computed as from the date of the mortgage down to the date of payment, or on any other and what footing, and for consequential relief.

On the summons coming on to be heard all the defendants contend that this is an action or suit by the plaintiffs for the recovery of interest in respect of money charged upon land, and that by s. 42 of the Real Property Limitation Act, 1833, six years' interest only can be recovered. The defendant Bruty does not suggest that he holds the balance otherwise than as first mortgagee, but he argues that, as his co-defendants insist that he shall not pay any more than six years' interest to the plaintiffs, he is bound to retain the fund and leave the plaintiffs to take

proceedings against him to recover, if they can, more than the six years' interest. I do not think this attitude of the defendant Bruty can be justified. I think he is, and always has been since his claims as first mortgagee were satisfied, under a statutory obligation to pay the surplus to the plaintiff Wood as the person then entitled to the mortgaged property and authorised to give a receipt for the proceeds of sale thereof: see Conveyancing Act, 1881, s. 21 (3) and s. 22. Bruty had not, in my opinion, any right as a satisfied prior incumbrancer to retain the surplus proceeds as against Wood, and in retaining them he has really been asserting on behalf of the mortgagor and those claiming under him by title subsequent to the plaintiffs' title a right as against the plaintiffs to have paid to them the whole surplus after deducting principal and six years of interest only. If the fund were in court and the mortgagor or the defendants applied for payment out on this footing, it is, I think, clear from what was said by the Court of Appeal in *Re Lloyd, Lloyd* v. *Lloyd* (1) that the application would not be successful even though the mortgagees against whom the application was made had never had in their hands the proceeds of sale of the mortgaged property. Is the position of the defendants strengthened by the fact that the fund is not in court, but has remained throughout in Bruty's hands, or are the plaintiffs prejudiced by the fact that it is they and not the defendants who come to ask for payment of the fund to them? I think not. Bruty's possession, on the view I take of the statutory obligation which arose on his prior claims being satisfied, must be treated as the possession of the person rightfully entitled to have the fund handed to him—that is, the plaintiff Wood—and on this footing the application is no more to be treated as an action to recover interest within the meaning of s. 42 than was the petition for payment out in *Edmunds* v. *Waugh* (2).

But, assuming that my view of the construction to be placed on the Conveyancing Act, 1881, is not sound and that Bruty—as has been argued—is a trustee of the fund for all the subsequent incumbrancers, he is not, in my opinion, entitled in the execution of the trust mero motu or at the instigation of any one or more of his cestui que trust to withhold from any cestui que trust a fund his title to which is unextinguished though his right to recover it by action may be barred. The position is fundamentally different by reason of the existence of the relationship of trustee and cestui que trust from that of an executor or liquidator who may be required by a residuary legatee or other party interested in the estate, or even by another creditor, to set up the statute as an answer to a claim founded on a debt already barred. The duty of the trustee is to ascertain the parties entitled to the trust fund, the shares of the fund to which they are respectively entitled, and to distribute the fund accordingly: it is no part of his duty when a cestui que trust has proved his title to a share of the fund to retain the share and require the cestui que trust to institute proceedings to recover it. Still less can such an attitude be justified in a case like the present, when it is to the personal interest of the trustee to withhold payment. The question remains whether, assuming Bruty to be a trustee for all the incumbrancers, is this application an action or suit within the meaning of s. 42 of the Act of 1833? I do not think it is. It is in substance an action by a beneficiary for the execution of the trust, and, although due execution will involve payment of all the arrears of interest to the beneficiary, this result is brought about by the nature of the trust, not by any order to be made in these proceedings. Reliance was placed by the defendants on the decision in *Re Stead's Mortgaged Estates* (3). I am uncertain how far that decision ought to be followed since the judgment in *Re Lloyd* (1), but treating it as a binding authority in circumstances similar to those there existing—that is to say, a compulsory sale of land subject to an equitable mortgage, payment into court by the purchaser of the price and an application by the mortgagee for payment out—I do not think it has any bearing on the facts with which I have to deal in this case. What I propose to do is to declare that, subject to the payment thereout of his costs of this summons to be taxed as between solicitor and client, the defendant Bruty

holds the surplus proceeds of sale and any interest thereon upon trust to pay the same to the plaintiff Wood. I direct taxation of the plaintiffs' costs of the summons as between party and party and direct the amount certified to be added to their security. No good purpose can be served by directing taxation of any further costs, but I give liberty to apply as to this and generally.

Solicitors: *Faithfull, Owen, Blair & Wright; Duffield, Bruty & Co.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

Re WHITFIELD

[Chancery Division (Sargant, J.), June 24, 1920]

[Reported [1920] W.N. 256; 125 L.T. 61]

Trustee—Will—Investment—Shares not authorised by investment clause—Retention by trustee under power to postpone sale—Capitalisation of profits of company in which shares held—New issue of fully paid shares—Power to postpone sale of new shares.

Ordinary shares in a company not included in the investment clause in a will were retained by the trustees under their power to postpone sale. Subsequently, the company capitalised certain undivided profits and issued new fully paid shares pro rata among the existing shareholders. The trustees took up their allotted quota of new shares.

Held: the trustees had not increased their holding in the company, because they still held the same proportion of the company's shares; the new shares were held upon the same trusts as the original shares and with the same power to postpone the sale thereof; and, therefore, the new shares need not be sold immediately.

Notes. Followed: *Re Wright's Settlement Trusts, Wright* v. *Wright*, [1945] 1 All E.R. 587. Referred to: *Re Sykes, Younghouse* v. *Sykes*, [1940] 4 All E.R. 122.

As to the duties of trustees relating to investment of trust funds see 33 Halsbury's Laws (2nd Edn.) 232 et seq., and for cases see 43 Digest 932, 933.

Cases referred to:

(1) *Re Pugh, Banting*, v. *Pugh*, [1887] W.N. 143; 43 Digest 932, *3701.*

(2) *Re Anson's Settlement, Earl Lovelace* v. *Anson*, [1907] 2 Ch. 424; 76 L.J.Ch. 641; 97 L.T. 472; 51 Sol. Jo. 686; 43 Digest 932, *3703.*

Also referred to in argument:

Re Ogilvie, Ogilvie v. *Ogilvie* (1919), 88 L.J.Ch. 159; 120 L.T. 436; 35 T.L.R. 218; 63 Sol. Jo. 246; 40 Digest (Repl.) 725, *2155.*

Originating Summons.

Robert Whitfield by his will left his property upon trust for sale to trustees, with power to postpone in their absolute discretion, with an investment clause as to residue which was divided in fifths, the income of each fifth to be paid by the trustees to a named person. At the time of his death the testator had certain ordinary shares which were not included in the investment clause, but which his trustees retained under the discretion given to them so to do. The company subsequently capitalised certain undivided profits available for dividend, and by resolution increased its capital and resolved the new shares should be allotted pro rata and fully paid amongst the existing ordinary shareholders. The trustees received notice of the resolutions and were informed that, as holders of 610 ordinary shares, the directors had allotted them 1,220 ordinary shares, upon which the sum of £1,220

A was to be paid up by the allocation of the proportionate sum by way of capitalisation of undivided profits, to which they were entitled in respect of their holding. The circular contained notice that the new shares were fully paid up shares, and that no shareholder could call for cash in lieu of his allotment. The trustees accepted the shares and issued this summons to determine whether they were entitled to retain them and whether the dividends thereon were income of the B testator's residuary estate. The trustees, in their evidence, said the original shares had not been affected in character by the transaction.

Alfred Adams, for the trustees.
Bischoff, *H. A. Hind*, and *P. F. S. Stokes*, for other defendants.

SARGANT, J. *Re Pugh*, *Banting* v. *Pugh* (1) does not apply to the present case. C There the company declared a bonus on the original shares, increased its capital by the creation of new shares which were offered to the existing holders pro rata at par, and proposed to apply part of the bonus in payment of the amounts payable on the new shares, the trustees having an option to accept these, and STIRLING, J., held that the trustees were right in taking the new shares, which were of greater value than their nominal amount, but that they ought to realise them at once. D There was also in that will a prohibition against investing in any shares except those that were authorised. *Re Anson's Settlement*, *Earl Lovelace* v. *Anson* (2) is also not applicable to the present case. I think that the passage in UNDERHILL ON TRUSTS (7th Edn.) at p. 276, means that the trustees must not invest any other moneys in the company's shares. Here the trustees have not increased their holding because they still hold the same proportion of the company's shares. All that E has happened is that the nominal value of their shareholding has been increased. The new shares form part of the residue and are to be held on the same trusts as the original shares, the trustees having the same power to postpone the sale of them as they had in respect of the original shares.

Solicitors: *Bell*, *Brodrick & Gray*, for *H. & A. Swinburne*, Gateshead; *Iliff*, *Sweet & Co.*, for *J. W. R. Punch & Robson*, Middlesbrough.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law*.]

SUTHERLAND & CO. *v.* HANNEVIG BROS., LTD.

[King's Bench Division (Rowlatt and McCardie, JJ.), November 11, 12, 1920]

[Reported [1921] 1 K.B. 336; 90 L.J.K.B. 225; 125 L.T. 281; 37 T.L.R. 102; 15 Asp. M.L.C. 203]

Arbitration—Award—Correction—"Clerical mistake or error arising from any accidental slip or omission"—Words of award, but not their meaning, intended by arbitrator—No power to amend—Arbitration Act, 1889 (52 & 53 *Vict.*, *c.* 49), *s.* 7 (*c*).

S. & Co. were the charterers and H. & Co. the sub-charterers of a steamship. At the termination of the charterparty disputes in which the owners claimed against the charterers, and the charterers claimed against the sub-charterers, were referred to arbitration. The arbitrators disagreed. The disputes came before the same umpire, who, in the case between the owners and the charterers, awarded that the costs of the arbitration, which he assessed at £130, and taxed costs should be paid by the charterers. In the case between the charterers and the sub-charterers, the umpire awarded that the sub-charterers should pay the charterers for hire and insurance, and proceeded: "I further find and award that the costs of this arbitration, which I assess at £130 and taxed costs, as well as costs of the arbitration between the owners and [the charterers] on the same subject, except taxed costs of the sitting of June 27, 1919, shall be paid by [the sub-charterers]." The parties were not clear what costs were payable by the sub-charterers under the umpire's award, correspondence ensued, and a letter was written to the umpire suggesting that "a clerical mistake, or error arising from an accidental slip or omission," which the umpire could correct by virtue of the Arbitration Act, 1889, s. 7 (c) [now the Arbitration Act, 1950, s. 17] had been made in the award. The umpire then made an award which, he said, he had amended so that it should read as he had originally intended to state the award. The amended award was as follows: "I further find and award that the costs of this arbitration, which I assess at £130, and taxed costs, as well as costs of the arbitration and the taxed costs of the owners against S. & Co. and S. & Co.'s own costs of the arbitration . . . shall be paid by [the sub-charterers] "

Held: in the original award the umpire had written down exactly what he intended to write, albeit the words used may not have expressed the meaning he intended, and, therefore, there was no "clerical mistake or error arising from any accidental slip or omission" which he could correct under s. 7 (b); by his amendment he had inserted in the award an exposition of his original words, which he had no jurisdiction to do; and so the amended award must be set aside.

Notes. The Arbitration Act, 1889, has been repealed, but the provision formerly contained in s. 7 (b) thereof is now made by the Arbitration Act, 1950, s. 17.

Referred to: *The Corchester*, [1956] 3 All E.R. 878.

As to alteration of an award by the arbitrator, see 2 Halsbury's Laws (3rd Edn.) 46, for cases see 2 Digest (Repl.) 659, 669, *1781–1794*. For the Arbitration Act, 1950, s. 17, see Halsbury's Statutes (2nd Edn.) 103.

Cases referred to:

(1) *Mordue* v. *Palmer* (1870), 6 Ch. App. 22; 40 L.J.Ch. 8; 23 L.T. 752; 35 J.P. 196; 19 W.R. 86, L.JJ.; 2 Digest (Repl.) 659, *1784*.

(2) *Henfree* v. *Bromley* (1805), 6 East, 309; 2 Smith, K.B. 400; 102 E.R. 1305; 2 Digest (Repl.) 660, *1787*.

(3) *I.R. Comrs.* v. *Hunter*, [1914] 3 K.B. 423; 84 L.J.K.B. 135; 110 L.T. 825, 975; 30 T.L.R. 363; 58 Sol. Jo. 400.

(4) *Oxley* v. *Link*, [1914] 2 K.B. 734; 83 L.J.K.B. 602; 110 L.T. 248, C.A.; 27 Digest (Repl.) 252, *2034*.

(5) *Scott* v. *Morley* (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 36 W.R. 67; 4 T.L.R. 56; sub nom. *Re Morley, Ex parte Morley, Scott* v. *Morley*, 4 Morr. 286, C.A.; 27 Digest (Repl.) 169, *1242*.

(6) *Doswell* v. *Norton* (1902), 18 T.L.R. 228; Digest (Practice) 475, *1557*.

Motion to set aside an award.

By a charterparty made on April 30, 1917, between R. W. J. Sutherland & Co., the charterers (herein called "the respondents"), and the owners of the steamship *Steady* (re-named the *Oistein*), the owners chartered the steamship in question to the respondents. On May 4, 1917, the respondents by a sub-charter, re-chartered the steamship *Steady* to Hannevig Bros., Ltd., the sub-charterers (herein called "the applicants"). The terms and conditions of the sub-charter were identical with those of the charterparty of April 30, 1917. Disputes arose between the parties, and these were referred to two arbitrations, one between the owners and the respondents, as charterers, and the other between the respondents, as disponents, and the applicants as sub-charterers. The owners claimed against the respondents as charterers. The respondents, in their turn, claimed over against the applicants, the sub-charterers. Both disputes ultimately came before the same umpire. In the first arbitration, the umpire having made his award on the points at issue ordered the charterers to pay the costs in these terms:

> "I further find and award that the costs of this arbitration, which I assess at £130, and taxed costs shall be paid by the charterers, and if in the first place, they shall have been paid by the owners, the latter shall forthwith be reimbursed for such costs by the charterers."

In the second arbitration, namely, the one between the respondents (the charterers) and the applicants (the sub-charterers), the umpire awarded that the applicants should pay certain sums, and on the question of costs, he added:

> "I further find and award that the costs of this arbitration, which I assess at £130 and taxed costs, as well as costs of the arbitration between the owners and Messrs. Sutherlands (the respondents) on the same subject, except taxed costs of the sitting of June 27, 1919, shall be paid by the charterers (in this case the sub-charterers, the applicants), and if, in the first place, they shall have been paid by the disponents (i.e., the respondents), the latter shall forthwith be reimbursed by the charterers (i.e. the applicants)."

The respondents thought that the award did not define sufficiently clearly, the costs which the applicants (Messrs. Hannevig Bros., Ltd.) were to pay. Accordingly, the respondents' solicitors, on May 20, 1920, wrote to the umpire as follows:

> "Dear Sir,—On perusing the award in this matter we are under the impression that a clerical mistake or error arising from an accidental slip or omission has been made in the award. The award gives to our clients, Sutherland & Co., the costs of the arbitration between the owners of the steamship *Steady* and Sutherland & Co., and what we are anxious to understand is as to whether that was intended to cover the costs which Sutherland & Co. have to pay the owners, and Sutherland & Co.'s own costs of that arbitration as well as the arbitrator's fees. For your guidance we enclose herewith the original award, and shall be glad to hear from you on the point."

A few days later, the umpire informed a member of the firm of the respondents' solicitors that he certainly had made an error in writing his award and had amended his award so that it should read as he originally intended to state it. The umpire then issued an amended award in which the clause dealing with costs read as follows:

> "I further find and award that the costs of this arbitration, which I assess at £130 and taxed costs as well as costs of the arbitration and the taxed costs of the owners against Sutherland & Co., and Sutherland & Co.'s own costs of the

arbitration between the owners and Sutherland & Co., on the same subject . . . shall be paid by the charterers"

(i.e. in this case) Hannevig Bros., Ltd. The applicants refused to pay the costs added by the amended award, and they moved to set aside the award on the ground that such an amendment was not within s. 7 (c) of the Arbitration Act, 1889, which provides that:

"The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . (c) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

The applicants contended that the umpire was functus officio and had no power to alter his award.

D. C. Leck, K.C., and *Hildesley* for the sub-charterers.
Le Quesne for the charterers.

ROWLATT, J.—In this case an extremely difficult and important question has arisen with regard to the extent of the powers conferred on arbitrators by cl. (c) of s. 7 of the Arbitration Act, 1889. Section 7 of the Act of 1889 provides that:

"The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . (*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

On the construction of those words as a matter of grammar "clerical" belongs to "mistake" only, and "error arising from any accidental slip or omission" is a second and independent limb of the clause. The words of the clause are similar to those found in R.S.C. Ord. 28, r. 11, and, in my opinion, the greater part of the difficulty has arisen owing to the extent of the meaning which has been given to the words of that order. I cannot help feeling that, as applied to arbitrators, the words ought to be construed rather strictly. Before the passing of the Arbitration Act, 1889, it is clear that the courts regarded it as very dangerous to allow arbitrators to alter or amend their awards after they had made them. The well-known case on that point is *Mordue* v. *Palmer* (1). In that case the error corrected by the arbitrator arose from the mistake of a clerk in copying the draft award, and it was held that the arbitrator could not put the mistake right, being functus officio. Such a state of things as that has been clearly altered by s. 7, cl. (c) of the Arbitration Act, 1889. The difficulty, however, which still remains is to see how far the alteration has gone.

In the present case, the arbitrator made an award, and he included in his award certain costs incurred in a matter between one of the parties and a third party, and the question arose whether the words he had used included all those costs or only some of them. The award was sent back to the arbitrator and he told Mr. Lewis, of the firm of solicitors representing the respondents, that he certainly had made an error in writing his award, and he amended it so that it read, as he said, as he had originally intended that it should read. That was not correcting a clerical mistake within the meaning of cl. (c) of s. 7 of the Act of 1889. What is meant there is something almost mechanical—a slip of the pen or something of that kind. Then the question is did the arbitrator correct an error arising from an accidental slip or omission? Here we get upon ground which is almost metaphysical. An accidental slip implies that something has been wrongly put in by accident, and an accidental omission implies that something has been left out by accident. That raises a further question, namely: What is an accident in this connection, an accident affecting the expression of a man's thought?

Such an accident is a very difficult things to define, but I am of opinion that what took place in connection with the award in this case was not an accident within the meaning of the clause. I cannot pretend to give a formula which will cover every case, but in this case there was nothing omitted by accident. The arbitrator, in

fact, wrote down exactly what he intended to write down, although it is doubtful what that really meant when considered from a legal point of view; and he has now really assumed a jurisdiction to expound what he had purposely written down. That is a thing which he has no jurisdiction to do. Counsel for the respondents, has contended that it was by inadvertence that the arbitrator did not put down all that he meant to put down. I am of opinion that inadvertence is not the right word to use in this case. A man may inadvertently write down a word which if he had thought more about the matter, he would have written differently, but that merely means that he has gone wrong. I am of opinion, that, in substance, the arbitrator assumed a jurisdiction which he did not possess, namely, to insert in the award an exposition of his words, because he found the words that he had used were not so well chosen as they might, and ought, to have been if chosen after further deliberation. The motion succeeds, and the award must be set aside.

McCARDIE, J.—I agree that this motion raises a difficult and important question, and my mind has fluctuated a good deal in the course of the argument. This alteration of the award by the arbitrator was a serious matter, and it involves an important and serious point of law. It is quite clear that under the old law as it stood before the Arbitration Act, 1889, the arbitrator could not have made this alteration in his award, for the law was most rigorous with regard to the limitation of the powers of an arbitrator, and from the moment that he put forward a paper as his award he was functus officio, and could not put right any mistake at all; any alteration was nugatory, and the original award stood—*Henfree* v. *Bromley* (2).

The question for our decision is how far the law has been altered by s. 7 (c) of the Arbitration Act, 1889, which empowers an arbitrator "to correct in an award any clerical mistake or error arising from any accidental slip or omission." I think that the word "accidental" in cl. (c) applies both to "slip" and to "omission." The clause is taken from Ord. 28, r. 11, and decisions under that rule are in point in so far as they are decisions on the rule and not, as many of them are, decisions based rather on the inherent jurisdiction of the court. In *I.R. Comrs.* v. *Hunter* (3), SCRUTTON, J. said, [1914] 3 K.B. at p. 428): "A referee, having once issued his award, cannot issue another without the consent of both parties." In saying that I do not think that the learned judge could have had present to his mind s. 7 (*c*) of the Arbitration Act, 1889. In *Oxley* v. *Link* (4), the Court of Appeal imposed a most stringent rule. In an action against a married woman sued in respect of her separate estate, judgment was by mistake drawn up in the ordinary form against the defendant personally, instead of in the form settled by the Court of Appeal in *Scott* v. *Morley* (5). It was held that the plaintiffs were not wanting to correct a slip, but were seeking to substitute one form of judgment for another, and that consequently Ord. 28, r. 11 did not apply. In this case, the arbitrator clearly did not make a clerical mistake, and the question is: Did he make an accidental slip? I do not think he did. He appears to have put down precisely what he meant to put down, and he did not put in anything that he did not intend to put in, nor did he omit anything that he intended to put in. I am, therefore, of opinion that the arbitrator was not entitled, under s. 7 (c) of the Act of 1889, to make the alteration which he did in this case. I may add, that in my view, the court in *Doswell* v. *Norton* (6), took a very liberal view in interpreting Ord 28, r. 11, and I think that it is very doubtful whether that case should be followed. I agree that the motion succeeds, and that the award must be set aside.

Award set aside.

Solicitors: *Roney & Co.; Downing, Handcock, Middleton & Lewis.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

EAGLESHAM *v.* McMASTER

[King's Bench Division (Earl of Reading, C.J.), February 20, 1920]

[Reported [1920] 2 K.B. 169; 89 L.J.K.B. 805; 123 L.T. 198; 84 J.P. 146]

Building Contract—Architects' certificate—Certificate condition precedent to contractor's right of action—Architect to act as arbitrator between parties—Errors of judgment by architect, but no fraud or collusion with building owner—Action by contractor against employer for sums not certified—Competency.

Clause 26 of a building contract, provided: "The certificate of the architect is a condition precedent to the contractor's right of action against the employer." Clause 27 provided: "The architect is to be the sole arbitrator or umpire between the employer and contractor, and is to determine any question, dispute or difference that may arise, either during the progress of the works or in determining the value of any variations that may be made in the work contracted for, and the certificate of the architect's decision upon such question, dispute, or difference shall be final and binding between the employer and contractor and without further appeal.

In his defence to an action by the contractor for further payment for work done under the contract, in respect of which no architect' certificate had been given, the employer pleaded the absence of the certificate. In reply the contractor pleaded that the employer was precluded from relying on its absence because the architect had acted as agent of the employer and/or acted in the interests of the employer alone and/or failed to carry out his duty as an arbitrator in that, inter alia, he had not measured and priced the work correctly, had omitted work done under the contract, had fixed the amounts of certificates arbitrarily, had received requests or instructions as to certificates from the employer, and had not disclosed to the contractor communications with the employer.

Held: (i) cl. 26 made the architects' certificate a condition precedent to the contractor's action; cl. 27 did not detract from that requirement, but merely obliged the architect to hear the parties and adjudicate on any dispute between them before giving his certificate: *Clarke* v. *Watson* (1) (1865), 18 C.B.N.S. 278, applied; *Lloyd Bros.* v. *Milward* (2) (1895), 2 Hudson's B.C., 4th Edn., 262, and *Robins* v. *Goddard* (3), [1905] 1 K.B. 294, distinguished; and, therefore, the employer was entitled to succeed: (ii) even if the contractor's allegations were true, the architect had not been guilty of fraud, collusion, or improper conduct, which would entitle the contractor to sue without a certificate, but merely of an error of judgment which did not give the contractor that right.

Per Curiam: If it had been shown that the employer had given instructions to the architect as to the amount for which he should certify, or as to the decision at which he ought to arrive on any particular matter, the contractor would be entitled to sue without the architects' certificate.

Notes. As to architects' certificates see 3 Halsbury's Laws (3rd Edn.) 458–470, as to the difference between arbitration and certifying see ibid., pp. 520–523, and for cases see 7 Digest 350–353, *73–84*.

Cases referred to:

(1) *Clarke* v. *Watson* (1865), 18 C.B.N.S. 278; 5 New Rep. 283; 34 L.J.C.P. 148; 11 L.T. 679; 13 W.R. 345; 144 E.R. 450; 7 Digest 363, *125*.

(2) *Lloyd Bros.* v. *Milward* (1895), 2 Hudson's B.C., 4th Edn. 262, C.A.; 7 Digest 359, *107*.

(3) *Robins* v. *Goddard*, [1905] 1 K.B. 294; 74 L.J.K.B. 167; 92 L.T. 10; 21 T.L.R. 120, C.A.; 7 Digest 359, *108*.

(4) *Hickman & Co.* v. *Roberts*, [1913] A.C. 229; 82 L.J.K.B. 678; 108 L.T. 436, n.; sub nom. *Roberts* v. *Hickman & Co.*, 2 Hudson's B.C., 4th Edn. 426, H.L.; 7 Digest 353, *84*.

A Also referred to in argument:

Scott v. *Liverpool Corpn.* (1858), 3 De G. & J. 334; 28 L.J.Ch. 230; 32 L.T.O.S. 265; 5 Jur. N.S. 105; 7 W.R. 153; 44 E.R. 1297, L.C.; 7 Digest 351, *76.*

Sharpe v. *San Paulo Rail. Co.* (1873), 8 Ch. App. 597; 29 L.T. 9, L.JJ.; 7 Digest 351, *77.*

Smith v. *Howden Union Rural Sanitary Authority and Fowler* (1890), 2 Hudson's
B B.C., 4th Edn., 156, D.C.; 7 Digest 408, *302.*

Re Hohenzollern Act. für Locomotivbau and City of London Contract Corpn., and Common Law Procedure Act, 1854 (1886), 54 L.T. 596; 2 T.L.R. 470; 2 Hudson's B.C., 4th Edn., 100, C.A.; 7 Digest 353, *83.*

Action tried by EARL OF READING, C.J., without a jury.

C The plaintiff building contractor claimed £707 18s. 7d., the balance which he alleged was due to him from the defendant for work done and materials supplied in connection with the erection of a town hall at Girvan, Ayrshire, which was to be presented by the defendant to the burgh. By a contract dated June 26, 1909 the plaintiff undertook to carry out the joinery work in connection with the erection of the town hall. It was provided by the contract that the amount of the contract
D money was to be paid to the contractor on the architect's certificate by instalments in sums of not less than £200, such instalments to bear a ratio of 80 per cent. in value, in the architect's opinion, of work executed. By cl. 25 of the contract it was provided as follows:

> "Of the balance of the contract money, 50 per cent. is to be paid (upon the architect's certificate) within one month after the receipt of a certificate from
E the architect of the complete performance of the works; 25 per cent. is to be paid (upon the architect's certificate) within three months after receipt of the above certificate, and the remaining 25 per cent. will be paid (upon the architect's certificate) twelve months after receipt of such certificate of completion, providing any defects that may appear in the building and works within that time have been remedied and made good by the contractor . . ."

F Clause 26 was as follows:

> "The certificate of the architect is a condition precedent to the contractor's right of action against the employer."

Clause 27 provided that:

> "The architect is to be the sole arbitrator or umpire between the employer and
G contractor, and is to determine any question, dispute, or difference that may arise either during the progress of the works or in determining the value of any variations that may be made in the work contracted for, and the certificate of the architect's decision upon such question, dispute, or difference shall be final and binding between the employer and contractor and without further appeal whatsoever."

H The plaintiff alleged that the total amount payable to him in respect of the work and material supplied was £4,310 16s. 4d., and after giving credit for £3,602 17s. 9d. paid by the defendants, the plaintiff now claimed the balance of £707 18s. 7d. By his defence the defendant said that nothing was due by him to the plaintiff as the value of the work done and materials supplied did not exceed £3,602 17s. 9d.,
I which sum had been paid by him to the plaintiff.

By para. 6 of the defence, the defendant pleaded further as follows: "The plaintiff has not obtained a certificate of the architect in respect of the sum sought to be recovered in this action or any part thereof. Certificates have been made by the architect for sums amounting in the aggregate to the sum £3,602 17s. 9d., and no more, and the full amounts payable under all certificates so made by the architect as aforesaid were satisfied by the defendant before this action was brought." By para. 7 of the defence the defendant pleaded an estoppel by reason of a judgment in Scotland. The plaintiff, in his reply, by para. 3, said: "The

defendant is precluded from relying on the conditions pleaded in that the said architect acted as agent of the defendant and-or acted in the interests of the defendant alone, and-or failed to carry out his duty as an arbitrator." The plaintiff, in his particulars, alleged (inter alia) that the final measurement by the architect was not in accordance with the Glasgow mode or in conformity with the original method adopted in the original schedule, that the prices had been wrongly varied by the architect; that work done by the plaintiff had been omitted by the architect; that the amounts allowed were in many cases improper and unreasonable; and that the architect arbitrarily fixed the amount for which he issued certificates, and refused to consider the plaintiff's objections thereto. Some correspondence afterwards passed between the solicitors, and the plaintiff's solicitors wrote a letter, dated Feb. 5, 1920, to the defendant's solicitor in which they intimated that the plaintiff would rely on the following particulars in addition to the particulars set out in para. 3 of the reply: "That the architect gave defendant an estimate and-or an undertaking as to the cost of the proposed town hall; that prior to the giving of the final certificate such cost was exceeded; that requests and-or instructions were given by the defendant to the architect in connection with the granting of certificates and execution of the work; that communications passing between the defendant and the architect were not disclosed to the plaintiff."

On an application to a judge in chambers it was ordered that the points of law raised by paras. 6 and 7 of the defence be tried before the question of amount (if any) due to the plaintiff. The order recited that counsel on both sides had agreed that if the points of law raised by paras. 6 and 7 of the defence be decided against the defendant, the defendant undertook to admit liability and consent to judgment for such sum (if any) as should be found due from him to the plaintiff.

Zeffertt for the plaintiff.

Barrington-Ward, K.C., and *A. E. Woodgate* for the defendant.

EARL OF READING, C.J.—This action comes before me on an order made by the judge in chambers for decision on points of law. As drawn up, the order does not truly express what the parties wished, but they have stated to me their views, and I take it that what they desire is that the case should be dealt with on the materials at present before the court, namely, the pleadings and the application by the plaintiff to amend—leaving any question of amount to be considered by an official referee.

On the construction of the contract, I come to the conclusion, having regard to cll. 25, 26 and 27 of the contract, that the parties intended that the plaintiff should only be entitled to recover if he had a certificate of the architect. The language of cl. 26 is very strong but it has been argued for the plaintiff, with great ingenuity, that cl. 26 is really disposed of by cl. 27, because the latter clause says that the architect is to be the sole arbitrator between the employer and the contractor, and is to determine any question, dispute or difference that may arise between them during the progress of the works, &c., and his decision is to be final and binding. Counsel for the plaintiff, has contended that cl. 27 destroys the effect of cl. 26, and that he brings himself within the decision in two cases. Clause 27, in my opinion, still leaves cl. 26 in operation and makes it necessary that the plaintiff should have obtained a certificate of the architect before he can recover, but cl. 27 does not leave it to the architect to make his certificate without hearing the parties and adjudicating on any dispute that may arise between them. Reading the two clauses together, I am of opinion that their true meaning is, that the certificate must be obtained before the plaintiff can sue for payment. It is not the court which says that the plaintiff shall not come before it, except on production of a certificate; the parties themselves have so agreed. The object of the clauses is to leave these matters to a person who has expert knowledge of building work and has the confidence of both parties, and the plaintiff was content to enter into the contract on that footing.

My view of the construction of the contract being that which I have expressed, I have to ask myself whether there is anything in the authorities cited which should induce me to change that opinion? I can find nothing in them to change my opinion; indeed they tend to confirm it. Counsel for the plaintiff, relied on two cases, *Robins* v. *Goddard* (3) and *Lloyd Bros.* v. *Milward* (2), as supporting his contention that where there is a clause providing that the obtaining of the architect's certificate shall be a condition precedent to the contractor's right of action against the employer, and also a clause providing that in the event of a dispute there shall be an arbitration by the parties, the latter clause destroys the finality of the architect's certificate and leaves any dispute to be decided, not by the architect's certificate, but in arbitration proceedings. In both of the cases relied on by counsel for the plaintiff in support of his contention, it is important to observe that the arbitrator was not the architect whose certificate was to be obtained, but another person, either designated or to be appointed for the purpose, so that what was to happen, according to the construction put on the contracts there in question was, that primâ facie the architect's certificate was final, and if the contractor obtained it he was entitled to be paid; but if either the contractor or the employer disputed it, the matter must go to arbitration. The court said that where the certificate was not final, it must be dealt with under the arbitration clause, and then on principles which were well established, the court would decide whether the case should be proceeded with or not. It is also worthy of note, as was pointed out by counsel for the defendant, that in *Robins* v. *Goddard* (3) the action was by the contractor against the building owner to recover sums due on certificates which had been issued by the architect. The employer set up as a defence and counterclaim the defective character and unsuitability of the work done and materials supplied. The Court of Appeal held that the certificates were not conclusive because of the wide terms of the arbitration clause, and therefore that the employer was entitled to set up his defence and counterclaim. That case does not affect the principle to which I propose to give effect.

In the other case referred to by counsel for the plaintiff, namely, *Lloyd Bros.* v. *Milward* (2), the contract provided that a certificate of the architect showing a final balance due or payable to the contractor was to be conclusive evidence that the work had been duly completed and that the contractor was entitled to receive payment; but by another clause it was provided that in case any question, dispute or difference should arise between the proprietor, or the architect on his behalf, and the contractor, as to, inter alia, the works having been duly completed, the matter was to be referred to the arbitration of a third person. The architect gave a certificate showing the final balance due to the contractor, but a dispute had arisen before the signing of that certificate, and the certificate was accordingly held not to be conclusive. That case does not affect the view which I have expressed. On the other hand, I am confirmed in my view by the decision in *Clarke* v. *Watson* (1). There it was made perfectly plain that where there is any agreement of this kind by which it is necessary for the contractor to have a certificate of the surveyor the court cannot entertain an action by him, where he has not obtained such a certificate. It was alleged by the contractors in that case that all things necessary had been done by them to entitle them to have the surveyor's certificate that the work had been duly and efficiently performed and completed to his satisfaction, but that the surveyor had not given the certificate and had wrongfully and improperly neglected and refused so to do. It was held, on demurrer, that, in the absence of collusion, the plaintiffs were not entitled to recover without producing the surveyor's certificate, nor were the defendants responsible for the refusal of the surveyor to give one. Willes, J., said:

> "Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error of judgment, or he may have refused to exercise any judgment; in which case the proper course would have been

to call upon the defendants to appoint some other surveyor who will do his duty."

Having arrived at the construction of this contract, which I have already expressed, the plaintiff must fail in the action unless he can show that there was some wrong act done by the defendant entitling him, the plaintiff, to proceed, notwithstanding that he has not obtained the architect's certificate. Such a wrong would be fraud or collusion between the defendant and the architect, or some moral turpitude amounting to improper conduct which would lead the court to interfere. There must be something in the nature of improper conduct by the defendant before the court can ignore the contract and say that the plaintiff may proceed notwithstanding the absence of the certificate. *Clarke* v. *Watson* (1) shows that quite clearly. The mere fact that the architect may have been guilty of an error of judgment by not applying his mind sufficiently to the question raised, or that he gave a wrong judgment, is immaterial for this purpose. The court cannot consider such matters unless the plaintiff has shown a ground for attacking the defendant with regard to the architect's certificate, and that is where the plaintiff fails. In *Hickman & Co.* v. *Roberts* (4) it was said that where improper conduct was shown—for example, if the architect was acting in the interests of one party by his direction—that would render his acts invalid. If, in this case, it had been shown that the defendant had given instructions to the architect as to the amount for which he should certify, or as to the decision at which he ought to arrive on any particular matter, there would be sufficient to override the necessity for obtaining the certificate, and the plaintiff would be entitled to proceed without it; but that is what is absent from this case. There is no allegation that the defendant did anything wrong. The allegation in para. 3 of the reply is that the defendant is precluded from relying on the conditions pleaded in that the architect acted as agent of the defendant and-or acted in the interests of the defendant alone, and-or failed to carry out his duty as an arbitrator. I can find nothing there which amounts to more than an allegation that the architect has committed some error of judgment by failing to take into account something which the plaintiff thinks he should have considered. Nowhere can I find in the particulars any allegation against the defendant. All the allegations are against the architect. Neither fraud nor collusion nor improper conduct on the part of the defendant is alleged; all that is said is that the architect has done things which he ought not to have done. That being so, sufficient has not been shown to entitle the plaintiff to proceed with the action in view of the conditions of the contract.

Counsel for the plaintiff, has asked for leave to amend. But at this very late stage I cannot allow an amendment of the pleadings to raise an answer involving serious reflections on the propriety of the defendant's conduct. I find that the defence is established, and the action will therefore be dismissed.

Judgment for defendant.

Solicitors: *Woodthorpe, Browne & Co.; Kingsford, Dorman & Co.*, for *Kingsford, Arrowsmith & Wightwick*, Canterbury.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

H. GOULD & CO., LTD. *v.* HOUGHTON

[KING'S BENCH DIVISION (Earl of Reading, C.J., Darling and Acton, JJ.), October 19, 20, December 21, 1920]

[Reported [1921] 1 K.B. 509; 90 L.J.K.B. 369; 124 L.T. 566; 85 J.P. 93; 37 T.L.R. 291; 65 Sol. Jo. 344; 26 Cox, C.C. 693; 19 L.G.R. 85]

Magistrates—Aiding and abetting—Offence punishable on summary conviction—Limit of time for taking proceedings—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict.*, *c.* 43), *s.* 5—*Sale of Food and Drugs Act*, 1875 (38 *&* 39 *Vict.*, *c.* 63), *s.* 6—*Sale of Food and Drugs Act*, 1899 (62 *&* 63 *Vict.*, *c.* 51), *s.* 19 (i).

Food and Drugs—Sale to prejudice of purchaser—Proceedings against manufacturer—Limitation of time—Charge against manufacturer of aiding and abetting—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict.*, *c.* 43), *s.* 5—*Sale of Food and Drugs Act*, 1875 (38 *&* 39 *Vict.*, *c.* 63), *s.* 6—*Sale of Food and Drugs Act*, 1899 (62 *&* 63 *Vict.*, *c.* 51), *s.* 19 (i).

An accessory before the fact to the commission of a misdemeanour is to be regarded in law for the purposes of conviction as a principal offender.

The appellants, manufacturers, were charged with aiding and abetting a retailer, G., in the offence of selling to the respondent an article of food that they had supplied to G. which was not of the nature, substance and quality of the article demanded, contrary to the Sale of Food and Drugs Act, 1875, s. 6, to which offence G. had pleaded Guilty. The respondent had purchased the article for test purposes, and by the Sale of Food and Drugs Act, 1899, s. 19 (i), a prosecution in those circumstances could not be instituted after the expiration of twenty-eight days from the time of the purchase. The proceedings against the appellants had been instituted more than twenty-eight days after the purchase, and they contended that they were bad. The respondent contended that the proceedings were not instituted under the Sale of Food and Drugs Acts, but under the Summary Jurisdiction Act, 1848, s. 5.

Held: the appellants were accessories to G.'s offence in that they aided and abetted in the commission of a misdemeanour; as such, they were liable as principals and were entitled to the protection of the time limit laid down in s. 19 (i) of the Act of 1899; and, therefore, the proceedings against them were out of time.

Notes. The Summary Jurisdiction Act, 1848, has been repealed and replaced by the Magistrates' Courts Act, 1952. For s. 5 and s. 11 of the Act of 1848 see s. 35 and s. 104 of the Act of 1952. The Sale of Food and Drugs Act, 1875, s. 6, and the Sale of Food and Drugs Act, 1899, s. 19, have been repealed; see now s. 2 (1) and s. 108 (1) of the Food and Drugs Act, 1955.

Referred to: *Homolka* v. *Osmond*, [1939] 1 All E.R. 154.

As to principals and accessories, see 10 HALSBURY'S LAWS (3rd Edn.) 295 et seq., and for cases see 14 DIGEST (Repl.) 81 et seq. For the Magistrates' Courts Act, 1952, ss. 35, 104, see 32 HALSBURY'S STATUTES (2nd Edn.) 451, 503. For the Food and Drugs Act, 1955, ss. 2, 108, see 35 HALSBURY'S STATUTES (2nd Edn.) 97, 188.

Cases referred to:

(1) *Du Cros* v. *Lambourne*, [1907] 1 K.B. 40; 76 L.J.K.B. 50; 95 L.T. 782; 70 J.P. 525; 23 T.L.R. 3; 21 Cox, C.C. 311; 5 L.G.R. 120, D.C.; 14 Digest (Repl.) 99, *633*.

(2) *Stacey* v. *Whitehurst* (1865), 18 C.B.N.S. 344; 5 New Rep. 368; 34 L.J.M.C. 94; 11 L.T. 710; 29 J.P. 136; 13 W.R. 384; 144 E.R. 477; 14 Digest (Repl.) 103, *658*.

(3) *R.* v. *Moland* (1843), 2 Mood. C.C. 276, C.C.R.; 14 Digest (Repl.) 81, *451*.

(4) *R.* v. *Greenwood* (1852), 2 Den. 453; 21 L.J.M.C. 127; 19 L.T.O.S. 191; 16 J.P. 356; 16 Jur. 390; 5 Cox, C.C. 521, C.C.R.; 14 Digest (Repl.) 81, *452*.

(5) *R.* v. *Burton* (1875), 32 L.T. 539; 39 J.P. 532; 13 Cox, C.C. 71, C.C.R.; 14 Digest (Repl.) 81, *453*.

(6) *R.* v. *Waudby*, [1895] 2 Q.B. 482; 64 L.J.M.C. 251; 73 L.T. 352; 59 J.P. 505; 44 W.R. 64; 11 T.L.R. 554; 39 Sol. Jo. 691; 18 Cox, C.C. 194; 15 R. 564, C.C.R.; 14 Digest (Repl.) 109, *740*.

(7) *R.* v. *De Marny*, [1907] 1 K.B. 388; 76 L.J.K.B. 210; 96 L.T. 159; 71 J.P. 14; 23 T.L.R. 221; 51 Sol. Jo. 146; 21 Cox, C.C. 371, C.C.R.; 14 Digest 99, *629*.

(8) *Benford* v. *Sims*, [1898] 2 Q.B. 641; 67 L.J.Q.B. 655; 78 L.T. 718; 47 W.R. 46; 14 T.L.R. 424; 42 Sol. Jo. 556; 19 Cox, C.C. 141, D.C.; 14 Digest (Repl.) 99, *630*.

(9) *R.* v. *Clayton* (1843), 1 Car. & Kir. 128; 14 Digest (Repl.) 81, *450*.

Also referred to in argument:

Cook v. *White*, [1896] 1 Q.B. 284; 65 L.J.M.C. 46; 74 L.T. 53; 60 J.P. 330; 44 W.R. 409; 12 T.L.R. 192; 40 Sol. Jo. 317; 18 Cox, C.C. 229, D.C.; 25 Digest 101, *241*.

Whitaker v. *Pomfret Bros.*, [1902] 1 K.B. 661; 71 L.J.K.B. 353; 86 L.T. 420; 66 J.P. 408; 50 W.R. 393; 18 T.L.R. 355; 20 Cox, C.C. 180, D.C.; 25 Digest 101, *242*.

Case Stated by justices for the borough of Richmond, Surrey.

On April 12, 1920, a complaint was preferred by the respondent, Robert A. Houghton, a duly appointed inspector under the Sale of Food and Drugs Act, 1875, against Arthur Frank Gore, of 71, Princess Road, Richmond, charging that he did, on Mar. 24, 1920, unlawfully sell to the prejudice of the respondent an article of food, to wit, port (flavour) wine, which was not of the nature, substance, and quality of the article demanded by the respondent, but was adulterated with 10½ grains of salicylic acid per pint, contrary to s. 6 of the Sale of Food and Drugs Act, 1875. At the hearing of the summons on April 29, 1920, Gore pleaded guilty. It was submitted on his behalf in mitigation, that he sold the article in question in the same condition as he received it from the manufacturers (the appellants), in ignorance that it contained salicylic acid in the quantity revealed by analysis. On this statement, the justices adjourned the case and suggested that the appellants should be summoned under s. 5 of the Summary Jurisdiction Act, 1848, for aiding and abetting the commission of the said offence.

On May 6, 1920, a complaint was preferred by the respondent against the appellants, H. Gould & Co., Ltd., that they did, on Mar. 24, 1920, unlawfully aid, abet, counsel, and procure Gore in the commission of the above offence. The summons issued on this complaint was made returnable on May 13, 1920. At the hearing of the summons, an objection was taken on behalf of the appellants that the proceedings were misconceived.

It was contended for the appellants that a summons for aiding and abetting an offence under s. 6 of the Sale of Food and Drugs Act, 1875, would not lie; that if such a complaint lay under s. 5 of the Summary Jurisdiction Act, 1848, the aider and abettor would be in a worse position than the principal offender both as regards the time for the institution of the proceedings and in regard to the time within which the summons must be returnable; that s. 19 of the Sale of Food and Drugs Act, 1899, limited the time for the institution of proceedings to twenty-eight days from the time of the purchase and provided that the summons should not be returnable in less time than fourteen days from the day on which it was served, and there must be served therewith a copy of any analyst's certificate on behalf of the prosecution, whereas under s. 11 of the Summary Jurisdiction Act, 1848, the proceedings could be commenced within six months and there was no obligation to serve a copy of any analyst's certificate obtained by the prosecution; that s. 5 of the Summary Jurisdiction Act, 1848, did not apply to offences where mens rea was not necessary to constitute an offence and that s. 25 of the Sale of Food and

Drugs Act, 1875, provided the means for proceeding against the parties from whom the seller purchased; that the sale to the person prejudiced created the offence and the person from whom the seller purchased weeks before the sale without a warranty could not be an aider and abettor; and that, if the proceedings were instituted under the Sale of Food and Drugs Act, 1875, they were bad as being out of time. For the respondent it was contended that the proceedings were not instituted under the Sale of Food and Drugs Act, 1875, but under s. 5 of the Summary Jurisdiction Act, 1848; that the proceedings were regular and within time; that, although this was the first case of aiding and abetting an offence under the Sale of Food and Drugs Acts, s. 5 of the Summary Jurisdiction Act, 1848, applied.

The justices were of opinion that s. 5 of the Summary Jurisdiction Act, 1848, applied, and they upheld the respondent's contention, but in view of the fact that the proceedings were novel and raised a question of importance they adjourned the hearing until the question raised should have been determined by the High Court. No evidence was given and there was no discussion as to the facts.

By the Summary Jurisdiction Act, 1848, s. 5:

> "Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable . . ."

By the Sale of Food and Drugs Act, 1899, s. 19:

> "(1) When an article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Acts in respect of the sale thereof, . . . shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

Hastings, K.C. (*Walter Frampton* with him), for the appellants.
G. Cecil Whiteley for the respondent.

Cur. adv. vult.

Dec. 21. **EARL OF READING, C.J.,** read the following judgment, in which he stated the facts, and continued: The facts have not yet been ascertained in this case, and it has not been established that the appellants did participate in the offence committed by Gore, but in the arguments before this court it has been assumed that evidence would be available to prove that the appellants aided and abetted, counselled or procured the commission of the offence of Gore. It is not, however, suggested that the appellants were in any sense present when Gore committed the offence; therefore, the part taken by the appellants would be that of accessories to or before the fact, and not that of principals in the second degree, and it cannot be disputed that, in misdemeanours (and treason), all who take part in the offence may be proceeded against as principals. Misdemeanour in this connection is not limited to indictable misdemeanours, for guilty participation in any offence punishable by summary conviction is a misdemeanour within this principle of law (*Du Cros* v. *Lambourne* (1)). It was admitted at the bar that the appellants could have been lawfully prosecuted as principals either together with Gore or before or after Gore's conviction, by virtue of the Summary Jurisdiction Act, 1848, s. 5, and the Accessories and Abettors Act, 1861, s. 8, and, I would add, under the common law, for the statutes are in this respect declaratory of the common law (*Du Cros* v. *Lambourne* (1), per LORD ALVERSTONE, [1907] 1 K.B. at p. 44). If the appellants had been convicted with Gore, or otherwise as principals, they, equally with Gore, would have been entitled to the protection of the twenty-eight days' limitation of time under the Sale of Food and Drugs Act, 1899, s. 19. So far no difficulty arises, but it is contended that this section has no application

to proceedings against the appellants for having committed a misdemeanour at common law—namely, aiding, abetting, counselling, or procuring Gore to commit an offence under s. 6 of the Sale of Food and Drugs Act, 1875. It is, therefore, contended that this limitation of time has no application to the present case, and that these proceedings could be instituted within six calendar months from the time when the matter of the complaint arose (Summary Jurisdiction Act, 1848, s. 11).

No authority can be cited for this proposition, and, in my judgment, it is unsound. The contention is that although the twenty-eight days' limitation of time would be a fatal objection if the appellants were charged as principals, it has no application to the present proceedings, because the appellants are charged with aiding and abetting, counselling and procuring. That means that, on precisely the same evidence, the appellants would be entitled to the benefit of the twenty-eight days' limitation of time if they were charged in the summons as principals, but would lose the benefit of it if they were charged as aiders, abettors, counsellors or procurers. This result would, in my judgment, be contrary to the common law and the statute law. The authorities show conclusively that, whatever the language used to denote the specific offence charged, or the part taken by the accused in the misdemeanour, the true principle of law is that expressed by WILLES, J., in *Stacey* v. *Whitehurst* (2) (18 C.B.N.S. at p. 355):

> "In cases of treason, and in offences which are less than felony, everyone who in cases of felony would be a principal in the second degree, or an accessory, is a principal"

—that is, as I understand it, that although in fact the accused has not committed the misdemeanour, but has only aided, abetted, or counselled, or procured its commission, yet he is to be treated in law as if he had taken the same part as the active perpetrator of the facts constituting the offence.

At a meeting of the judges held in Hilary Term, 1843, when considering *R.* v. *Moland* (3), all the judges were of opinion that, in misdemeanours and in treason, all who take part in the crime are principals. This law seems to have been well established long before 1843. In SIR MATTHEW HALE'S PLEAS OF THE CROWN, vol. 1, p. 613, ch. 55, treating of principals and accessories in felony, the learned author points out that in high treason all participators are principals, and then proceeds:

> "In cases that are criminal, but not capital, as in trespass, mayhem, or præmunire, there are no accessories, for all the accessories before are in the same degree as principals. . . . It remains, therefore, that the business of this title of principal and accessory refers only to felonies."

BLACKSTONE (COMMENTARIES, vol. 4, 21st Edn., p. 36) says:

> "In all crimes under the degree of felony, there are no accessories either before or after the fact; but all persons concerned therein, if guilty at all, are principals."

Again, in *R.* v. *Greenwood* (4), TALFOURD, J., held it clear that, in misdemeanours, an absent participator is a principal, but in view of certain decisions he reserved the case for the Court for Crown Cases Reserved, where his opinion was confirmed. POLLOCK, C.B., affirmed the law as expressed by TALFOURD, J. ERLE, J., said (5 Cox, C.C. at p. 523):

> "The principle on which the learned judge acted at the trial is, I apprehend, one of universal application; that all persons who are concerned in the commission of a misdemeanour are principals";

and the court was of opinion that, where decisions were not in accordance with this proposition, the judges had not borne in mind this difference in principle between cases of misdemeanour and cases of felony. In *R.* v. *Burton* (5), it was again held that, in misdemeanours, all participants are principals. It would appear

from the brief report that the court consisted of Kelly, C.B., Blackburn, Brett, Cleasby, and Archibald, JJ. In answer to the argument that the principal having been acquitted by the jury they could not convict Burton, who was an accessory only, Blacburn, J., said (13 Cox, C.C. at p. 75):

> "Is there such a person as an accessory in point of law in a misdemeanour? Both Summers and Burton were principals in this charge";

and the court treated the question as indisputably admitting only of a negative answer and affirmed the conviction.

In recent years this principle of law has been several times considered by the King's Bench Division. In *R.* v. *Waudby* (6), Lord Russell of Killowen, C.J., said ([1895] 2 Q.B. at p. 483):

> "Where a person is charged with aiding and abetting, if he is found guilty of aiding and abetting a misdemeanour, he is guilty as a principal, for there are no degrees of guilt in misdemeanour,"

and held that, there being no secondary guilt in misdemeanour, the prisoner was a principal offender. All the members of the court concurred. *Du Cros* v. *Lambourne* (1) is a direct authority of this court for the proposition that a person who has aided and abetted the commission of an offence punishable on summary conviction may, under the Summary Jurisdiction Act, 1848, s. 5, be convicted on an information which charges him with having committed the offence as principal offender. Lord Alverstone, C.J., said ([1907] 1 K.B. at p. 43):

> "It is important . . . to bear in mind that in the case of crimes other than felonies there is no distinction between a principal offender and aiders and abettors . . . there is no such person as an accessory in point of law in a misdemeanour. . . . Keeping in view the fundamental distinction between felonies and misdemeanours and the impossibility of there being in the case of misdemeanours accessories or aiders and abettors as distinct from principals, one finds that s. 5 of the Act of 1848 provides that a person aiding and abetting may be charged with the principal offender and is liable to the same punishment."

Ridley and Darling, JJ., agreed. In a later case, *R.* v. *De Marny* (7), Lord Alverstone, in a court of five judges, again affirmed the proposition that, in misdemeanours, persons who aid and abet, counsel or procure the commission of an offence are themselves principal offenders. The other four judges concurred in his opinion and the reasons for this decision.

From these authorities it is, in my judgment, conclusively established that an accessory before the fact to the commission of a misdemeanour is to be regarded in law for the purpose of conviction as a principal offender. No doubt the terms "accessory" and "principal in the second degree" are sometimes used in reference to cases of misdemeanour, but they are so used for the convenient purpose of compendious reference, and to distinguish between the actual perpetrator of the facts, often called the principal offender, and other participators in the misdemeanour who take part by aiding and abetting or counselling or procuring the commission of the offence. Again, when considering the sentence to be imposed, these are convenient expressions to distinguish between the degrees of actual participation by the various offenders; but for the purposes of conviction in misdemeanours the law is that all are to be regarded as principals, whether termed principal offenders, aiders or abettors, or counsellors or procurers.

Bearing this proposition in mind, it follows, in my judgment, that the justices came to a wrong conclusion and should have upheld the appellants' objection. However apt the words in the summons may be to describe the actual part taken by the appellants in the commission of the misdemeanour, the charge against them is to be treated in law as the same in degree as that charged against Gore, namely, that of principal offenders. By the Accessories and Abettors Act, 1861,

s. 8, aiders and abettors "shall be liable" to be tried and punished as principal offenders. The words "shall be liable" import that the participators in the misdemeanour are to be regarded as having committed the same offence in law as the principal offender. Section 5 of the Summary Jurisdiction Act, 1848, is to the same effect. It is to be observed that this s. 5 did not create an offence, as the magistrates seem to have thought, but merely regulated procedure and punishment. Once it is established that the appellants aided and abetted, counselled or procured the sale by Gore of the article of food contrary to the provisions of the Sale of Food and Drugs Act, 1875, s. 6, the appellants are to be treated as principal offenders with Gore. As the respondent purchased the article of food for test purposes, the limitation prescribed is applicable to them as to Gore. It follows that these proceedings are a prosecution under the Sale of Food and Drugs Acts in respect of the sale of an article of food purchased for test purposes, and that s. 19 of the Sale of Food and Drugs Act, 1899, is, by reason of the proceedings having been instituted after the expiration of twenty-eight days from the time of purchase, a fatal objection to the prosecution.

In my judgment, this appeal must be allowed with costs, and the case remitted to the justices to dismiss the summons.

DARLING, J., read the following judgment: I agree that the appellants may be charged as principals and punished as such; but I think it is manifest that they might lawfully be charged, tried, and punished as being what they really always were, and still remain, accessories before the fact—that is, persons aiding and abetting in the commission of a misdemeanour. The appellants were charged with being accessories to the offence against s. 6 of the Sale of Food and Drugs Act, 1875, committed by Gore, who had sold the wine bought by him of the appellants. Gore had been guilty of an offence in doing that, and I think that the appellants were, properly speaking, accessories, for BLACKSTONE states (COMMENTARIES (21st Edn.) vol. 4, p. 35) that

> "An accessory is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed."

He also writes (ibid. at p. 36) that

> "In all crimes under the degree of felony, there are no accessories either before or after the fact; but all persons concerned therein, if guilty at all, are principals: the same rule holding with regard to the highest and lowest offences; though upon different reasons. In treason all are principals, propter odium delicti; in trespass all are principals, because the law, quae de minimis non curat, does not descend to distinguish the different shades of guilt in petty misdemeanours."

Even from this it would appear that there really are accessories in misdemeanours, but that, as they cannot be separated from their principals in the matter punishment, it is not worth while to regard inferior criminals through a microscope, or to treat them scientifically, as felons were treated when most felonies were capital offences so far as the principals were concerned. It is commonly said that there are no accessories in either treason or misdemeanour, but I think that this is a loose and misleading, though often sufficient, statement of the law. I know of no better authority on such a subject as this than SIR MICHAEL FOSTER'S work on CROWN LAW, and there (3rd. Edn. p. 344) he writes thus:

> "LORD CHIEF JUSTICE HALE spendeth a whole chapter on this point, which he entitleth 'Concerning principals and accessories in high treason.' And though, in conformity to the established mode of speaking, he calleth every person who can any way be considered as an accomplice in treason a principal in it; yet, when he cometh to speak of the course and order to be observed in the prosecution of the offenders, he considereth those accomplices whose supposed guilt is

connected with and dependeth upon the real guilt of another in the light of mere accessories; and stateth a few cases by way of illustration and proof."

And again (ibid., at p. 345), FOSTER states, referring to HALE, C.J.:

> "The same rule of equity and natural justice the learned judge in another place applieth to the case of felonious escapes and rescues, and addeth, 'If the principal offender be convicted and hath his clergy, I think the gaoler or rescuer shall never be put to answer the escape or rescue, as the accessory where the principal hath his clergy is thereby discharged, for the rescuer and officer are a kind of accessories.' He calleth them a kind of accessories, because there can be no felonious escape or rescue where no felony had been previously committed; but in strict, legal propriety they are not accessories to the original felony; for though a man should be committed for many felonies, yet the escape or rescue is considered as one single felony and is so charged. With regard to a person knowingly receiving and harbouring a traitor, the learned judge, in the place lately cited, argueth, That though he is in the eye of the law a principal traitor and shall not be said to be an accessory, yet thus much he partaketh of an accessory, his indictment must be special of the receipt and not of the principal treason. If he is indicted by a several indictment, he shall not be tried till the principal be convicted; if in the same indictment with the principal, the jury must be charged to inquire first of the principal offender, and if they find him guilty, then of the receipt; and if the principal be not guilty, then to acquit both; for though in the eye of the law they are both principals in treason, yet in truth he (the receiver) is so far an accessory that he cannot be guilty if the principal be innocent. In the case of Mrs. Lisle, whose hard fate it was to fall into the hands of perhaps the worst judge that ever disgraced Westminster Hall, no regard was paid to this doctrine."

One must be careful even now to give no cause to be classed with LORD JEFFREYS. I agree with a learned writer (9 HALSBURY'S LAWS (1st Edn.) p. 248, art. 526) who has stated that accessories in misdemeanour may be "reckoned" as principals for certain purposes, but I hold that as a principal does not become an accessory when an accessory is indicted as a principal with him, so an accessory does not cease to be an accessory although he may be charged as a principal.

It seems to me, therefore, that for some purposes of indictment and procedure the law recognises accessories as such, in cases of high treason even, and I am of opinion that for similar purposes they are to be recognised in cases of misdemeanour. This opinion appears to me to be confirmed by the very words of the Accessories and Abettors Act, 1861, itself, where, in dealing with misdemeanours specifically and alone, in s. 8, these words are used:

> "Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour . . . shall be liable to be tried, indicted, and punished as a principal offender."

That statute was held, in *Du Cros* v. *Lambourne* (1), to be declaratory of the common law, and it appears to me to recognise the distinction in fact and in law between principals and accessories as existing even in cases of misdemeanour, and then to enact—not that accessories are truly principals, but that they "shall be liable" to be treated as though they were. From this, it follows that an accessory may be—and in some cases ought to be—indicted and tried separately as such, be the charge high treason or mere misdemeanour. Such a course was taken in this case. The appellants were charged with the common law misdemeanour of aiding and abetting Gore in the commission of a statutory offence—i.e., a violation of s. 6 of the Sale of Food and Drugs Act, 1875. In my opinion, this course is in accordance with law. But I think that this particular prosecution is, nevertheless, one "under the Sale of Food and Drugs Acts," and that, therefore, the appellants are entitled to the same protection in regard to time limit as is given by s. 19 of the Sale of Food and Drugs Act, 1899.

ACTON, J.—I agree with my Lord. In this case, in the circumstances already stated by my Lord, the summons against the appellants for "aiding and abetting, &c.," was made returnable on May 13, 1920, and on that date the appellants appeared to answer the complaint. Objection was then taken on behalf of the appellants to the proceedings, and that objection, so far as is material to the present decision, was as follows: It was contended that the prosecution of the appellants (no less than that of Gore) could not be instituted after the expiration of twenty-eight days from Mar. 24, 1920, and, accordingly, that, since it had not been instituted until May 6, 1920, it could not be maintained. It was said in short that the proceedings were bad as having been instituted out of time. The answer to this objection on behalf of the respondent was that the offence charged against the appellants was an offence at common law, for which the appellants were, by the provisions of s. 5 and s. 11 of the Summary Jurisdiction Act, 1848, liable to be proceeded against at any time within six months from "the time when the matter of such complaint or information . . . arose"—that is to say, at any time within six months from Mar. 24, 1920. It was said, therefore, that, although admittedly the prosecution of Gore, as the person actually selling, could not have been maintained if instituted after the expiration of twenty-eight days from Mar. 24, 1920, the prosecution of the appellants as aiders and abettors of Gore in the commission of the offence committed by him could be lawfully and properly instituted at any time within six months from Mar. 24, 1920.

In my opinion, this contention cannot be supported. A person who aids and abets the commission of any misdemeanour (and this in this context includes an offence punishable on summary conviction) is "liable to be proceeded against in every respect as if he were a principal offender" per CHANNELL, J., in *Benford* v. *Sims* (8) ([1898] 2 Q.B. at p. 646); s. 5 of the Summary Jurisdiction Act, 1848; and compare the Accessories and Abettors Act, 1861, s. 8. He is, moreover, for all purposes of procedure, conviction and punishment to be deemed to be in point of law a principal: *Du Cros* v. *Lambourne* (1), per LORD ALVERSTONE, C.J. ([1907] 1 K.B. at p. 44), citing with approval BURN'S JUSTICE OF THE PEACE (30th Edn.) at p. 1008:

> "In crimes below the degree of felony there can be no accessories; but all persons guilty therein, if concerned at all, are principals"

See also *R.* v. *Burton* (5). Accordingly, if a person is charged with any crime "below the degree of felony" as a principal offender, and the evidence against him shows that he was absent when the offence was committed, but that he aided or abetted its commission, or caused or procured it to be committed, the person so charged may still be convicted as a principal offender: *R.* v. *Clayton* (9), per WILLIAMS, J., who in summing-up said: "In misdemeanours and in treason all who take part in the crime are principals": *R.* v. *Moland* (3) (2) Mood. C.C. at p. 277), where it appears that a meeting of the judges in Hilary Term, 1843, determined that "in misdemeanours all parties are principals, whether present or not." There is no distinction in point of law for the purposes of prosecution and conviction between him who actually perpetrated the offence "below the degree of felony" and him who, in a case of felony, would be an accessory before the fact.

These appear to be the principles which have to be applied to the present case. Section 5 of the Summary Jurisdiction Act, 1848, provides that

> "Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same [that is to say, the offence the commission of which is aided, abetted, counselled, or procured] either together with the principal offender or before or after his conviction . . ."

Beyond question, the appellants were liable to be proceeded against as principals, and, as has been shown, are for all purposes of prosecution and conviction to be deemed to be in point of law principals in the doing of an act which is constituted an offence by s. 6 of the Sale of Food and Drugs Act, 1875. The offence in this

instance was the sale to the respondent by Gore of an adulterated article of food purchased from him for test purposes, and s. 19 of the Sale of Food and Drugs Act, 1899, provides that any prosecution in respect of such sale shall not be instituted after the expiration of twenty-eight days from the time of the purchase. In my opinion, for the reasons already given, the prosecution of the appellants was a prosecution under the Sale of Food and Drugs Acts in respect of the sale by Gore to the respondent, in the commission of which offence the appellants must, for the purposes of a prosecution, be deemed to be principals not less than Gore. The prosecution was, therefore, out of time and could not be maintained. As was pointed out by counsel for the appellants, to hold otherwise would be to hold that some separate and distinct offence is created by s. 5 of the Summary Jurisdiction Act, 1848, whereas that is really a section dealing merely with procedure. The contention of the respondent in effect came to this, that whether a defendant in the position of the appellants is or is not entitled to the protection of s. 19 of the Sale of Food and Drugs Act, 1899, may depend on nothing more than the mere choice of the words employed in describing the offence with which that defendant is charged, though a person "guilty therein, if concerned at all," must always be in point of law a principal. This, in my view, is a contention which cannot be supported.

The appeal must be allowed and the Case sent back with an intimation that the opinion expressed by the justices in the Special Case (for they gave no decision) is erroneous in law.

Appeal allowed and Case remitted.

Solicitors: *Neve, Beck & Kirby*; *Philbrick & Co.*, for *T. W. Weeding*, Kingston-on-Thames.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

LANGRICK *v.* LANGRICK AND FUNNELL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), February 18, 19, 1920]

[Reported [1920] P. 90; 89 L.J.P. 114; 123 L.T. 94; 36 T.L.R. 308 64 Sol. Jo. 531]

Divorce—Costs—Damages—Payment by co-respondent—No knowledge that respondent married woman—Means of knowledge available to co-respondent—Co-respondent careless of right or wrong—Assessment of damages—Matrimonial Causes Act, 1857 (20 *& 21 Vict., c.* 85), *s.* 33.

The divorce court may order a co-respondent found guilty of adultery with the respondent to pay damages and costs to the petitioner even if the co-respondent did not at the time of the commission of the adultery know that the respondent was a married woman. A co-respondent who, careless of right or wrong, commits adultery with a woman whom he ought to have realised was married, is liable, if the woman is not worthless and if her husband was blameless, to be condemned in substantial damages. In assessing damages the court will consider the injury to the husband, but need not necessarily assess the value of the wife.

Notes. The Matrimonial Causes Act, 1857, has been repealed: a general jurisdiction as to costs is now conferred on, inter alia, the Divorce Division by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1). The right to claim damages is now contained in the Matrimonial Causes Act, 1950, s. 30.

Considered: *Gibbs* v. *Gibbs and Heathcote* (1920), 123 L.T. 206. Explained: *Taylor* v. *Taylor and Kraft* (1920), 123 L.T. 112. Followed: *Lycett-Green* v. *Lycett-Green and Puy*, [1956] 3 All E.R. 97; Applied: *Jackson* v. *Jackson*, [1960] 3 All E.R. 621.

As to damages for adultery see 12 HALSBURY'S LAWS (3rd Edn.) 388–390, as to payment of costs by a co-respondent see ibid., 402–405, and for cases see 27 DIGEST (Repl.) 545–551 and 572–577. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1), and the Matrimonial Causes Act, 1950, see 18 and 29 HALSBURY'S STATUTES (2nd Edn.) pp. 486 and 388 respectively.

Case referred to :

(1) *Lord* v. *Lord and Lambert*, [1900] P. 297; 69 L.J.P. 54; 27 Digest (Repl.) 547, *4954*.

Petition by a husband for dissolution of marriage on the ground of the respondent wife's adultery with the co-respondent, from whom he claimed damages.

The petitioner was a sergeant in the army, and the co-respondent a lieutenant in the same regiment. The respondent and co-respondent had filed answers denying adultery, but at the hearing withdrew these pleas, and admitted adultery. The co-respondent, however, denied having known that the respondent was a married woman, and said she had introduced herself to him as Miss Amy Cook. The respondent gave evidence in support of this statement. According to the evidence given by her and the co-respondent they met in May, 1918, at a hotel in Hull, and acts of adultery occurred at the petitioner's house in Home Street, Hull, which was described by the respondent to the co-respondent as her sister's house, but which contained large wedding photographs of the petitioner and respondent, which the co-respondent saw, and at a hotel at New Holland, where they passed a night together in June, 1918, as Mr. and Mrs. Irving.

Le Bas, for the co-respondent.

Sir Patrick Rose Innes, K.C. (with him *J. H. Watts*), for the petitioner.

SIR HENRY DUKE, P.—The material questions in this case affect the judgment I ought to give in respect of the petitioner's claim to damages and costs. The adultery of the respondent and the co-respondent is beyond all question. It has been specifically admitted with indubitable truth in the witness-box by both the respondent and co-respondent.

The contest has been waged mainly by counsel for the co-respondent with a view to establishing two things in favour of the co-respondent, first that the co-respondent was not guilty of the very grave offence in a military man of seducing the wife of his military subordinate, and, second, that he was not guilty of adultery with knowledge that the person with whom he committed adultery was a married woman—two separate matters. The allegation of knowledge, so far as it is immediately relevant to the issues in the case, and is not a question of military conduct, affects both the claim for damages and the claim for costs. I propose presently to say a word or two with regard to each aspect of the matter.

I dispose, in the first instance, of that which was said by counsel who conducted the co-respondent's case with great moderation and great ability to be the real ground for his strenuous resistance to the suit of the petitioner. If it had been established that the co-respondent, an officer in the regiment in which the petitioner is a non-commissioned officer, had had guilty knowledge to the full extent to which I was asked in the first instance, and I am not sure whether I am not still asked by counsel for the petitioner to assume that he had such knowledge, obviously his conduct would be that of a man who was unfit to bear a commission or to associate with gentlemen. It is my duty to express the conclusion at which I have arrived upon that part of the case. It would not be fair to either of the parties that I should not express that opinion. The primâ facie case, which was made, was that the respondent had been frequently at the camp of the battalion in which her husband was a sergeant—a sergeant of old standing, something like ten years, I think—and that the co-respondent was an officer of the regiment, and was there, and was likely to become aware in the ordinary course of the life at the camp who she was. The facts called for an answer from the co-respondent in respect of that matter, but I accept

absolutely the statement of the co-respondent that he did not personally know the petitioner until after the events had happened, on which this petition is founded, and that he had no personal knowledge of the respondent before the events which are in question in this case, and that he had no knowledge that she was the wife of a sergeant in the battalion in which he either serves or had served. I need say no more upon that part of the matter.

I pass on to deal with the case as it invokes the jurisdiction of this court in respect of damages and costs. It has often been said that the jurisdiction of the court to award damages, and the jurisdiction to award costs in suits such as this, are jurisdictions which differ to some extent in their character, and are not entirely governed by the same considerations. Persons who have looked merely at the exercise of the discretion have formed the erroneous view that there is something capricious and irrational in the mode, in which these questions of damages and costs in cases of adultery are disposed of by the court. There is nothing capricious or irrational. It may be worth while, as the subject is being discussed, and as at the present time there are many cases in which, unhappily, damages for adultery have to be claimed, that I should express concisely the view, which I believe to be the true view with regard to both these matters.

First, with regard to damages. The claim for damages in a suit founded upon adultery is a claim, the right to which is established by the Matrimonial Causes Act, 1857. It is established in place of a cause of action, which existed at common law, the cause of action namely, of a married man for the criminal conversation of a defendant with the wife of the plaintiff. That cause of action was taken away by the Act of 1857, and this claim for damages in a suit for divorce was deliberately substituted. The grounds on which the damages may be recovered are the common law grounds, on which damages might be recovered for criminal conversation. The ground of damage there was that the plaintiff had certain lawful rights, and that the defendant had infringed them, whereby the plaintiff had suffered damage, and when the necessary allegations were established, the plaintiff was entitled to a verdict for damages, which might be a verdict of one farthing or might be a verdict, as sometimes happened in such cases, for a very large sum, but on obtaining his verdict he recovered such costs as the general law with regard to costs gave him in an action at common law. He was not deprived of costs, he was not given costs, except under the limitation under which a man could recover costs in a common law action. He may still recover a sum of money for the wrong, which is measured by the same process by which it was measured at law before the Act of 1857.

With regard to costs, his claim is no longer subject in respect of damages, which may be assessed, to the statutory or other rules of the common law, which regulated costs in the action for criminal conversation. His right to recover costs is founded on s. 34 of the Matrimonial Causes Act, 1857, [now replaced in more general terms by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1)] which directs generally that

> "whenever in a petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings."

That is a general rule which invests the court, in the case of a co-respondent found guilty of adultery, with judicial discretion to determine whether he shall pay any and, if any, what part of the costs of the suit. This applies to the claim for damages separately, if need be, and it applies to the suit generally; and if the same considerations affect the suit generally and the claim for damages, the discretion of the court will be exercised on the one set of facts, which conclude the general suit. If you have the fairly common case where the co-respondent was well aware of the identity of the respondent and was guilty of adultery with the respondent with knowledge of the facts, the same causes which lead to a judgment against him for

costs of the suit lead to a judgment against him for the costs of that part of the suit which relates to the recovery of damages. He is a wrongdoer in part and in whole, and must be dealt with accordingly in regard to the whole matter. As to the costs of the suit where there is no claim for damages, which had become a comparatively common case, but in the present state of things, as I said on a recent occasion, ought not to be regarded as necessarily the ordinary condition of the suit, the court, on finding adultery proved against a co-respondent, has a judicial discretion, on which it has to determine whether he shall pay the costs or part of the costs of the suit. I am not prepared at present to say that in any case in which the co-respondent was not aware that the respondent was a married woman, he must escape from costs. In my view that is an attempted limitation of the discretion, which the legislature has reposed in the court to which I ought not to assent. Every case must be judged upon its facts, and the discretion with regard to the payment of costs, both as to claims for damages and as to the suit generally, must be a judicial discretion, as I understand the term, exercised with regard to the facts of the particular case. I mentioned that because I have seen it often treated, and for many years have been accustomed to see it treated, as one of the commonplaces of the divorce jurisdiction, that if the petitioner had not conclusive proof or at any rate unless there was a strong case to show knowledge on the part of the co-respondent, the co-respondent must inevitably be discharged from the costs of the suit. I deal with these matters in detail not because they are matters as to which there is any mystery, but because they are matters arising in the every-day work of the court, and it is proper that the members of the profession, and particularly the members of the Bar who practice regularly in the court, should be informed of the grounds on which the jurisdiction of the court is being exercised.

I add one other word. I find in *Lord* v. *Lord and Lambert* (1), in which LORD GORELL considered the questions both of the jurisdiction as to damages and the jurisdiction as to costs, that he expressed the view in the course of the discussion of the case, that there may be damages without proof—he did not say how much damages—but it is possible that there may be damages without proof of guilty knowledge, and that the control of the court over the costs in a case, where there was a question as to knowledge, is a discretionary control. The argument was submitted to the learned judge that the petitioner was not entitled to ask for costs, the petitioner having no evidence as to the co-respondent's knowledge, and LORD GORELL's reply to that was, "That is discretionary." I refer that opinion of LORD GORELL to the section to which I have already referred, which deals with the power to give costs against a co-respondent in whole or in part, where he has, in fact, been guilty of adultery.

I come to deal with the particular facts in this case, and it is material in the case, quite apart from the question which arises on the conflict of evidence as to the character of the parties whose evidence is in conflict, but with regard to the issues in the case itself, to come to a clear conclusion as to what was the amount of knowledge, and what was the acount of notice, of the co-respondent at the time he was guilty of adultery with the respondent. I have put out of the case the allegations of express knowledge by reason of the facts connected with the military service of the petitioner and the co-respondent and the resort of the respondent to the camp, and I come to the facts which relate to the conduct of the parties themselves. I accept the evidence of the respondent and the co-respondent that the first occasion of their meeting was in one of the rooms open to the public in a hotel at Hull. I think it was called the Cross Keys Hotel. I accept the evidence of the co-respondent as to the manner in which the association began. I have considered the demeanour and bearing, and perhaps I ought to add the general aspect of the respondent as she appeared in the witness-box, and her account of herself, and the mode in which her case with her help was shaped in the court, and I come to the conclusion that at the Cross Keys Hotel she and her friend were there not unwilling to meet advances on the part of a man in the position—

A the apparent or real position—of the co-respondent and of the naval man who was with him. I accept her evidence that on that night the co-respondent accompanied her to the petitioner's home at Hull, and there committed adultery with her. I accept her evidence that adultery took place on two occasions in the petitioner's house. I accept the evidence of both of them, and indeed there is no question about it, that they went away together to spend a time at the Yarborough B Hotel, and I come to the conclusion that they went there in order that they might commit adultery.

The matter which raises the question in the case is the matter of the communications between the respondent and the co-respondent, what name she gave him, what story she told him, and matters of that kind. I do not know who is telling the true story about that, and it is not necessary that I should determine that C in my view of the facts. I have strong suspicions as to how the thing is, but to my mind I have something much more trustworthy than an uncertain conclusion upon conversations, which are the subject of a dispute, namely, the conduct of the parties. Now what do I find with regard to the conduct of the parties? This petitioner, against whom nobody with any warrant for it has made any imputation, is a non-commissioned officer who, I am satisfied, has held his stripes and deserved D to hold them. He is a husband whose wife, according to her own letters and her own evidence, regarded the discovery of her guilt as a great trouble, and I am satisfied that he was a man who did not deserve the reproaches which were levelled at him, properly addressed to him by way of inquiry by learned counsel. In his home, in which, two or three years before, on his marriage, the petitioner had installed the respondent, she says with some assistance of hers, the co-respondent E found himself. Now what did the home tell? In the living room of the home were two photographs, one of the woman who was ready to commit adultery with him, as a bride, in her wedding dress, beside her husband, and another of a group, the parties recently married, the bride in her wedding dress, the husband in his military uniform with his military friend and with a civilian friend. Here was a home, apparently a decent, comfortable home, which was maintained at any F rate as to the substance of it out of this man's earnings as a soldier, separation allowance and so forth, and it may be to some extent partly by the earnings of the respondent. In that home the co-respondent found himself, with evidence unmistakable as to the position in which he was, and if he was so blinded by the animal instincts, which took him there, that he could not come to the conclusion, to which a rational decent man would come with regard to the position in which he was, G he must not complain if common-sense people, proceeding upon reasonable grounds, come to the conclusion that if he did not know he was in the home of another man, he ought to have, for that is the position in which he was. He had the fullest means of knowledge. He committed adultery there again. I am satisfied that he committed adultery there again. He took the woman, whose portrait was on the walls of that home, beside her husband, to a hotel, and he committed adultery H with her again at a hotel, and that was done by common assignation between them. He concealed all possibility of their being tracked by giving an invented name for himself and for the woman, and an invented address, and he described her as his own wife, and he says she bought a wedding ring.

I pay no attention to these niceties of what she said to him or he said to her. I In my judgment, if a man chooses to go abroad, and careless of right or wrong, commits adultery with a woman, whom any person of common sense could see was probably a married woman, he must take the consequences. I find, therefore, that on the ground of the means of knowledge, which the co-respondent had before his eyes, he was not merely guilty of adultery with the respondent, but that his adultery was such as ought to carry with it proper redress (it cannot be compensation) to the petitioner for the wrong he has done. I look at the petitioner's position in life. I do not assess the damages at the value of a wife. There you have to enter into all kinds of questions moral and metaphysical, which the court does

not have to consider. Here was a man, who, not late in his life, but when he was a non-commissioned officer of many years standing, had set up a home, and it was broken up, at any rate partly by the co-respondent, by the guilt of his wife, and her adulterer. The home was broken-up. The man was exposed to the ignominy which a man suffers, especially when he is treated in that way without any fault on his own part, and damage must be assessed with regard to this. It is suggested that the woman was going about as a common prostitute. The conduct of the co-respondent shows that that is not true. The conduct of the co-respondent shows that at the time he was writing letters to her in July he was a wooer, not a purchaser. That throws some light on the damage suffered by the petitioner. As I say, the petitioner was not the author of his own wrongs. If he had been, at common law he would have recovered no damage; he might have got a farthing —he would recover no more. He had not a wife who was a mere troll upon the town, a ready prey for everyone who came that way, to be readily bought. I am satisfied that that was not the position. In either of these cases the damages might be cut down to a very small figure indeed. They must be regarded in such a case as this as serious damages. The petitioner has claimed £150. I have to consider what he is pretty sure to get. I have said before that if you have some knowledge of what the position of the co-respondent is, it is not wise to assess to the petitioner such damages as defeat the object of damages. The co-respondent is an officer in His Majesty's service. He is a young and active man. I say nothing about his matrimonial history; that is an affair with which I have nothing to do except so far as it reflects on his general conduct. Looking at the matter in the best light I can, and considering the wrong which he has done to the petitioner, and the damage it is to a man to suffer such a wrong, both materially and personally, I think if I assess the damages at £125 I shall assess them at a very lenient basis. I assess the damages at £125. I have no doubt I ought to exercise the discretion of the court by ordering the co-respondent to pay the costs. There will be a decree, an order for damages at £125 to be paid into court within fourteen days and an order for costs. If the co-respondent is well advised he will consider whether he shall propose terms to the petitioner, which will lead to the giving to him of a reasonable period of time for the bringing of those damages, or the balance of them, into court in case he has not them in hand.

Solicitors: *C. J. Smith & Hudson; Collyer Bristow & Co.*

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

Re OLYMPIC FIRE AND GENERAL REINSURANCE CO., LTD. Ex parte POLE

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), June 2, 1920]

[Reported [1920] 2 Ch. 341; 89 L.J.Ch. 544; 123 L.T. 786; 36 T.L.R. 691]

Company—Underwriting—Sub-underwriting—Irrevocable authority by sub-underwriter to underwriters to apply for shares—Authority coupled with an interest—No direct application for shares by sub-underwriter to company—Right of sub-underwriter to withdraw authority before receipt of notice of allotment—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32 (1) (*a*).

On Dec. 1, 1919, the applicant delivered to a trust company which was underwriting 150,000 shares in a company that was incorporated on that date a sub-underwriting letter stating that he was a subscriber for 10,000 shares and declaring that the contract and his application should be irrevocable on his part and, notwithstanding any withdrawal on his part and/or any repudiation of his responsibility thereunder, should be sufficient to authorise the directors of the company to allot to him the shares mentioned and to enter his name on the register of members in respect thereof. The underwriters endorsed their acceptance on the letter. No direct application for the shares was made by the applicant to the underwriters or to the company, but a cheque was given for the amount of the deposit on the shares. The underwriters made an oral application for their due proportion of the shares of the company, and the latter allotted the shares accordingly, but before receiving notice of the allotment of shares to him the applicant purported to withdraw his sub-underwriting letter, and applied, under s. 32 (1) (a) of the Companies (Consolidation) Act, 1908 [now Companies Act, 1948, s. 116 (1) (a)], to rectify the register of members by removing his name as the holder of shares.

Held: although there was no contract with regard to the shares between the applicant and the company, the authority conferred on the underwriters by the applicant in the sub-underwriting letter was an authority coupled with an interest in the person to whom it was given, for the letter, if carried into effect, would relieve the underwriters of their liability to the extent of the liability undertaken by the applicant, and, therefore, for that reason, and in view of the terms of the letter, the applicant's offer to sub-underwrite the shares was irrevocable and his application for rectification of the company's register must be dismissed.

Re Hannan's Empress Gold Mining & Development Co., Carmichael's Case (1), [1896] 2 Ch. 643, applied.

Notes. Referred: *Re Greater Britain Insurance Corpn., Ex parte Brockdorff* (1920), 124 L.T. 194.

As to underwriting and sub-underwriting see 6 Halsbury's Laws (3rd Edn.) 146–149, and for cases see 9 Digest (Repl.) 183 et seq. For Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *Re Hannan's Empress Gold Mining and Development Co., Carmichael's Case*, [1896] 2 Ch. 643; 65 L.J.Ch. 902; 75 L.T. 45, C.A.; 9 Digest (Repl.) 188, *1213*.

(2) *Re National Savings Bank Association, Hebb's Case* (1867), L.R. 4 Eq. 9; 36 L.J.Ch. 748; 16 L.T. 308; 15 W.R. 754; 9 Digest (Repl.) 271, *1710*.

Appeal from an order made by P. O. Lawrence, J., on a motion by the applicant, one Pole, under s. 32 of the Companies (Consolidation) Act, 1908, for rectification of the register of the Olympic Fire and General Reinsurance Co., Ltd.

The company was incorporated on Dec. 1, 1919, with a capital of £400,000 divided into shares of £1 each, of which 350,000 were offered immediately for public subscription. By a contract made between the company and the Angel Court Trust, Ltd., and dated Dec. 3, 1919, the trust agreed to underwrite 150,000 shares and the company agreed that any applications by the public for shares which were duly allowed should be applied in relief of the trust company's underwriting obligation. The company agreed (a) to pay three per cent. commission on the nominal value of shares underwritten, (b) to pay within seven days after the first general allotment a sum of £12,500 in cash, and (c) to repay the sum of £20,000 which the trust company had advanced to procure the registration of the company and other expenses connected with the promotion. In anticipation of the execution of this underwriting agreement, the trust had procured a number of sub-underwriting letters to be signed by various persons, of whom Mr. Pole was one. The sub-underwriting letter signed by Mr. Pole was addressed to the trust, and dated Dec. 1, 1919. Omitting formal parts, it was as follows:

(1) "For the consideration below stated we agree to subscribe at par or procure responsible subscribers to your satisfaction for 10,000 shares of £1 each, being part of the shares which are to be offered [by the Olympic company] for subscription, and to pay for the same in the manner and on the conditions and subject to the terms to be named in the prospectus to be filed with the Registrar of Joint Stock Companies prior to the same being issued to the public under the above title or any modification thereof. We agree to be bound by the terms of such prospectus notwithstanding any variation between the same and any draft or proof copy thereof produced to us on or prior to our making this contract. We now hand you application for the shares hereby underwritten by us, together with cheque for £1,250, being deposit of 2s. 6d. per share payable on such shares. (2) If on or before the closing of the subscription list, the date and time for which closing the directors shall determine, there are 150,000 shares of the above issue bonâ fide and duly applied for by the public, then no allotment is to be made to us in respect of this contract, and the company is to return to us our cheque or the proceeds thereof. (3) If within such time as provided in cl. 2 less than such 150,000 shares are applied for by the public, then we are only to be allotted not more than our proportion of the deficiency between the amount so subscribed for by the public and such 150,000 shares, having regard to the proportion which the number of shares hereby underwritten by us bears to 150,000 shares. (4) You are to pay to us a commission of 3 per cent. in cash upon the total shares hereby underwritten by us, such commission to be payable within fourteen days after payment by us of the moneys (if any) payable on allotment in respect of the shares allotted to us. (5) This contract and our said application shall be irrevocable on our part, and this contract shall notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form be sufficient to authorise and empower the directors to allot to us the above-mentioned shares and enter our name on the register of members in respect thereof."

(The use of the plural style in this letter is explained by the fact that a printed form was utilised, which form was no doubt prepared for signature by a firm or by more than one person).

Mr. Pole handed this letter to the trust with his cheque for £1,250 which they paid into their bank, but he did not hand them the application form, nor did he apply to the company for the shares. On Dec. 3 the underwriters indorsed their formal acceptance on the letter. The issue was not a success, and nineteen-thirtieths of the amount underwritten had to be taken up by the underwriters. On Dec. 16, therefore, the trust verbally applied in their own name and those of the sub-underwriters (including Mr. Pole) to the company for the allotment of

95,000 shares. On the same day the company went to allotment and allotted 6,334 shares to Mr. Pole, being his proportion of 10,000 shares under his sub-underwriting contract. On Dec. 22, Mr. Pole wrote to the company withdrawing his application for shares and demanding the return of £1,250 paid on application. The company did not answer the letter, and on Dec. 29 sent him a formal notice of allotment. Mr. Pole then brought this motion under s. 32 of the Companies (Consolidation) Act, 1908, for rectification of the register by removing his name and for repayment of £1,250 on the ground that there was never any contract between himself and the company (i) because he had not applied for them himself nor authorised the trust to apply for them on his behalf, and (ii) because, even if the application by the trust was equivalent to an action by himself, he had withdrawn his application before receiving notice of allotment. P. O. Lawrence, J., held that the authority given to the trust to make the application for the 6,334 shares was a continuing and irrevocable authority and that Mr. Pole was not at liberty to withdraw the application which the trust had made on his behalf.

Re National Savings Bank Association, Hebb's Case (2), was inapplicable to the facts of the present case, and the notice of allotment given by the company on Dec. 29, 1919, was effectual to complete the contract by Mr. Pole to take the 6,334 shares notwithstanding the attempted withdrawal of his application on Dec. 22, 1919. The case was covered in principle by the decision of the Court of Appeal in *Carmichael's Case* (1). It could not be said that Mr. Pole's name had been entered in the register of the Olympic company "without sufficient cause" within s. 32 of the Companies (Consolidation) Act, 1908, and, therefore, the motion would be dismissed with costs. The applicant appealed.

Owen Thompson, K.C., and *C. A. Bennett* for the applicant.

Ward Coldridge, K.C., and *J. F. Carr* for the company, were not called on to argue.

LORD STERNDALE, M.R.—I think that this appeal fails, and that the judgment of P. O. Lawrence, J., is quite right.

The matter arises in respect of the issue and underwriting of some shares in a company called the Olympic Fire and General Reinsurance Co., Ltd. The company were issuing 350,000 shares, and as to 150,000 of those shares there was an underwriting agreement with a company called the Angel Court Trust, Ltd., who have been called "the trust," and I will call them so in my judgment. That agreement was the usual underwriting agreement that they bound themselves to take the 150,000 shares unless the public came in and took up the shares. If the public took up a number of the shares, then the 150,000 shares which the trust underwrote and agreed to take would be reduced pro ratâ. As usual, the trust, in order to carry this arrangement out, made a sub-underwriting agreement with the applicant in the present case. I accept that there were other sub-underwriting agreements about which we know nothing. That sub-underwritng agreement was contained in what is called the sub-underwriting letter. That says :

> "For the consideration below stated we agree to subscribe at par or procure responsible subscribers to your satisfaction for 10,000 shares of £1 each, being part of the shares which are to be offered for subscription, and to pay for the same in the manner and on the conditions and subject to the terms to be named in the prospectus to be filed with the Registrar of Joint Stock Companies prior to the same being issued to the public under the above title or any modification thereof. We agree to be bound by the terms of such prospectus notwithstanding any variation between the same, and any draft or proof copy thereof produced to us on or prior to our making this contract. We now hand you application for the shares hereby underwritten by us, together with cheque for £1,250, being deposit of 2s. 6d. per share payable on such shares."

There is a provision reducing the 10,000 shares in the same circumstances as the 150,000 shares of the trust were reduced, namely, in the circumstances of the public taking up a certain quantity, and then they are to get a commission of three per cent. in cash. Then follows this clause:

> "5. This contract and our said application shall be irrevocable on our part, and this contract shall, notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form, be sufficient to authorise and empower the directors to allot to us the above-mentioned shares, and enter our name on the register of members in respect thereof."

As a matter of fact, although this letter states: "We now hand you application," no such application was handed. What was done was that the applicant handed his cheque for the amount mentioned, namely, £1,250, the trust forwarded to the company the cheque for £1,250, and the sub-underwriting letter signed by the applicant. That was done, as the learned judge in the court below has found, with the approval and authority of the applicant. I think that the learned judge is right in that finding. I think that what the applicant did was, that, instead of handing in the application form, he put the sub-underwriting letter and cheque into the hands of the trust, and said to them in effect: "Now you use this cheque and this sub-underwriting letter for the purpose of carrying out the terms of that letter and of the agreement which I have made with you. What happened was that on Dec. 16, the public having come in as subscribers for shares to a certain extent, not 10,000 but 6,334 shares were allotted to the applicant at a meeting of the company's directors. There were present at the meeting, according to the information that I have before me, at any rate, four directors of the trust, and, therefore, the trust had ample notice of the allotment of the shares.

In my opinion, that is enough to dispose of this case. But as it was not disposed of in the court below on that ground I do not propose to make that the ground of my judgment. I say that for this reason. Although there was no express authority for the trust to receive notice of allotment on behalf of the applicant, yet, in my opinion, that was included in the authority that was given by him to the trust when, instead of making his application in the ordinary form, he handed his cheque and the sub-underwriting letter to them with, as I have said, an authority which in effect was: "Use these two documents—this sub-writing letter and this cheque—for the purpose of carrying out the irrevocable agreement which I have made with you, for the purpose of relieving you from the obligations under your underwriting agreement." In my opinion, that would carry an authority to receive on his behalf notice of the allotment. As a matter of fact, formal notice of the allotment was not received by him until Dec. 29. What the reason for the interval was I do not quite know. It may very well be that in the meantime the directors of the company were trying to get in some more of the public as subscribers for shares, and so relieve the underwriters and the sub-underwriters from their obligations. Before Dec. 29, the applicant had withdrawn his application, and any authority for the trust to make the application. I had better read the letter and have its exact terms.

> "As solicitors for Mr. A. R. Pole, we hereby give you notice that he withdraws his application of Dec. 2, to your company for 10,000 shares therein, and that you are not to proceed to allotment to him of any shares, whether under that application or otherwise. We are instructed to request you to return £1,250 paid by Mr. Pole."

That was, of course, an intimation to the effect that the authority of the trust was withdrawn. I do not think that any express withdrawal of the authority was communicated to the trust. Mr. Pole founded the application that he subsequently made to remove his name from the register of members of the company on the ground of a certain misrepresentation with regard to the position of a Mr.

A White. That ground had so little substance in it that, according to the judgment of the learned judge in the court below, it was withdrawn very early in the course of the hearing of the case before him, and it has not been relied upon before us. Any merits, therefore, so far as appears on the facts before us, that there might be in this application have gone.

B Having failed on the original ground of his application, Mr. Pole, as he was perfectly entitled to do, said: "That does not matter. Legally, whether I was misled or not as to Mr. White, there was no contract between me and the company for these shares, and, therefore, I cannot be put upon the register. I withdrew my application before the allotment was communicated to me, and if I have committed any breach of contract at all it is one with which you, the company, have nothing to do, but it is a matter to be settled between myself and the C trust. I may have committed a breach of contract so far as they are concerned. That does not justify you, the company, in allotting me the shares." On the facts before us there was not only a clear breach of contract with the trust, but it seems to me that there was a very considerable and grave breach of faith. I do not wish to say anything about that because very often in these cases there are matters in the background which do not legally bear upon the question before the court, D but which may, and often do, influence the motives of the parties in their action. The question which we have to decide is simply a question of law: Is the applicant entitled to withdraw his application for shares and his authority to the trust? In my opinion, he is not. I have already said that what he did with regard to the trust resulted in his having authorised them to do what was necessary by means of his sub-underwriting letter and his cheque to carry out his agreement with E them. That, to my mind, gave the trust just as much an authority as the authority which was given to the underwriter in *Carmichael's Case* (1), by Carmichael. If that be so, it is quite clear that the authority given to the trust was an authority with an interest—an irrevocable authority. When the applicant purported to withdraw that authority by giving notice to the company, he had no more right to F do it than if he had given notice to the trust that he withdrew the authority. He could no more do it indirectly than he could do it directly. I think that the learned judge, in the court below, took a perfectly proper view of the matter in three passages which I have noted in his judgment. He finds the facts in the same way as I think they ought to be found, and then he says ([1920] 1 Ch. at p. 594):

> "In these circumstances I am clearly of opinion that the authority thus given G was a continuing authority which could not be revoked by Mr. Pole, and, further, that Mr. Pole was not entitled to interfere with the trust's exercise of such authority by withdrawing any application made by the trust under such authority any more than he would have been entitled to withdraw his own application had he signed and handed such an application to the trust as contemplated by the sub-underwriting contract."

H In a subsequent passage, after alluding to the argument that it was a matter entirely between the trust and the applicant, and that the company had nothing to do with it, he says (ibid. at p. 595):

> "I think that it is at least doubtful whether, in the circumstances of this case, the trust could, if they had been so minded, have rendered the withdrawal I effectual as against the company by electing to recognise it as valid, trusting to their remedy in damages against Mr. Pole."

As to that, I offer no opinion. Then he says:

> "But even if the trust could have adopted that course, I am of opinion that it was not the only course open to them. In my judgment, the trust could, as they did, in fact, elect to hold Mr. Pole to his bargain and treat, and insist on the company treating, the withdrawal as wholly inoperative and void. The company knew of the sub-underwriting contract which was lodged with them

at the time of making the application for the shares, and they also knew that the purported withdrawal by Mr. Pole of the application was not authorised or recognised by the trust."

In an earlier passage he says (ibid. at p. 593):

"In my opinion such authority [the authority conferred by Mr. Pole upon the trust] extended not only to the making of the application, but also to the maintenance of the application when made as an effectual application down to the date of its final acceptance by the company."

That, to my mind, is a right finding of fact, and Mr. Pole, therefore, in my opinion, was not right in withdrawing the application that had been made for him by the trust, and the shares were properly allotted to him. I am not at all sure that when the trust, acting on his authority, handed in the sub-underwriting letter and the cheque to the company, and the company, as I think they did by not rejecting it, accepted it, and thereby undertook to allot to Mr. Pole, not the 10,000 shares which he had applied for, but that 10,000 reduced accordingly as shares were taken up by the public, there was not a direct relation created between Mr. Pole and the company, just as if his underwriting agreement had been made with them. But I do not rest my judgment upon that. I do not think that it is necessary to do so. For the reasons which I have given, I think that this appeal fails, and must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The appeal is from an order of P. O. LAWRENCE, J., refusing to accede to an application made by Mr. Pole for the rectification of the company's register of shareholders by striking out the name of Mr. Pole entered therein in respect of 6,334 shares, on the ground that his name was entered "without sufficient cause," within the meaning of s. 32 of the Companies (Consolidation) Act, 1908. I need not re-state the facts which have been stated by the Master of the Rolls. It is enough to say that Mr. Pole signed what is commonly known as a sub-underwriting letter. That letter contains a clause providing that the contract and the application therein referred to

"shall be irrevocable on our part, and that this contract shall, notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form, be sufficient to authorise and empower the directors to allot to us the above-mentioned shares, and enter our name on the register of members in respect thereof."

In the face of that it is quite obvious that Mr. Pole has a somewhat difficult task before him when he seeks to establish that his name was entered on the register "without sufficient cause." He has elected to rest his case upon the ground that there was no binding agreement between him and the company in pursuance of which the company was entitled to enter his name upon the register of shareholders. That is the point, and it is a mere question of law which we have to determine.

In my opinion, P. O. LAWRENCE, J., has correctly stated the conclusion at which we ought to arrive in the passage of the report which has been already read by my learned brother. I think that it is quite clear that the authority conferred by the sub-underwriting letter was an authority coupled with an interest in the person to whom it was given, for this reason. It was given to the Angel Court Trust, who had contracted to underwrite 150,000 shares, and the sub-underwriting letter, if carried into effect, would relieve the trust, the principal underwriters, of their liability to the extent of the liability incurred by Mr. Pole. I think it was plainly an authority coupled with an interest. As such, quite independently of the clause in the contract which I have already read, the contract would be irrevocable.

What is the effect of that authority being so irrevocable? I think that the effect is expressed in *Carmichael's Case* (1), which is, to my mind, indistinguishable from the present case. I think the effect is well expressed by P. O. LAWRENCE, J., in

the passage to which I have already alluded. He says ([1920] 1 Ch. at p. 594):

> "In these circumstances I am clearly of opinion that the authority thus given was a continuing authority which could not be revoked by Mr. Pole, and, further, that Mr. Pole was not entitled to interfere with the trust's exercise of such authority by withdrawing any application made by the trust under such authority any more than he would have been entitled to withdraw his own application had he signed and handed such an application to the trust as contemplated by the sub-underwriting contract."

There is another point. Mr. Pole's case depends upon his having, as he says, withdrawn his application before the allotment in pursuance of it had been communicated to him. Of course, in the ordinary case where a man applies for shares in a company that is a mere proposal, and that proposal, like every other, may be withdrawn before its acceptance is communicated. But, in my judgment, it is established on the facts that the allotment—that is to say, the acceptance of the proposal—was communicated not to Mr. Pole personally, but to the Angel Court Trust, his agents, at the time it was made. The minutes of the meeting at which the allotment was made are in evidence, and from them it appears that a Mr. Young and a Mr. Hobday, both directors of the Angel Court Trust, one of them also a director of the company, were present at the meetings at which the allotment was made. I think, further, that it is plain upon this letter that the authority conferred upon the Angel Court Trust extended to authorise them to accept the communication of an allotment made in pursuance of the underwriting letter. That is a ground which was not taken before P. O. LAWRENCE, J., and is not included in the judgment. Whether the case is rested on that, or whether it is rested on the irrevocability of the authority conferred upon the trust and the extension of that authority not only to the making of the application, but to the maintaining of the application, it seems to me that the application by Mr. Pole to have his name struck off the register as having been inserted therein "without sufficient cause" must fail, and that this appeal ought to be dismissed with costs.

YOUNGER, J.—I am of the same opinion. This is a sub-underwriting contract, but on the facts of the case, and, having regard to the terms of the sub-underwriting letter, the position, in my opinion, as between the applicant and the company is not materially different after allotment of shares was made to him from the position all through of the principal underwriters, the trust, towards the company. In the case of the trust, as in the case of all ordinary underwriting agreements between an underwriter and a person proposing to make an issue to the public, the fundamental characteristic of such an agreement is that for a prescribed consideration the underwriter is bound to take and pay for his prescribed proportion of the shares underwritten which are not in the event applied for and allotted. It is of the essence of the transaction that such an application on the part of the underwriter may not be withdrawn before actual allotment to him. The reason is that, if it were open to him so to withdraw from the underwriting contract, which is essentially a contract of insurance against a possibility of the public not coming in as subscribers for shares, it would be of no advantage at all to the company. On the other hand, while the underwriter is under a disadvantage which it is not the lot of an ordinary applicant for shares being a member of the public, the underwriter gains a certain advantage in this, that, while he may not himself withdraw his application, the company, notwithstanding the terms of that application, cannot allot to him more than the agreed proportion of the shares which, in the event, he is bound to take. The present case deals with sub-underwriting. There is, in the first instance, no direct contract between the sub-underwriter and the company. But the essence of the bargain, the fundamental characteristic of this form of underwriting, is the same as in the case of an underwriting contract between the underwriter and the company. It is the underwriter now who is being

relieved from risk, and, accordingly, as between the underwriter and the sub-underwriter, the sub-underwriter may not withdraw. The sub-underwriter who has got valuable consideration for the bargain from the underwriter empowers the underwriter to bind him, the sub-underwriter, as between himself and the company to a bargain in like manner. The essence of the bargain between the underwriter and the sub-underwriter is that its terms should be communicated to the company, or otherwise, if these terms were not so communicated, the sub-underwriter would be under the risk of having allotted to him more shares than those which, in accordance with his bargain with the underwriter, he was bound to take. Accordingly, in my opinion, when the applicant entered into the sub-underwriting contract with which we are concerned here and handed the sub-underwriting letter to the underwriters, he did so knowing that in the ordinary and necessary course of business it would, in turn, be transmitted to the company. Being so transmitted to the company, it amounted then, as it appears to me, to an invitation to the company to act upon the terms of the bargain so constituted between the sub-underwriter and the underwriters. When the company, in obedience to that invitation, acts upon it, it appears to me that the bargain becomes as irrevocable as between the sub-underwriter and the company, as it always was as between the sub-underwriter and the underwriters.

In the present case the applicant has, fortunately or unfortunately for himself, discovered, after this notice of motion was given, that the terms of his sub-underwriting letter are not altogether in common form. It is a pure piece of good or bad luck, so far as he is concerned because he states quite candidly in his affidavit in support of the motion that the sub-underwriting letter which he had signed, he had not got, nor has he seen a copy. In the course of the proceedings it was produced by the other side, and it appears that, whereas in terms the sub-underwriting letter contemplates that there will be an actual unqualified application by the sub-underwriter for 10,000 shares, in point of fact, in his case that provision of the letter was not carried out, and no such application was signed. I entirely agree with the other members of the court and with P. O. LAWRENCE, J., that that does not affect in this instance the essential characteristic of the transaction as between the sub-underwriter and the underwriters in the respect which I have stated. As I have already said, as soon as that sub-underwriting letter was, as the applicant must have known it would be, handed to the company and acted on by them, so that they allotted to him no more than the precise number of shares which, under his bargain as between himself and the underwriters, he was bound to take, that constituted an irrevocable contract as between himself as sub-underwriter and the underwriters from which he could not by any withdrawal, escape. Like the Master of the Rolls, I will not base my decision upon what might, I think, be a sufficient answer, that the authority of the underwriters to carry out the transaction between them and the sub-underwriter extended to any authority to receive notice of the actual allotment. That notice was given to the underwriters, as we know now from evidence before any attempt at repudiation by the sub-underwriter had been made.

Appeal dismissed.

Solicitors: *E. O'Connor & Son; Churchill, Smallman & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HUTCHINSON *v.* NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN AND OTHERS

[House of Lords (Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Atkinson and Lord Moulton), March 22, 23, May 4, 1920]

[Reported [1920] A.C. 795; 89 L.J.Ch. 469; 123 L.T. 439; 64 Sol. Jo. 496]

Will—Gift to next of kin—"For such . . . persons as, on the failure of [preceding] trusts, shall be my next of kin"—Time when next of kin to be ascertained.

By his will, dated in March, 1852, a testator, who died in June, 1855, bequeathed his residuary personal estate on trust for his wife for life and subject thereto on trust in equal thirds for his three daughters for life, with remainders to their respective children, with cross-remainders. The will continued: "And I do further direct that on failure of all the trusts hereinbefore declared of the residue of my personal estate, such residue shall be in trust for such person or persons as, on the failure of such trusts, shall be my next of kin and entitled to my personal estate under the statutes for distribution of the personal estates of intestates, such persons, if more than one, to take distributively according to the said statutes." The three daughters died without having had any issue. S., the last of these daughters, died on Jan. 11, 1918.

Held: the next of kin must be ascertained as at the date of distribution, viz., at the death of the surviving daughter, S., there being sufficient context in the will to displace the ordinary rule that next of kin of a deceased person will be ascertained at the date of his death.

Bullock v. *Downes* (1) (1860), 9 H.L. Cas. 1, applied.

Decision of the Court of Appeal, [1919] 2 Ch. 17, reversed.

Notes. As to the meaning of "next of kin" in a will, see 34 Halsbury's Laws (2nd Edn.) 319 et seq.; and for cases see 44 Digest 876 et seq.

Cases referred to:

(1) *Bullock* v. *Downes* (1860), 9 H.L. Cas. 1; 3 L.T. 194; 11 E.R. 627, H.L.; 44 Digest 876, *7328*.

(2) *Wharton* v. *Barker* (1858), 4 K. & J. 483; 4 Jur. N.S. 553; 6 W.R. 534; 70 E.R. 202; 44 Digest 883, *7397*.

(3) *Mortimer* v. *Slater* (1877), 7 Ch.D. 322; 47 L.J.Ch. 134; 37 L.T. 520; 26 W.R. 134; affirmed sub nom. *Mortimore* v. *Mortimore* (1879), 4 App. Cas. 448; 48 L.J.Ch. 470; 40 L.T. 696; 27 W.R. 601, H.L.; 44 Digest 884, *7406*.

(4) *Sturge and Great Western Rail. Co.* (1881), 19 Ch.D. 444; 51 L.J.Ch. 185; 30 W.R. 456; sub nom. *Sturge* v. *Sturge*, *Sturge to Great Western Rail. Co.*, 45 L.T. 787; 44 Digest 881, *7383*.

(5) *Re Wilson*, *Wilson* v. *Batchelor*, [1907] 1 Ch. 450; 76 L.J.Ch. 228; 96 L.T. 392; affirmed [1907] 2 Ch. 572; 77 L.J.Ch. 13; 97 L.T. 656; 52 Sol. Jo. 11, C.A.; 44 Digest 884, *7410*.

(6) *Re McFee*, *McFee* v. *Toner* (1910), 79 L.J.Ch. 676; 103 L.T. 210; 44 Digest 881, *7384*.

(7) *Re Helsby*, *Neate* v. *Bozie* (1914), 84 L.J.Ch. 682; 112 L.T. 539; 44 Digest 886, *7426*.

(8) *Re Mellish*, *Day* v. *Withers*, [1916] 1 Ch. 562; 85 L.J.Ch. 433; 114 L.T. 991; 44 Digest 881, *7385*.

(9) *Withy* v. *Mangles* (1843), 10 Cl. & Fin. 215; 8 Jur. 69; 8 E.R. 724, H.L.; 40 Digest (Repl.) 630, *1225*.

(10) *Hood* v. *Murray* (1888), 14 App. Cas. 124; 40 Digest 507, **43*.

(11) *Cable* v. *Cable* (1853), 16 Beav. 507; 21 L.T.O.S. 16; 51 E.R. 874; 44 Digest 883, *7395*.

(12) *Wheeler* v. *Addams* (1853), 17 Beav. 417; 1 W.R. 473; 51 E.R. 1095; 40 Digest (Repl.) 635, *1284*.

(13) *Travis* v. *Taylor* (1866), 12 Jur. N.S. 791; 14 W.R. 909; 44 Digest 885, *7422*.
(14) *Re Morley's Trusts* (1877), 25 W.R. 825; 44 Digest 885, *7423*.
(15) *Re Taylor*, *Taylor* v. *Ley* (1885), 52 L.T. 839, C.A.; 44 Digest 877, *7332*.

Also referred to in argument:

Re Winn, *Brook* v. *Whitton*, [1910] 1 Ch. 278; 79 L.J.Ch. 165; 101 L.T. 737; 44 Digest 881, *7380*.

Holloway v. *Holloway* (1800), 5 Ves. 399; 31 E.R. 649; 44 Digest 882, *7389*.

Appeal from an order of the Court of Appeal, reported [1919] 2 Ch. 17.

The testator William Hutchinson, by his will dated Mar. 27, 1852, gave his residuary personal estate on trust for his wife for life, and then on trust in equal thirds for his three daughters, Elizabeth Myles Hutchinson, Sarah Hutchinson, and Frances Hutchinson and their issue, with cross-remainders, and directed that on failure of all the trusts thereinbefore declared of his residuary personal estate, such residue should be held in trust for his next of kin. Elizabeth Myles Hutchinson married, but died without issue in September, 1898. Frances Hutchinson died on April 13, 1911, a spinster. Sarah Hutchinson died on Jan. 11, 1918, a spinster, having by her will, dated in 1907, bequeathed the residue of her estate in trust for the defendants, the National Refuges for Homeless and Destitute Children.

The question having arisen on the distribution of the testator's estate whether the next of kin who took as ultimate residuary legatees under his will ought, in the events which had happened, to be ascertained at the date of the death of his last surviving daughter, Sarah, a summons was taken out by the executors for the determination of that question, James Hutchinson and the National Refuges for Homeless and Destitute Children being made defendants. On the hearing of that summons P. O. Lawrence, J., held that the persons to take were the persons entitled under the statutes of distribution, and to be ascertained at the death of the testator. The representative of the persons who would have been the next of kin of the testator if he had lived at the date of the death of his daughter Sarah appealed. The Court of Appeal (Swinfen Eady, M.R., Scrutton, L.J., and Eve, J.), affirmed that decision.

C. E. E. Jenkins, *K.C.*, and *Herbert Preston*, *K.C.*, for the appellant.
Ward Coldridge, *K.C.*, and *Sheldon* for the first-named respondents.
Lavington for the remaining respondents.

The House took time for consideration.

May 4. The following opinions were read.

VISCOUNT FINLAY.—This case raises a point on the construction of the will dated Mar. 27, 1852, of William Hutchinson, who died on June 3, 1855. The question is whether the residuary bequest is to be construed as in favour of the next of kin of the testator to be ascertained at the time of his death or whether it is in favour of those who would have been the next of kin if his death had taken place at the time when the antecedent interests under the will expired.

The testator left a widow who died on Aug. 24, 1870, and three daughters—Elizabeth, who died in September, 1898; Frances, who died on April 13, 1911; and Sarah, who died on Jan. 11, 1918—none of them leaving any issue. Claim is made to the residue by a charity under the will of Sarah, who was one of the next of kin of the testator on his decease. The appellant is a grandson of Ann Hutchinson, a sister of the testator, and would be one of the next of kin of the testator if by the terms of the will that class should be ascertained as at the death of Sarah in 1918. P. O. Lawrence, J., decided in favour of the Charity and he was affirmed by the Court of Appeal.

The will provided for an annuity to the widow of the testator and gave interests in the residue of the property to the three daughters of the testator and their issue with cross remainders and then proceeded as follows:

"And I do further direct that on failure of all the trusts hereinbefore declared

A of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, such persons if more than one to take distributively according to the said statutes."

It was urged for the appellant that this clause shows that the class of next B of kin is to be ascertained as on the death of Sarah, the last surviving daughter. The respondents, on the other hand, contended that the words of the clause leave the class of next of kin to be ascertained in the usual manner at the death of the testator. There are a great many authorities on the construction of such clauses, many of which have been cited to your lordships. The leading case is *Bullock* v. *Downes* (1). The will in that case created trusts in favour of the son of the testator C for life and afterwards in favour of his children, and in case there should not be any child of the son

> "then to stand possessed of the same in trust for such person or persons of the blood of me as would by virtue of the statutes of distribution of intestates' effects have become and been then entitled thereto in case I had died intestate."

D The decision of the House (LORD CAMPBELL, L.C., LORD BROUGHAM, LORD CRANWORTH, LORD WENSLEYDALE and LORD KINGSDOWN) was that the persons entitled were to be ascertained at the death of the testator and that the interest of the son as one of those persons was not affected by the previous gift of a life interest in the whole of the residue and passed to his personal representatives. The whole effect of the decision is stated in a few sentences in the judgment of the E Lord Chancellor (LORD CAMPBELL) as follows (9 H.L. Cas. at p. 12):

> "It seems to me quite clear that upon the just construction of this will the personal representatives of the testator's son were, in the events which happened, entitled to a share of the personal property in question; the son, having been one of the blood, or next of kin, of the testator, who at the testator's death would, by virtue of the statute of distributions, have been entitled F thereto in case the testator had died intestate. Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator and not those who answer that description at the death of the first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. G Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death. . . . There may be, as in the last case of *Wharton* v. *Barker* (2), before PAGE WOOD, V.-C., a clear indication in the will that, notwithstanding the use of such expressions, the time for ascertaining the class is the time fixed by the will as the period of distribution. But in the will now to be construed nothing appears H to indicate an intention in the testator contrary to the general rule; and on the contrary the second 'then' in this limitation seems expressly to refer to the time of the testator's death as the period when the class was to be ascertained."

Bullock v. *Downes* (1) therefore decides that, primâ facie, the next of kin are to be ascertained at the death of the testator, but that if there is a sufficient indication to that effect in the words of the will, the time for ascertaining the class may be I the time fixed by the will as the period of distribution. The question in this as in every other case of the kind must be whether there is in the will a sufficient indication that the period of distribution is the time at which the class is to be ascertained.

Your lordships are indebted to the counsel in the case for the selection which has been made from the multitude of authorities of a certain number of typical cases. Taken in chronological order these cases are as follows: 1858, *Wharton* v. *Barker* (2); 1877, *Mortimer* v. *Slater* (3); 1884, *Sturge and Great Western Rail. Co.*

(4); 1907, *Re Wilson, Wilson* v. *Batchelor* (5); 1910, *Re McFee, McFee* v. *Toner* (6); 1914, *Re Helsby, Neate* v. *Bozie* (7); 1916, *Re Mellish, Day* v. *Withers* (8).

The first of these cases, *Wharton* v. *Barker* (2) is of great value as it contains a very thorough investigation by WOOD, V.-C., of all the authorities up to 1858, and the other cases in the list give a view of the state of the authorities down to 1916. It would be useless to go through these cases in detail. It is a question of construction in each case whether the class is to be ascertained at the death of the testator or at a later date. It is for those who assert that the class is to be ascertained at a date other than that of the death of the testator to show that this is the fair result of the language of the will. If by the use of an adverb of time or otherwise the will shows that the class is to be ascertained on the death of the holder of some antecedent interest, this settles the point.

I turn at once to the consideration of the clause in the will on which the determination of this case must turn. That clause directs what is to be done "on failure of all the trusts hereinbefore declared of the residue of my personal estate." That event has happened by the death of Sarah, the last of the daughters of the testator, without issue. The clause goes on to provide that in that event

> "such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, such persons if more than one to take distributively according to the said statutes."

The reference for the second time to "the failure of such trusts" is to be noted. In the words "for such person or persons as on the failure of such trusts shall be," &c., the phrase "on the failure of such trusts" must denote the time at which the next of kin are to be ascertained. "On the failure of such trusts" in this connection is exactly equivalent to "then." In the event of failure of the antecedent trusts the residue is to go to such persons as then answer the description given in the clause. What is that description? It is "my next of kin and entitled to my personal estate under the statutes for distribution." Great stress was laid by the respondents on these last words. It was urged that no one can be entitled under the statutes of distribution except the next of kin on the death of the testator and that these words showed that the testator had in view the next of kin under the statutes at the time of his death. It was argued that these words did away with the inference which otherwise might have been drawn from the earlier words in the clause that the class was to be ascertained at the date of the failure of the antecedent trusts. I cannot attribute any such force to these words. It appears to me that what they mean is that the next of kin to be ascertained as on the failure of the earlier trusts are to be the next of kin according to the statutes of distribution. Without some such words the trust for next of kin would have been read as denoting next of kin at common law and not according to the statute: *Withy* v. *Mangles* (9); and see VAUGHAN HAWKINS on THE CONSTRUCTION OF WILLS (1st Edn.), p. 97 and following pages. These words are merely part of the definition of the class as being next of kin according to the statute and not at common law. The reference to "the failure of such trusts" as the point of time at which the class is to be ascertained is clear and definite, and to read the words "entitled to my personal estate under the statutes" as denoting the next of kin at the death of the testator would make the clause repugnant to itself.

The clause goes on to deal with the manner in which the members of the class are to take "such persons if more than one to take distributively according to the said statutes." These last words to me seem somewhat to militate against the respondent's contention. If the class denoted by the earlier words had been the next of kin at the death of the testator they would as a matter of course have taken distributively as under the statutes. The last words would in that case have been unnecessary, but they come in naturally in dealing with an artificial class of next of kin with reference to the date at which the earlier trusts fail and

provide that the members of the class are to take according to the statute as tenants in common and not as at common law as joint tenants.

Great reliance was placed by the respondents on the decision in the second case in the list, *Mortimer's Case* (3) in the Court of Appeal and in the House of Lords. But the words in that case are very different from those in the present. There the clause ran,

> "or if there be no such children that the same be paid to such person or persons as would have been entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates."

JAMES, L.J., said (7 Ch.D. at p. 327):

> "The words are, 'the same shall be paid to such persons as will then be entitled,' that is, to the persons to whom the law would give it. The expression does not denote the persons to whom the law under certain contingencies would give the title, but the persons who can allege themselves to be entitled under the statute. That was the ratio decidendi in *Bullock* v. *Downes* (1). It appears to me to be plain that to satisfy that expression you must have a person who can show a title under the statute of distributions, and the only persons who can show a title under the statute of distributions are the persons who were next of kin at the death of the testator (who was partially intestate) or the persons who represent them."

He held that to satisfy such words "the claimant must show an actual title under the statute of distribution." In the House of Lords LORD CAIRNS, L.C., said that the words amounted to this (4 App. Cas. at p. 452):

> "At the expiration of the preceding limitations you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death."

LORD BLACKBURN said that it was even a clearer case than *Bullock* v. *Downes* (1).

In the present case, for the reasons I have given in dealing with the language of the clause, I think that the reference is, to borrow LORD CAIRNS' expression, to an artificial class of next of kin to be created. HALL, V.-C., in *Sturge and Great Western Rail. Co.* (4), pointed out that the judgment of JAMES, L.J., in *Mortimer's Case* (3) depended on the particular expressions used and held (I borrow the language of the headnote in the LAW REPORT) that where a testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall, by virtue of the statute of distributions, be his next of kin, the class is an artificial class to be ascertained on the hypothesis that the testator lived up to and died at the subsequent period of time. The words used in the will in *Re Wilson* (5) appear to me to be indistinguishable from those on which *Mortimer's Case* (3) was decided.

In *McFee's Case* (6), as also in *Re Helsby* (7), the bequest was to the persons who at the time should be the testator's next of kin according to the statute of distributions, and it was held that the class was an artificial class to be ascertained on the hypothesis that the testator had lived up to the time in question. I construe the clause in the present case as having exactly the same meaning as the clauses in the two cases to which I have just referred.

In *Re Mellish* (8) the bequest was in favour of the person or persons who, at the decease of the survivor of certain beneficiaries under the will

> "shall be of the blood of my said son George Mellish and of kin to him and who under the statute of distribution of intestates' effects would be entitled to his personal estate if he were dead, unmarried, and intestate, such persons if more than one to take in the portions prescribed by the same statute."

NEVILLE, J., held that the gift was to an artificial class consisting of the next of kin of George Mellish to be ascertained as if he had died on the death of the

life tenant. Such authorities are of value chiefly as calling attention to the points on which the construction of any particular will must turn. We always come back to the particular words employed in the will in each case. In my opinion the words of the present will are reasonably clear and bear the meaning contended for by the appellant. They do not, in my judgment, point to the class who were entitled on the death of the testator, but to an artificial class to be determined at the date of the failure of the trusts in the will.

In my opinion, the judgments below should be reversed and the costs of all parties should be paid out of the estate.

VISCOUNT CAVE.—The testator, at the date of his will, was fifty-nine years of age, and had living a wife and three daughters, but no other issue. By his will, dated Mar. 26, 1852, he gave his residuary estate to trustees on trust for his wife for life, and subject thereto on trust in equal thirds for his three daughters for life, with remainder to their children, and with cross gifts between them; and the will proceeded as follows:

> "And I do further direct that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, such persons if more than one to take distributively according to the said statutes."

The testator died in 1855, and his widow in 1870; and the last survivor of his three daughters died in 1918. None of his daughters had issue. The question raised in this case is whether the "next of kin" referred to in the ultimate trust above set out are to be ascertained at the date of the testator's death or at the period of distribution—i.e., at the date of the death of the last survivor of the three daughters.

On this question, if I had been concerned simply with the terms of the will and had been unembarrassed by the decisions pronounced in similar cases, I should not have entertained any doubt. If there had been no such antecedent authorities, I should have said without hesitation that the testator intended his ultimate gift to benefit persons living at the time when the preceding trust failed to take effect, that the persons to be so benefited were those who at that time might be his nearest of kin, but that those nearest of kin were to be ascertained not by mere proximity in blood but in accordance with the scheme of the statute of distribution, and were to take in shares, to be ascertained in like manner. I should accordingly have pronounced in favour of the persons who would have been the testator's next of kin under the statute if he had died at the period of distribution. But P. O. Lawrence, J., and the Court of Appeal have held the case to be concluded by authority, and have determined the question in favour of the testator's statutory next of kin at his death; and it is, therefore, necessary to consider carefully the authorities on which their decision was based. For if those authorities have laid down any rule or canon of construction which binds this House, it should, of course, be followed.

The authorities principally relied on for the respondents are two decisions in this House, viz., *Bullock* v. *Downes* (1) and *Mortimore* v. *Mortimore* (3). In *Bullock* v. *Downes* (1) the words to be construed were:

> "Such person or persons of the blood or next of kin to me, the said Andrew Downes, as would by virtue of the Statutes of Distribution of intestates' effects have become and been then entitled thereto in case I had died intestate."

In *Mortimore* v. *Mortimore* (3) the words were:

> "Such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates."

In each of these cases, therefore, the class of persons to take under the gift was

to consist of persons entitled under the statute, and this was to be their primary qualification; and in each case the word "then" contained in the gift was capable of being held, and was, in fact, held to refer, not to the time when the class was to be ascertained, but to the time when the next of kin in question would come into the enjoyment or receipt of the fund. That this was, in each case, the reason of the decision of this House appears from a consideration of the judgments delivered. In *Bullock* v. *Downes* (1) LORD CRANWORTH expressed the reason of his decision as follows (9 H.L. Cas. at p. 19):

> "Even assuming that the word 'then' as connected with the word 'entitled,' is to be read as an adverb of time, still the time indicated is not the time of the death of the testator, but the time when the persons would come into the enjoyment of that which is bequeathed to them. The legatees to take on the son dying wihout issue are not the persons who would have been entitled if the testator had then died, but those who would then be entitled if the testator, when he died, had died intestate."

And in *Mortimore* v. *Mortimore* (3), LORD CAIRNS expressed a similar view in the following words (4 App. Cas. at p. 452):

> "Now, I am quite willing to look at the word 'then' as if it meant at the expiration of the preceding limitation, but then, what does this amount to? Why, this: At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death."

It is evident from the judgments of HALL, V.-C., in *Sturge and Great Western Rail. Co.* (4) and of PARKER, J., in *Re Wilson, Wilson* v. *Batchelor* (5), that those learned judges took a similar view as to the ratio decidendi in *Bullock* v. *Downes* (1) and *Mortimore* v. *Mortimore* (3).

In the present case the elements which determined the decisions in the above mentioned two cases are not to be found. The gift is not to those persons entitled under the statute who at the date of distribution may be entitled to receive the fund, but to those persons who on the failure of the preceding trust, i.e., at the time of distribution, shall be the testator's next of kin; and unless the will is to be held as self-contradictory, the words "and entitled," &c., which follow must be read not as defining the class to take, but only as determining the manner in which the next of kin are to be ascertained. If so, this case is similar to *Wharton* v. *Barker* (2) where the words were,

> "unto the person or persons that shall then be considered as my next of kin and personal representative or representatives agreeable to the order of the statutes of distribution."

In that case it was held that the persons to take were an artificial class to be ascertained at the time of distribution; and a similar result was reached in *Re McFee* (6), *Re Helsby* (7) and *Re Mellish* (8).

For the above reasons I am of opinion that the order under appeal should be reversed, and that it should be declared that on the true construction of the will of the testator, William Hutchinson, the next of kin therein designated to take the residue of his personal estate on the failure of the trust thereby declared by his will in favour of his daughters and their children must in the events that have happened be ascertained as at the date of the death of his surviving daughter Sarah Hutchinson. The costs of all parties here and below should be taxed as between solicitor and client and paid out of the testator's estate.

LORD DUNEDIN (read by VISCOUNT CAVE).—Much authority has been and can be cited from cases which bear more or less resemblance to this. I do not think it necessary to advert to any except to the well-known list of classes of cases given by THESIGER, L.J., in his judgment in *Mortimer* v. *Slater* (3). Now the clause to be here construed first of all prescribes the time at which the succession

in question is to open. It is "on the failure of the trusts hereinbefore declared," then the deed goes on to specify the class; it is "to the person or persons as on the failure of the trusts shall be my next of kin, &c." It is, I think, clear that this second repetition of "on the failure of the trusts" is exactly equivalent to the adverb "then." That being so it brings it within the first of THESIGER, L.J.'s, classes, where the adverb "then" imported that the class was to be ascertained at the time so pointed out, i.e., at the period of distribution, and it makes it impossible to hold that it falls within the third class where the adverb is used "not in connection with the description of the class, but in connection with the time at which the estate is to come into being," for the function of determining when the estate was to come into being has been already fulfilled by the first set of words "on failure of the trusts."

Then it is said that the sentence does not stop with the words "next of kin," but goes on to say, "entitled to my personal estate under the statutes for the distribution of personal estates of intestates," and appeal is made to the opinion of JAMES, L.J., in the same case to the effect that these words mean someone who has an active title under the statute who can only be one of a class ascertained at the death of the testator. In that case, however, there was no feature like the repetition of the words "on the failure of such trusts," and accordingly the function of the word "then" to designate the opening of the succession had not been exhausted. It seems to me, therefore, a more natural reading to hold in the present case that the reference to the Statute of Distributions is not for the purpose of insisting on the condition of an active title on the part of the recipient, but to distinguish between the next of kin at common law and the next of kin under the rules of this statute.

I, therefore, concur in the judgment proposed.

LORD ATKINSON.—The facts have already been stated. In *Hood* v. *Murray* (10), LORD WATSON, in a judgment concurred in by LORD HALSBURY and LORD MACNAUGHTEN, lays down with his accustomed clearness and precision the rule of construction established by the case of *Bullock* v. *Downes* (1), and *Mortimore* v. *Mortimore* (3). The rule, he said (14 App. Cas. at p. 137), as he understood it, was simply that

> "in cases where a testator or settlor in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must primâ facie, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion the rule has no other effect than to attribute to the words used their natural and primary meaning unless that meaning is displaced by the context."

In several of the cases cited expressions were found in the document to be construed sufficient to express an intention of the settlor or testator different from this primary intention, and in others insufficient for that purpose. The question for decision in the present case is to which of these two classes does the case belong? In the present case the testator directs that on failure of all the trusts thereinbefore declared of the residue of his personal estate something is to be done with that residue. It is this. It is to be held in trust for such person or persons as on the failure of the aforesaid trusts shall be testator's next of kin. Stopping there for a moment, it would appear to me that the words "as on the failure of such trusts" indicate a point of time. They are equivalent to the words, "at the time when the failure already mentioned occurs," or words to that effect. Their meaning might be effectually expressed by the adverb of time "then," so that the clause would run, "And I further declare that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be held in trust for such person or persons as then shall be my next of kin." The authorities, I think, establish that if the word "then" had been thus used, it would be held

A that the next of kin the testator had intended to benefit were those who would answer that description if he had died on the day the failure of all the trusts had occurred. In *Wharton* v. *Barker* (2) the clause in the testator's will on which the question in controversy turned ran thus:

> "And in case both my daughters should die without issue or having such issue
> B all should die under twenty-one without leaving issue then I direct my trustees to pay one moiety unto the person or persons, who shall then be considered as my next of kin and personal representative or representatives agreeable to the order of the statutes of distribution, and the other moiety unto the person or persons who shall then be considered the next of kin and personal represen-
> C tatives of my late wife Sarah if agreeable to the order of the Statute of Distribution."

At the date of the will his daughter Sarah was the only child and sole next of kin of his late wife Sarah. This daughter survived the testator and died without issue. It was held that the persons entitled to the second moiety were those who at the death of the surviving daughter were the next of kin according to the statute
D of the deceased wife, and that having regard to the juxtaposition of the bequests the persons entitled to the first moiety were those what at the same period were next of kin according to the statute of the testator. It is obvious that the word "then" at the place where it first occurs meant "in that event" and in both the other places it was an adverb of time, meaning "at that time." SIR PAGE WOOD, when delivering judgment, after having reviewed all the then existing authorities,
E is reported to have said (4 K. & J. 501):

> "In this state of the authorities I find it recognised in all the decisions that if in a gift to 'next of kin' without reference to their claims as under an intestacy the word 'then' occurs as an adverb of time referring to the death of the tenant for life or other events fixed as the period of distribution that circum-
> F stance is conclusive evidence that the testator did not intend the general rule of construction to apply. In the cases before the Master of the Rolls—*Cable* v. *Cable* (11) and *Wheeler* v. *Addams* (12)—the court was of opinion from the context that it was not so used and must necessarily be construed as 'thereupon' or 'in that event' so as to mark the conjunction of circumstances; but here I am absolutely precluded from considering the word 'then' in the
> G clause 'unto the person or persons who shall then be considered as the next of kin' as marking the conjunction of circumstances by the fact that the same word has previously been used in that sense in the earlier part of the sentence 'then I direct my said trustees,' &c., so that no possible sense can be given to the word when it occurs the second time unless it be read as an adverb of time."

H The principle of construction thus laid down in this case has been many times emphatically approved of and acted on. In *Travis* v. *Taylor* (13) a testator left real and personal estate on trust, after the death of his sister to pay the income thereof to his niece during her life and after her death to stand possessed of the said estate in trust for her children if any, and in case of her leaving no children
I then for such person or persons as should then be his next of kin, in a course of administration according to the statute for the distribution of intestates' personal effects. The testatrix died in 1842, her sister in 1854, and her niece, childless, on May 15, 1863. Here the word 'then' is obviously used in two senses. Where it first occurs it means "in that event," and where it occurs for the second time it must mean "at that time." It would not make sense of the provision to give it the meaning of "in that event" in the latter case. It was held by KINDERSLEY, V.-C., that the general rule did not apply, and that the persons to take would be

the testator's next of kin at the date of his niece's death. In delivering judgment the Vice-Chancellor said (12 Jur. N.S. at p. 791):

> "The general rule is that where property is given to the next of kin, the next of kin must primâ facie be those who are so at the death of the testator. It appears to me, however, when I consider the terms of the will and compare them with those in *Wharton* v. *Barker* (2) that the reasoning of WOOD, V.-C., applied more fully to this case."

KINDERSLEY, V.-C., moreover, points out that in *Bullock* v. *Downes* (1) the Lord Chancellor expressly referred to *Wharton* v. *Barker* (2), and did not disapprove of it.

In *Re Morley Trusts* (14) the testator gave his residuary personal estate to his wife for life and after her death directed his trustees to pay and divide three-fifths of the residue amongst such persons as under the Statute of Distribution would have become entitled, on his late father's side at the death of his wife if he had died intestate, and as to the remaining two-fifths in similar terms, to his wife's next of kin on his mother's side. MALINS, V.-C., held that the period for ascertaining the class to take was the date of the death of the testator's widow, and not that of the testator himself, pointing out that his decision was in strict accordance with *Wharton* v. *Barker* (2), and not in conflict with the general rule laid down in *Bullock* v. *Downes* (1) in which there were no words pointing to futurity as there were in the case he was deciding. In *Re Taylor, Taylor* v. *Ley* (15) property was directed to be held by trustees in the events which happened,

> "In trust for such person or persons as under the statute of distribution of the estates of intestates shall, exclusive of my daughter, C. L., and my grandchild, G. G., and her issue, if any, then be my next of kin, such persons, if more than one, to take in equal shares as tenants in common."

When the particular event happened on which the trust came into operation there were living the testator's daughter and the testator's sister and two nephews, sons of a deceased brother. It was held by BRETT, M.R., and BAGGALLAY and FRY, L.JJ., reversing KAY, J., and following *Wharton* v. *Barker* (2), that the effect of the words "shall then be my next of kin" was to create an artificial class, viz., those who would have been his next of kin under the statute of distributions had he died at the time indicated by the word "then." In *Sturge and Great Western Rail. Co.* (4) the testator, who had several children, after declaring several trusts in favour of each of them and their respective issue, directed that in the event of any one of his children dying without issue and without having exercised the power of appointment by the will conferred on each child, then as to the property held in trust for that child and the rent and annual profits thereof from the time of such decease, directed it should be held in trust.

> "for the person or persons who at the time of such decease shall by virtue of the statutes for the distributions of the estates of persons dying intestate be my next of kin, and if more than one in equal shares and proportions and in manner described in the said statute."

The testator died in 1844, leaving seven children and no issue of any deceased child. Frances Sturge, one of his daughters, died a spinster in May, 1871 without having executed the power of appointment given to her. Mary Harwood, another daughter died in the lifetime of her sister, Frances, leaving seven children, who were alive at the death of this aunt of theirs. The testator's next of kin at his own death were his seven children, but the persons who would have been entitled under the statutes of distribution at or immediately after the death of his daughter, Frances, if he had then died, were his five surviving children and the seven children of Mary Harwood. It was urged in argument, as it was urged on behalf of the respondents in the present case, that the case was governed by the decisions in *Bullock* v. *Downes* (1), and *Mortimer* v. *Slater* (3), and that those only could take "by virtue of the statute: who were next of kin of the testator at the time of his death." But HALL, V.-C., said

(19 Ch.D. at p. 450) that on the construction of the testator's will he, the Vice-Chancellor, could come to no other conclusion than that the testator had created an artificial class . . . and that he

> "intended, and in effect said: 'At each of the several periods, you shall ascertain the class and then the members of it are to take in certain modes, but the modes in which they are to take must be regulated by the statutes of distribution as nearly as the existing circumstances of the case will admit—the class being different from that which would have comprised the persons to take if it had been directed by me to be taken at a different period, namely, my death'."

The Vice-Chancellor's criticism of the decisions in *Bullock* v. *Downes* (1) and *Mortimer* v. *Slater* (3) is important and instructive. He said (ibid. at p. 449):

> "With regard to these authorities . . . and more particularly with regard to JAMES, L.J.'s, judgment in *Mortimer* v. *Slater* (3), I have observed that the decisions depended upon the particular expressions used with respect to 'such persons as will then be entitled.' That is what JAMES, L.J., laid hold of at once in the latter case, and he asked in effect: How do you show that you are entitled under that description? In order to satisfy the description you must be a person who can show a title under the statute, and the only persons who can do that are the next of kin at the testator's death,"

and he rested the case on no other ground than that. The Vice-Chancellor, in the same case, then refers to the remarks of BAGGALLAY, L.J., in reference to the judgment of LORD HATHERLEY, then Vice-Chancellor, in *Wharton* v. *Barker* (2) and quotes the passage from BAGGALLAY, L.J.'s, judgment running as follows (ibid.):

> "The Vice-Chancellor then went into the considerations of the particular words which he found in that case and was of opinion that they did clearly and distinctly point to another period as the period to which the class was to be ascertained."

HALL, V.-C., then proceeds (ibid. at p. 450):

> "It appears to me that the corresponding words here, 'Who at the time of such respective decease of my children shall,' &c., import that the class was to be ascertained at that time. It seems to follow as a matter of course that we have got an artificial class, artificial in the sense that you must suppose that the testator was looking at a class who would be ascertained at the time he designated and at no other time, and that although we find in this case a reference to the 'shares proportions and manner prescribed by the statutes,' yet those words must give way for the purpose of ascertaining the class at another point of time than the death of the testator at which the statute would ascertain them."

Mortimer v. *Slater* (3), which came to the House of Lords under the title of *Mortimore* v. *Mortimore* (3), was decided two years and a half before *Sturge and Great Western Rail. Co.* (4) was ruled on by HALL, V.-C. Nothing was then said in your Lordships' House to dispose of the Vice-Chancellor's criticism. There was no creation of an artificial class at all in *Mortimore* v. *Mortimore* (3). The words to be construed ran simply:

> "and if there shall be no such children, that the sum to be paid to such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates,"

but here the word "then" does not appear to me to be an adverb of time at all, but is equivalent to "in that event." It would appear to me that almost every word of this lucid and convincing judgment of HALL, V.-C., applies to the present case.

In the present case a time has been fixed by the testator for the ascertainment of the artificial class, viz., the time when the trust declared fails. That is not the time at which the natural class, if I may so describe it, would be ascertained by the

Statute of Distribution, but the words "be entitled to under the Statute of Distribution" cannot have the effect of substituting the statutory date for the ascertainment of the class, for the period the testator has clearly fixed for the ascertainment of it. The words "entitled under the statute of distribution" must, to use HALL, V.-C.'s, language, give way for the purpose of ascertaining the class at a point of time other than the death of the testator. The point of time being fixed in the present class, the artificial class must satisfy another condition. Members are not to be the next of kin of the testator at common law, but must be such persons as would be entitled under the Statute of Distribution, if the testator had died, not at the time of his actual death, but at the special time fixed for the ascertainment of the artificial class.

In *Re Mellish, Day* v. *Withers* (8) a testator who died in 1880 gave by his will, £12,000 on trust to invest it and pay the income to G. M. for life, and after his decease to pay the income to E. M., his wife, for life, and after the decease of the survivor of them on trust for the person or persons who at the decease of the survivor should be of the blood of G. M. and of kin to him, and who would, under the statutes of distribution of intestates' effects, be entitled to his personal estate as if he were dead, unmarried, and intestate. Held by NEVILLE, J., that the gift was to an artificial class consisting of the next of kin of the G. M., to be as certained as if he had died on the day of the death of E. M. That learned judge, after pointing out that the rule in *Bullock* v. *Downes* (1) was expressly stated to be primâ facie, and did not preclude the court from giving effect to what it finds to be the intention of the testator expressed by the words of his will, says that he is unable to distinguish the case he was deciding from *Sturge and Great Western Rail. Co.* (4), the decision of which is based on *Wharton* v. *Barker* (2).

The decision of PARKER, J. in *Re Wilson, Wilson* v. *Batchelor* (5), does not appear to me to be in conflict with this line of authorities, extending from 1850 to 1916, but quite distinguishable from them. The clause in the will on which the decision turned ran thus:

> "I direct that the trust fund and the income thereof and all statutory accumulations of icome (if any) or so much thereof respectively as shall not have been applied under any of the powers hereinbefore contained or referred to, shall be in trust for such person or persons as on the death of my said nephew Samuel Eyres Wilson will be entitled to (sic) as my next of kin under the statute for the distribution of intestates' estates."

PARKER, J., in giving judgment, distinguishes the case under consideration from *Sturge and Great Western Rail. Co.* (4). He said that if the words in that case had been the same as in the case before him, he thought HALL, V.-C., would have decided differently, and wound up his judgment by saying ([1907] 1 Ch. at p. 464):

> "I have come to the conclusion, having regard to the express words 'will be entitled as my next of kin under the statute,' that no one will be entitled who cannot say, 'I am or represent a person who at the death of Samuel Eyres Wilson was one of the next of kin of the testator by virtue of the statute'."

On appeal, this case was treated as governed by *Bullock* v. *Downes* (1), and it was said that even if the words "at the death of my nephew" were treated as equivalent to "then," they only referred to the time when persons entitled would come into possession. The words of the will in that case are wholly different from those in the present case. They are not, it would appear to me, directed to create an artificial class at all.

On the whole, therefore, I am of opinion that the appeal should succeed, that the decision appealed from was erroneous and should be reversed, and that declaration should be made in the form suggested by LORD CAVE.

LORD MOULTON.—The testator in this case died leaving a widow and three daughters. The earlier dispositions in the will are not material for the purposes of

the present case, which relates solely to the residue which, after the death of the wife, is left in trust in certain proportions to his daughters and their issue for life with cross limitations. The ultimate effect of these provisions is to prevent the failure of these trusts until all three daughters have died without issue. This is the event which has, in fact, happened, and the question raised in this litigation is the interpretation of the clause in the will which defines the ultimate gift over in that case. [His Lordship read the relevant part of the testator's will, and continued:] The question we have to decide is what did the testator mean by this direction. That which first strikes one on reading these words is the repetition of the phrase "on failure of the trusts." Those words may have one of two meanings. They may define the event which is to call into operation the gift over or they may refer simply to the time when that gift over shall take effect. It cannot be doubted that where the phrase first occurs it is used to define the event on the happening of which the gift over shall come into force. But I am clearly of opinion that where it subsequently appears it refers simply to the moment of time when that event occurs. To give it the other interpretation would not only render it mere surplusage, but but would leave no rational explanation of its insertion. It may, therefore, be fully and correctly replaced by the word "then," seeing that by reason of the earlier words of the clause the word "then" will mean "on failure of such trusts." In the events that have happened the clause will then read as follows: "Such residue shall be in trust for such person or persons as then shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estate of intestates, such persons if more than one to take distributively according to the said statutes." The earlier words of this description appear to me to fix the intention of the testator with regard to the class who are to benefit by the gift. It is to be the persons who would be his next of kin at the date in question, or, in other words, those who would have been entitled to his personal estate had he died intestate at the date in question. I can see no other possible interpretation of the words, which are in themselves plain and simple and thus interpreted they define the class of beneficiaries clearly and without ambiguity. The difficulty arises from the words that follow, i.e., "and entitled to my personal estate under the statutes, &c." The judgment of Swinfen Eady, M.R., would have us regard these words as setting forth a second qualification which persons must possess in order to entitle them to be included in the class which is to benefit by the gift over. He considers that the beneficiaries must not only be such next of kin but must also have been entitled to the testator's personal estate as next of kin at the date of his death. Such an interpretation creates a hopeless contradiction between the two parts of the clause. To be one of the "then" next of kin the person must be alive at the date when the clause comes into force, and that cannot occur until all the next of kin at the date of the testator's death have died leaving no issue, so that none of those entitled at his death can be among the "then" next of kin. This latter part of the clause, therefore, cannot have been inserted for the purpose of defining the class of beneficiaries (which has been already fully defined), but must have some other object.

The object of the latter words of the clause appears to me to be evident when one reflects that the clause would not have adequately expressed the testator's intentions if it had only defined the class of persons who were to benefit under the gift. It is necessary that it should also define the shares which the individuals forming that class should take and the language of the last words of the clause shows beyond controversy that they, at least, refer to the mode of distribution among the members of that class. Looking at it from this point of view the meaning of the whole becomes plain in spite of the awkwardness of the language. To ascertain the class you are to find out who are the testator's "then" next of kin. For that purpose you must imagine a demise of the testator intestate at the date of the failure of the earlier trusts, and the first part of the clause we are construing says that the persons who would share his personal estate upon such hypothetical demise shall be the persons who are to share in the residue. The object of the latter part of the clause is to say

that such hypothetical demise shall also determine the shares they shall individually take, i.e., they shall take as they would be entitled to do under the statutes of distribution in such a case. The effect of the whole clause is therefore that the funds shall be distributed precisely as though the testator had died intestate at the date when the gift over is to take effect. Thus interpreted the provision for the distribution of the fund is intelligible and one which the testator might reasonably be expected to make.

No doubt the clause is clumsily framed, but not so clumsily as to defeat what I am clear was the intention of the testator. Both "next of kin" and "entitled" are used in relation to the same hypothetical demise and not in the strict legal sense which would require them to relate to a real demise. I do not think that this is in any way a strained interpretation. If the clause be read as a whole it seems to me to be not difficult to perceive that the word "entitled" relates to the position of the individuals as next of kin and means that they are to claim as such next of kin would be able to claim in the distribution of an estate. Perhaps it would have been clearer if the word "and" had been omitted before "entitled," but without that alteration it is to my mind sufficiently clear that the aim of the whole of the clause is that the distribution is to be the same in all respects as though the hypothetical demise had been an actual demise.

Interpreted as above this is not a case which in any way clashes with the decisions in such cases as *Bullock* v. *Downes* (1), *Mortimore* v. *Mortimore* (3), and *Re Wilson* (5), to which we were referred in the arguments of counsel. In all of these cases the class is defined by their being "next of kin" to the testator. In a case of that kind there is no ambiguity and the words must be given their strict legal meaning. But in this case it is not so defined. It consists of those who would be next of kin in case of a hypothetical demise and who therefore in the eye of the law are not next of kin to the testator. The definition of the class is, in my opinion, so clear that the fact that the testator has spoken of them as being entitled "under the statutes of distribution" cannot confuse it and we are driven to accept the further description as being one in which the word "entitled" is not used in relation to the rights which would follow upon the actual demise of the testator, but to those that would follow from the hypothetical demise which is the foundation of his definition of the class of those who are to share in the funds.

I am therefore of opinion that this appeal should be allowed, and that it should be declared that the persons who would be the next of kin of the testator, had he died at the date of the failure of the earlier trusts, are entitled to share in the gift over in the proportions and in the manner that they would have been entitled to share had the testator actually died at such date.

Appeal allowed.

Solicitors: *Rose, Johnson & Hicks; Hawes, Wood & Ware; Farrar, Porter & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

MERRETT *v.* SCHUSTER

[Chancery Division (P. O. Lawrence, J.), April 20, 21, 22, May 3, 1920]

[Reported [1920] 2 Ch. 240; 89 L.J.Ch. 399; 123 L.T. 105; 64 Sol. Jo. 550]

Sale of Land—Contract—Rescission—Condition—Title—Objection or requisition which the vendor is unable or unwilling to remove or comply with—Honest belief of vendor that vacant possession could be given—Vendor's right to rescind.

O. was the tenant from year to year of agricultural land belonging to the defendant. The tenancy was determinable by a year's notice expiring at Michaelmas in any year. In June, 1918, O. died and his executors arranged with the defendant that he would accept C. as tenant in place of O., the defendant stipulating that the letting to C. should be for one year only, i.e., up to Michaelmas, 1919. C. went into possession of the land and paid rent direct to the defendant. In August, 1919, the defendant instructed agents to sell the land by auction, and it was stated in the advertisements and particulars that the land was in the occupation of C. as sub-tenant to O.'s executors, "the tenancy expiring on Sept. 29, 1919, when vacant possession may be had." No formal notice had been given to O.'s executors to quit. C. attended the sale and bid for the land, but the plaintiff became the purchaser. C. refused to give up possession of the land, and claimed to be entitled to remain in possession by virtue of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919. On Oct. 11, 1919, the defendant gave C. formal notice to give up possession on Oct. 15, 1919, and threatened legal proceedings. The plaintiff claimed specific performance of his contract of purchase, and on Dec. 9, 1919, the defendant gave notice to the plaintiff rescinding the contract under the conditions of sale which, among other things, provided that if the purchaser insisted on any objection or requisition as to title which the vendor should be unable, or, on the grounds of expense, unwilling, to remove or comply with, the vendor might rescind the contract.

Held: the defendant's notice to rescind the contract was valid and afforded a good defence to the plaintiff's claim for specific performance because, although the statement as to vacant possession was untrue, it was not made recklessly but in the honest belief that it was true, and, therefore, the defendant was not disentitled to give the notice.

Re Jackson and Haden's Contract (1), [1906] 1 Ch. 412, applied.

Notes. Considered: *Baines* v. *Tweddle*, [1959] 2 All E.R. 724.

As to exercise of right of rescission, see 29 Halsbury's Laws (2nd Edn.) 288 et seq.; and for cases, see 40 Digest (Repl.) 235 et seq.

Cases referred to:

(1) *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412; 75 L.J.Ch. 226; 94 L.T. 418; 54 W.R. 434; 50 Sol. Jo. 256, C.A.; 40 Digest (Repl.) 100, *757*.

(2) *Greaves* v. *Wilson* (1858), 25 Beav. 290; 27 L.J.Ch. 546; 31 L.T.O.S. 68; 4 Jur. N.S. 271; 6 W.R. 482; 53 E.R. 647; 40 Digest (Repl.) 73, *556*.

(3) *Duddell* v. *Simpson* (1866), 2 Ch. App. 102; 36 L.J.Ch. 70; 15 L.T. 305; 12 Jur. N.S. 969; 15 W.R. 115, L.JJ.; 40 Digest (Repl.) 101, *763*.

(4) *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203; 8 Jur. 551; 63 E.R. 384; 40 Digest (Repl.) 220, *1788*.

Also referred to in argument:

Engell v. *Fitch* (1868), L.R. 3 Q.B. 314; 37 L.J.Q.B. 145; 16 W.R. 785; affirmed (1869), L.R. 4 Q.B. 659; 10 B. & S. 738; 38 L.J.Q.B. 304; 17 W.R. 894, Ex.Ch.; 40 Digest (Repl.) 285, *2369*.

Bain v. *Fothergill* (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261, H.L.; 40 Digest (Repl.) 287, *2392*.

Re Daniel, Daniel v. *Vassall*, [1917] 2 Ch. 405; 87 L.J.Ch. 69; 117 L.T. 472; 33 T.L.R. 503; 61 Sol. Jo. 646; 40 Digest (Repl.) 285, *2372*.

Royal Bristol Permanent Building Society v. *Bomash* (1887), 35 Ch.D. 390; 56 L.J.Ch. 840; 57 L.T. 179; 40 Digest (Repl.) 200, *1623*.

Hoy v. *Smythies* (1856), 22 Beav. 510; 28 L.T.O.S. 183; 2 Jur. N.S. 1011; 52 E.R. 1205; 40 Digest (Repl.) 98, *745*.

Ramuz and Edwards' Contract (1893), 37 Sol. Jo. 701; 40 Digest (Repl.) 96, *730*.

Quinion v. *Horne*, [1906] 1 Ch. 596; 75 L.J.Ch. 293; 54 W.R. 344; 50 Sol. Jo. 272; 40 Digest (Repl.) 100, *759*.

White v. *Cuddon* (1842), 8 Cl. & Fin. 766; 6 Jur. 471; 8 E.R. 300, H.L.; 40 Digest (Repl.) 51, *322*.

Action.

The following facts are taken from his lordship's judgment:

"The defendant is the incumbent of the ecclesiastical benefice of Down Hatherley, near Gloucester. The glebe lands belonging to the benefice include certain pasture and arable fields (with suitable farm buildings), containing by admeasurement 103 acres and 38 perches, situate close to Down Hatherley Rectory. For the sake of brevity I propose to call these fields 'the glebe lands,' although they do not comprise the whole of the glebe. When the defendant became the incumbent in January, 1918, the glebe lands (together with a piece of land about 3 acres in extent, also part of the glebe) were in the occupation of Mr. Joshua Oakley as tenant from year to year at a rent of £91. This tenancy could only be determined by a year's notice on either side expiring at Michaelmas in any year. Mr. Joshua Oakley died in June, 1918. His executors were Mr. Roberts and Mr. Grimes, the latter being a solicitor practising in Gloucester. Some time before Michaelmas, 1918, Mr. Roberts met the defendant, either at Mr. Oakley's house or at the rectory, with a view to arranging what was to happen to Mr. Oakley's tenancy. At this interview Mr. Roberts asked the defendant whether he would accept Mr. Cock as a tenant in the place of Mr. Oakley. The defendant expressed his willingness to make an agreement with Mr. Cock, but told Mr. Roberts that, as he was thinking of selling the land, he would not be able to guarantee Mr. Cock any tenancy which would last longer than a year. The defendant asked to whom it was suggested that he would have to look for the rent in future, and Mr. Roberts told him it was Mr. Cock. The defendant then asked Mr. Roberts if the executors wanted to be released from the tenancy, and Mr. Roberts replied in the affirmative. Shortly afterwards Mr. Roberts brought Mr. Cock to the rectory and introduced him to the defendant. At this interview Mr. Cock said that he realised that he was to have a tenancy for one year only, but wished to know whether the defendant would take him on as a yearly tenant, to which the defendant replied that that would be a question of terms, whereupon Mr. Cock said that he would come back another time to discuss the matter. A few days later Mr. Cock came to the rectory and asked the defendant what terms he suggested for a yearly tenancy. The defendant told him that he would want £2 per acre. Mr. Cock declined to offer more than £1 per acre, and, as he was not prepared to make a higher offer and the defendant considered the offer of £1 per acre too low, no agreement for a yearly tenancy was reached. Before Mr. Cock left the rectory the defendant said to him, 'Very well, then; your time is up Michaelmas 1919,' and Mr. Cock appeared to acquiesce in this statement. Mr. Cock went into occupation of the land comprised in Oakley's holding and paid the rent of £91 direct to the defendant. In August, 1919, the defendant placed the glebe lands, together with other land forming part of the glebe (but not including the additional 3 acres of land comprised in Oakley's holding), into the hands of Messrs. Bruton, Knowles & Co., auctioneers of Gloucester, for sale by public auction. Messrs. Bruton, Knowles & Co. settled the advertisements and the particulars and conditions of sale. The glebe lands formed lot 3, and the other land lots 1 and 2. In the course of settling the advertisements and

particulars a question arose as to vacant possession being given to the purchasers of lots 1 and 2. Messrs. Bruton, Knowles & Co. were apparently under the impression that the defendant had told them that he could give vacant possession of all the three lots and had settled the draft advertisements and particulars on that footing. This was a mistake, and the defendant denied emphatically that he had told Mr. Bruton that he could give vacant possession of lots 1 and 2. However that may be, the draft advertisements and particulars were altered as regards lots 1 and 2 by stating that the sale of these lots would be subject to the existing tenancies. I only mention this incident because it was relied on by the plaintiff as showing that the defendant's attention had expressly been drawn to the question of giving to the purchaser vacant possession of the lots about to be offered for sale. There never was any doubt in the mind of the defendant as to his ability to give vacant possession of the glebe lands constituting lot 3, and the advertisements and particulars stated that the glebe lands were 'in the occupation of Mr. Cock as sub-tenant to the trustees of Mr. Joshua Oakley, deceased, the tenancy expiring at Sept. 29, 1919, when vacant possession may be had.' The sale took place on Sept. 6, 1919. Mr. Cock was present at the sale and bid for the glebe lands, which, however, were eventually knocked down to the plaintiff at the price (including £58 for timber) of £3,308, and the plaintiff paid a deposit of £325. The sale took place on a Saturday afternoon. On the following Monday (Sept. 8, 1919) Mr. Cock came to see the plaintiff at the office of the plaintiff's solicitors and offered to buy the glebe lands. The plaintiff refused to sell the whole, but offered to sell part, which offer Mr. Cock declined. At this interview, Mr. Cock told the plaintiff that he wanted to stay on, and said that he was not bound to go out in view of the provisions of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, which had then recently received the Royal Assent. The plaintiff's solicitors, Messrs. Jones, Blakeway and Jones, thereupon on the same day wrote a letter to the defendant's solicitors asking them to state exactly the position as to vacant possession being given on Sept. 29, 'as we hear that there is some question about it.'

"In answer to this letter the defendant's solicitors on Sept. 11, 1919, wrote to the plaintiff's solicitors as follows :

> 'There is no question as to the land being void on the 29th inst. If Mr. Cock asserts to the contrary he is wrong. Our client writes : "The position is this : Some few months after the death of my tenant, Mr. Joshua Oakley, his executors introduced Mr. Cock to me and asked permission to sublet to him for the year ending the 29th Sept. 1919, after which time they gave me notice that their tenancy would cease. Mr. Cock then came to me and offered to make an agreement; he said that if I would accept a pound per acre all round he would pay the same from that moment and from year to year. I said that my price was two pounds an acre. To this he refused to listen and did not even offer to bargain. So I told him plainly, 'Very well, then; your tenancy expires next Michaelmas'." There does not appear to have been any written agreement with the late Mr. Oakley and certainly none with his executors or Mr. Cock.'

Relying on the statements contained in this letter, the plaintiff (who is an auctioneer and estate agent as well as a farmer) found sub-purchasers of three portions of the glebe lands at enhanced prices, and actually received the whole of the purchase money for one of these parcels. He also received two offers at an enhanced price for the remainder of the glebe lands, which he did not accept. These sub-sales and offers were made on the footing of vacant possession being given on Sept. 29, 1919. If the three sub-sales had been completed, and if the smaller of the two offers for the remainder had been accepted the plaintiff would have made a profit of upwards of £500 on the transaction. On Oct. 2, 1919, the plaintiff visited the glebe lands and found ploughing going on and cattle on the land. He thereupon interviewed Mr. Cock, who told him that he was tenant for the next

two years. On Oct. 3, 1919, the plaintiff's solicitors wrote to the defendant's solicitors acquainting them with the attitude adopted by Mr. Cock and asking for an explanation. The defendant at once went to see Mr. Cock and then for the first time learnt from Mr. Cock that he claimed to be entitled to retain possession of the glebe lands by virtue of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919. After some correspondence the defendant's solicitors on Oct. 11, 1919, wrote to Mr. Cock making a formal demand on him to give up possession of the property on Oct. 15, threatening legal proceedings in default, and pointing out that he was holding over under a misapprehension. Mr. Cock at or about this time seems to have consulted Mr. Grimes, and was apparently acting under his advice when refusing to give up possession of the glebe lands. In the end both Mr. Roberts and Mr. Grimes denied that they had given the defendant notice to quit, and Mr. Cock definitely refused to give up possession. Thereupon the defendant asked Mr. Bruton to ascertain whether Mr. Cock would accept any reasonable compensation for giving up possession, but Mr. Cock declined to come to any arrangement and insisted on remaining as tenant until at least Michaelmas, 1921. On Oct. 28, 1919, the plaintiff commenced this action claiming specific performance of his agreement and damages in addition or in the alternative. On Dec. 9, 1919, the defendant through his solicitors gave notice to rescind the agreement under conditions of the Public Sale Conditions of the Gloucester and Wiltshire Incorporated Law Society, subject to which the sale was effected." The relevant conditions were as follows:

"Condition 5. [After providing that objections and requisitions in respect of the title should be made by the purchaser within a specified time, continued as follows:] And if he shall insist on any objection or requisition as to the title, or evidence of title, or abstract, particulars, plans, conditions, conveyance, surrender or otherwise (not being a claim for compensation falling within the seventh of these conditions) which the vendor shall be unable or, on the ground of expense, unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser or his solicitor at any time, and notwithstanding any negotiation or pending litigation in respect of such objection or requisition, or any attempt to remove or comply with the same, rescind the contract, unless within fourteen days after the delivery of such notice, the purchaser shall, by notice in writing, withdraw such objection or requisition, and upon such rescission the deposit shall be returned to the purchaser. . . .

Condition 7. If any error or mistake shall have been made in the description of the property the same shall not annul the sale, but if the same shall be pointed out either by the vendor or purchaser prior to the time appointed for the completion of the purchase, compensation shall be allowed or given by the vendor or purchaser, as the case may require, and, in default of agreement, the amount thereof, where the sum claimed shall not exceed £10, shall be settled by the auctioneer, whose decision shall be final, and in any other case the amount thereof shall be ascertained by valuation."

Owen Thompson, K.C., and *H. B. Vaisey* for the plaintiff.
C. E. E. Jenkins, K.C., and *G. R. Northcote* for the defendant.

Cur. adv. vult.

May 3. **P. O. LAWRENCE, J.** [after stating the facts, said:] At the trial, counsel for the plaintiff pressed for specific performance with compensation, and only asked for damages for loss of bargain in case the court should hold that he was not entitled to the relief he primarily desired. The main defence relied on by the defendant is that the agreement has been validly rescinded and that consequently the plaintiff is not entitled to specific performance or to any damages. [His Lordship read the fifth public sale condition.] The plaintiff does not seriously dispute that his objection is an objection as to the title or particulars within the

meaning of condition 5, and is not a claim for compensation falling within condition 7. Further, he does not dispute that the notice of rescission has been given in good faith on the ground that the defendant is either unable or else, on the ground of expense, unwilling to remove the objection, and he admits that he has not withdrawn, but, on the contrary, still insists upon his objection. He contends, however, that the defendant is not in the circumstances entitled to avail himself of the power of rescission conferred by condition 5 at all, because the statement in the particulars with respect to the termination of the tenancy and the giving of vacant possession of the glebe lands was inserted therein by the defendant recklessly and without troubling to verify its accuracy and was calculated to mislead and did in fact mislead the plaintiff. The plaintiff in support of his contention relies on *Re Jackson and Haden's Contract* (1), in which COLLINS, M.R., states the result of the authorities bearing on this point. The broad effect of what the Master of the Rolls said on this subject is, I think, accurately summarised in WILLIAMS ON VENDOR AND PURCHASER (2nd Edn.), p. 187, that a vendor who has in the particulars knowingly or recklessly made an untrue statement of a material fact concerning the property sold is not entitled to rescind under such a condition as condition 5 in the present case, so as to deprive the purchaser of his right to enforce specific performance of the contract with compensation. From the report of the case it does not appear clearly how far ROMER and COZENS-HARDY, L.JJ., concurred in the general remarks on the law made by the Master of the Rolls, but, whether they did so concur or not, I consider myself bound by the judgment of the Master of the Rolls and by his statement of the law. The question for decision on this head of defence therefore resolves itself into whether the statement in the particulars as to the termination of the tenancy and the giving of vacant possession of the glebe lands was made recklessly within the meaning of the principle laid down or recognised by the Master of the Rolls in *Re Jackson and Haden's Contract* (1). It is not suggested that the defendant made the statement knowing it to be untrue. I think that the principle which I have mentioned must not be confused with the well-established principle that a vendor is not entitled to exercise a power which he reserves to himself to rescind the contract arbitrarily or capriciously. There are many decisions recognising this latter principle, some of which, e.g., *Greaves* v. *Wilson* (2), have been cited during the argument. In the present case it has not been suggested that there has been any arbitrary or capricious exercise of the power. The defendant has in my judgment made reasonable efforts to remove the plaintiff's objection, and has only given the notice to rescind after these efforts had failed. Moreover, the condition itself is framed so as to be as fair as possible between vendor and purchaser. The power can only be exercised if the vendor either is unable or is, on the ground of expense (but no other ground), unwilling to remove the objection, and the purchaser is given a fortnight after the service of the notice of rescission within which to withdraw his objection. In the present case it has been proved to my satisfaction that the defendant was either altogether unable or was unable without legal proceedings to procure vacant possession to be given to the plaintiff until Michaelmas, 1921, and that the defendant was unwilling to incur the expense of legal proceedings the result of which he could not foresee.

The Master of the Rolls in *Re Jackson and Haden's Contract* (1) contrasts *Duddell* v. *Simpson* (3), in which the vendor had made a misrepresentation, but had taken steps to assure himself that the representation was true and was therefore held entitled to rescind, with *Nelthorpe* v. *Holgate* (4), in which the vendor knew of the defect in his title, but had taken no steps to assure himself that he could remove it, and had not satisfied the court that he was under a mistaken belief that he could make a good title, and was therefore held not entitled to rescind. In *Re Jackson and Haden's Contract* (1) the vendor, knowing that he was not entitled to the minerals under a piece of land in Staffordshire, put it up for sale by a description wide enough to include the minerals under it in the belief that no purchaser would be misled as it was well known in the district that the minerals were reserved.

On the purchaser taking the objection that the vendor had not shown any title to the minerals, and claiming specific performance with compensation, it was held by all the members of the court that the vendor was not entitled to rely on a condition giving him power to rescind on the ground that the objection taken by the purchaser was an objection falling within a condition as to compensation contained in the contract in that case, and by COLLINS, M.R., and COZENS-HARDY, L.J., on the additional ground that the vendor had made the representation knowing that it was untrue, and recklessly, and that the case fell within the principle recognised in *Nelthorpe* v. *Holgate* (4). The Master of the Rolls (after stating that a vendor, in order to disentitle himself to rely on the power to rescind, must have done less than an ordinary prudent man having regard to his relations with another person when dealing with him is bound to do) considered that where a vendor, knowing the exact facts, had recklessly made a description of them which would mislead another person, there was a clear failure of duty on his part, viz., a reckless disregard of his duty as to the accuracy of statement when making a statement with a view to other people acting on it as correct, and held that the vendor, in that case, was not entitled to avail himself of the power to rescind, the purchaser's objection having arisen wholly and solely out of the recklessness in which the vendor had formulated the contract.

The difficulty in the present case lies not so much in ascertaining the true principle, but in applying the principle to the facts as proved before me. The defendant has a bad memory and a somewhat lively imagination; moreover, in the witness-box he was unable to express himself clearly even when he desired and was anxious to state what according to his recollection had happened at the three crucial interviews in September, 1918. I have come to the conclusion, however, that he was an honest witness, and that he did not say anything which he did not believe to be true. I doubt very much whether the defendant had remembered all that took place between himself and Mr. Roberts at the first interview, and I am convinced that he was unable to express clearly the true effect of what he did remember as having transpired at this interview. I have not much doubt that no formal notice to quit was given either by or to Mr. Roberts (as, indeed, the defendant admitted), but the defendant's evidence has convinced me that whatever was said at that interview and at the later interviews, the result of the interviews was that the parties concerned were left under the impression that the annual tenancy then subsisting in favour of Mr. Joshua Oakley's executors would determine either immediately, if an agreement for an annual tenancy could be come to between the defendant and Mr. Cock, or at latest on Sept. 29, 1919, if no such agreement could be come to, and that, failing such an agreement being reached, Mr. Cock would become the sub-tenant of the glebe lands for the remaining year of the late Mr. Oakley's tenancy, viz.: up to Sept. 29, 1919, and that the defendant would accept the rent for that year from Mr. Cock so long as it was duly paid. That this was the result of the interview was and still is the firm belief of the defendant and the subsequent conduct both of the executors and of Mr. Cock tends strongly to support the view that it was also their belief, at all events their conduct in my opinion was more consistent with this view than with the attitude finally adopted by them. When Mr. Roberts introduced Mr. Cock to the defendant, Mr. Cock, in the presence of Mr. Roberts, told the defendant that he realised that he would have to give up possession at Michaelmas 1919, and Mr. Roberts did not dissent from this statement. Further Mr. Cock was told plainly by the defendant, after the failure to reach an agreement for an annual tenancy, that his tenancy would determine on Sept. 29, 1919, a statement in which Mr. Cock seemed to acquiesce. Mr. Cock thereafter paid his rent to the defendant and not to the executors, who apparently were content with this arrangement although the result of the transaction was that they were not released from their obligation to pay the rent for the remaining year of the tenancy should Mr. Cock make default in payment of such rent. Neither the executors nor Mr. Cock seem to have made any protest when the glebe lands

were publicly advertised for sale, with vacant possession to be given on Sept. 29, 1919. The former must, I think, have had their attention called to these advertisements and to the particulars of sale, and the latter actually attended the sale and bid for the property. Mr. Cock, finding that the plaintiff outbid him at the sale, appears to have consulted Mr. Grimes. As the result of his advice Mr. Cock seems to have claimed the benefit of the Agricultural Lands Sale (Restriction of Notices to Quit) Act, 1919, which had received the Royal Assent on Aug. 19, 1919. This claim is wholly inconsistent with the claim made later on. It was not until after the defendant's advisers had pointed out that the provisions of that Act had no application to his case that the contention that no notice to quit had been given or received by the executors was first put forward. In the absence of any evidence by Mr. Roberts or by Mr. Cock it is impossible for me to express a final opinion as to whether the effect of the interviews in September 1918, was or was not to determine Mr. Oakley's tenancy on Sept. 29, 1919. On the evidence of the defendant coupled with the attitude adopted by the executors and by Mr. Cock, however, I am of opinion that the defendant had substantial ground for coming to the conclusion, first, that the executors had agreed that their tenancy should determine on Sept. 29, 1919, and, secondly, that the arrangement which the defendant had made with Mr. Roberts and with Mr. Cock in September, 1918, was made on the footing that the tenancy both of the executors and of Mr. Cock would determine at Michaelmas, 1919.

I am further of opinion that Mr. Cock was told both by Mr. Roberts and by the defendant (and fully appreciated at the time) that his tenancy was a tenancy which would only last up to Sept. 29, 1919. The mistake he made in September, 1919, was that he considered himself as having received a notice to quit on Sept. 29, 1919, which, if it had been in fact, might have brought him within the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, whereas his tenancy in truth, if the defendant was right in his belief, was really one for a year only. That the defendant had arrived at the conclusion that the executors had agreed to determine the tenancy at Michaelmas, 1919, is fully borne out by the statement contained in the letter which he wrote to his solicitors (quoted in their letter of Sept. 11, 1919), in which he states that the executors had given him notice that the tenancy would cease after Sept. 29, 1919. This letter was written at a time when the defendant's recollection of what had taken place was somewhat fresher than it was when he was in the witness-box. That the defendant had substantial ground for arriving at his conclusion is, in my opinion, amply borne out by Mr. Cock's attitude at the sale. It is inconceivable that if Mr. Cock had then thought that his tenancy would not determine on Sept. 29, 1919, he should have let the sale proceed on the footing that vacant possession would be given to a purchaser and that he should have actually competed with persons bidding on that footing. The case is near the line, but on the whole, having given my best consideration to all the evidence adduced before me, I have come to the conclusion that the defendant was not guilty of such recklessness in stating that the tenancy of the glebe lands would determine on Sept. 29, 1919, and that vacant possession could be had after that date so as to disentitle him to rely on the power of rescission reserved to him under condition 5. Both in *Nelthorpe* v. *Holgate* (4) and in *Re Jackson and Haden's Contract* (1) the vendor had stated what he knew to be untrue, whereas in the present case the defendant stated what he believed to be (and what, on a more complete investigation than is practicable in this case, may possibly, in fact, be found to be the facts) true. In *Nelthorpe* v. *Holgate* (4) the vendor had no justification whatever for making the misrepresentation, and did not satisfy the court that he had made the statement under the belief that he could make a title without the concurrence of his mother, or, in consequence of any promise or representation on her part, that she would concur in the sale, whereas in the present case the defendant has satisfied me that he made the statement in question in the bonâ fide belief that he could give vacant possession to the

purchaser without the concurrence of either Mr. Cook or the executors, and in consequence not only of the representation which he believed, and still believes, was made to him by Mr. Roberts that the tenancy of the executors would come to an end on Sept. 29, 1919, but also in consequence of Mr. Cock having stated to him in Mr. Robert's presence that his tenancy would last up to that date only and having later acquiesced in the defendant's statement as to his view of the duration of the tenancy. It looks to me as if it were highly probable that the learned Vice-Chancellor in *Nelthorpe* v. *Holgate* (4) would have held that the vendor in that case could have availed himself of the power of rescission if it had been shown either that he had honestly believed that he could have made a title without the concurrence of his mother or that she had made a representation to him that she would concur. In my view, the facts of the present case approach more closely to the facts in *Duddell* v. *Simpson* (3) than to the facts in *Nelthorpe* v. *Holgate* (4). It is true that in *Duddell* v. *Simpson* (3) the vendor had, immediately before issuing the particulars, communicated with the owners of the last three days of the term, who had expressed their willingness to concur, whereas in the present case no communication was made to the executors or Mr. Cook immediately before the advertisements and particulars were issued. The reason, however, for the defendant not having again communicated with the executors and Mr. Cock is obvious—from first to last the defendant never had any doubt in his own mind that the effect of the arrangement which he had made in September, 1918, was that the executors' and Mr. Cock's tenancy would come to an end on Sept. 29, 1919. *Duddell* v. *Simpson* (3), moreover, shows that a statement made on the faith of a promise or representation by a third party that he will concur in the sale without having previously made an agreement with that third party binding him to concur in the sale is not "reckless" necessarily within the meaning of the authorities on this point. In my judgment the cases establish that a vendor ought not to be held disentitled to exercise a clear and unambiguous power of rescission reserved to him in the contract because he has made an untrue statement of fact concerning the property agreed to be sold in a case where the statement has been made under the bonâ fide belief that it is true, and there exists some substantial ground for such belief. Such a case, in my judgment, differs materially from a case in which the vendor either knows that the statement is untrue (as in *Re Jackson and Haden's Contract* (1), or has no belief in the truth of the statement, as in *Nelthorpe* v. *Holgate* (4), and differs, also, from the case where the vendor, though believing the statement to be true, has no ground, or only a fanciful and unsubstantial ground, for such belief. In my judgment, COLLINS, M.R., in *Re Jackson and Haden's Contract* (1), did not lay down any new principle, and in speaking of the recklessness of the vendor intended to cover those cases in which a vendor had made an untrue statement without having any or at most only unsubstantial grounds for believing that it was true. In the result I hold that the notice given by the defendant to rescind the agreement in this case was a valid notice and affords a good defence to the action. Having arrived at this conclusion, it is unnecessary for me to say anything about the other points taken by the defendant in answer to the claim for specific performance with compensation and to the alternative claim for damages for loss of bargain; to deal with these points would only be prolonging my judgment uselessly. I therefore content myself with dismissing the action on the ground that the agreement has been duly rescinded by the defendant. As regards costs, the defendant, in his defence, pleaded the notice to rescind, and offered to return the deposit and to pay the costs of the action down to the delivery of the defence. Notwithstanding the non-acceptance by the plaintiff of this offer, and his failure to succeed in the action, I have come to the conclusion that in the circumstances the plaintiff should not be ordered to pay any costs to the defendant. One of my reasons for exercising my discretion in this manner is that when, two days after the sale, and before the plaintiff had attempted to deal with the glebe lands, he expressly asked to be informed of the exact position as to vacant possession being

given to him on Sept. 29, 1919, he was definitely informed by the defendant's solicitors that there was no question as to the land being vacant on Sept. 29. No inquiry was made by the defendant or by his solicitors of the executors or of Mr. Cock before returning this answer. The plaintiff was encouraged by this answer to enter into arrangements for the resale of the property, which I think I am justified in assuming he would not have done had he known the true facts, and was thus practically compelled to fight the matter out. The action will be dismissed without costs.

Solicitors: *Morley Shirreff & Co.*, for *Jones, Blakeway & Jones*, Gloucester; *Fish, Roscoe & Co.*, for *Hannam-Clark & Sons*, Gloucester.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re GARDNER. HUEY *v.* CUNNINGTON

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), July 8, 1920]

[Reported [1920] 2 Ch. 523; 89 L.J.Ch. 649; 124 L.T. 49; 36 T.L.R. 784; 64 Sol. Jo. 650]

Trust and Trustee—Secret trust—Gift of life interest to husband—No other disposition—Corpus devolving on husband under intestacy—Unattested memorandum—Communication to husband after date of will.

A testatrix, who died on April 9, 1919, by her will, dated April 23, 1909, gave all her estate to her husband for his use and benefit during his life, "knowing that he will carry out my wishes." She made no other disposition by her will. The husband died on April 14, 1919. The will of the testatrix was found in the husband's safe with an unattested paper, signed by the testatrix and dated April 27, 1909, stating that her wishes were that "the money I leave my husband" should on his death be divided between two named nieces and a nephew. Since the will of the testatrix disposed of only a life interest in her estate (which comprised only personalty), subject thereto her property devolved on her husband under her intestacy. Evidence was given that shortly after the execution of her will, the testatrix had said, in the presence of her husband, that her property was to be divided after the husband's death between her two nieces and her nephew, and the husband had assented to that statement.

Held: the phrase "knowing that he will carry out my wishes" referred only to the life interest conferred by the testatrix on her husband; but the husband could not properly refuse to carry into effect the wishes expressed to him by the testatrix and assented to by him and, therefore, the nieces and nephew were entitled to the corpus.

Principle as stated by LORD DAVEY in *French* v. *French* (1), [1902] 1 I.R. 172, 224, at p. 230, applied.

Decision of EVE, J., [1920] 1 Ch. 501, reversed.

Notes. Considered: *Re Gardner, Huey* v. *Cunningham*, [1923] 2 Ch. 230. Applied: *Re Williams, Williams* v. *All Souls, Hastings, Parochial Church Council*, [1923] Ch. 244; *Re Young, Young* v. *Young*, [1950] 2 All E.R. 1245. Referred to: *Re Blackwell, Blackwell* v. *Blackwell*, [1929] All E.R. Rep. 71; *Re Keen, Evershed* v. *Griffiths*, [1937] Ch. 236.

As to evidence of secret trusts, see 34 HALSBURY'S LAWS (2nd Edn.) 183 et seq.; and for cases, see 43 DIGEST 596 et seq.

Cases referred to: A

(1) *French* v. *French*, [1902] 1 I.R. 172.

(2) *Johnson* v. *Ball* (1851), 5 De G. & Sm. 85; 18 L.T.O.S. 182; 16 Jur. 538; 64 E.R. 1029; 43 Digest 598, *464*.

(3) *Re Gardom, Le Page* v. *A.-G.*, [1914] 1 Ch. 662, C.A.; affirmed (1915), 84 L.J.Ch. 749; 113 L.T. 475; 59 Sol. Jo. 599, H.L.; 43 Digest 596, *451*.

(4) *Re Fleetwood, Sidgreaves* v. *Brewer* (1880), 15 Ch.D. 594; 49 L.J.Ch. 514; 29 W.R. 45; 43 Digest 598, *463*. B

Also referred to in argument:

McCormick v. *Grogan* (1869), L.R. 4 H.L. 82; 17 W.R. 961, H.L.; 43 Digest 600, *480*.

Re Maddock, Llewelyn v. *Washington*, [1902] 2 Ch. 220; 71 L.J.Ch. 567; 86 L.T. 644; 50 W.R. 598, C.A.; 43 Digest 598, *467*. C

Re Hetley, Hetley v. *Hetley*, [1902] 2 Ch. 866; 71 L.J.Ch. 769; 87 L.T. 265; 51 W.R. 202; 43 Digest 592, *415*.

Smith v. *Attersoll* (1826), 1 Russ. 266; 38 E.R. 103; 43 Digest 598, *462*.

Appeal from an order of Eve, J.

Elfrida Gardner (hereinafter called the testatrix) by her will, dated April 23, D 1909, gave and bequeathed all her real and personal estate of every description to her husband, Herbert Gardner, for his use and benefit during his life, stating that she did so knowing that he would carry out her wishes, and she appointed her husband sole executor of her will. The testatrix died on April 9, 1919, possessed of personal estate of the approximate value of £3,500. Herbert Gardner survived his wife, the testatrix, only a few days, and died on April 14, 1919, and on Aug. 9, E 1919, letters of administration with the will annexed of the testatrix were granted to the plaintiffs, Isaac Mackay Huey, Ellen Sidney Whitlock, and Lewis William Taylor. By his will, dated July 19, 1916, Herbert Gardner appointed the first two plaintiffs to be executors and trustees, and bequeathed to each of them, in case they should respectively prove his will and act in the trusts thereof, the legacy therein mentioned as some acknowledgment of the trouble they would have in F acting as executors and trustees thereof, and also in carrying out the dispositions in the will of his wife, who had appointed him sole executor of her will and had thereby given him a life interest in certain property. After making specific bequests of stock on certain trusts and after purporting to appoint certain trust funds over which he had no power of appointment, Herbert Gardner gave the residue of his estate to his wife the testatrix. Herbert Gardner executed two codicils in April G and November, 1918, to his will by the second of which he appointed Lewis W. Taylor to be an additional executor and trustee, but did not alter the gift in his will of his residuary estate. His will and codicils were duly proved by the plaintiffs. One of the executors searched the testatrix's house soon after her decease and found her will in her husband's safe, and with it a paper of which the following is a copy: H

> My wishes are that the money I leave to my husband should on his death be equally divided among my nieces and nephew—viz.: May Cunnington, Camoys, Braintree, Essex; Mabel Olive Hope Bayly, Lorenco Marques, Delagoa Bay, S. Africa; and Lancelot Brodrick, National Bank, Wipenaar, Orange River Colony, S. Africa. In the event of May Cunnington not surviving my husband, I then the money to be divided between Mabel Olive Hope Bayly and Lancelot Brodrick in equal parts.—Elfrida Gardner.—April 27, 1909.

The paper was inclosed in an envelope indorsed as follows:

> Contains the will of Elfrida Gardner and also a copy of the last will of the Revd. Herbert Gardner, dated July 19, 1916. The will is in the possession of Messrs. Burgess, Taylor and Tryon, 1, New Square, W.C.

The indorsement appeared to be in the handwriting of Herbert Gardner and the

envelope contained the said paper, the will of the testatrix, and a copy of Herbert Gardner's will.

Mabel O. H. Bayly died on Oct. 9, 1917. There was evidence that Herbert Gardner asked the defendant May Cunnington for her address, as he was about to insert it in his will. On Aug. 9, 1919, letters of administration with the will annexed of the testatrix were granted to the plaintiffs as executors of the will of Herbert Gardner. The trustees' originating summons to which Austen Gardner, one of the next of kin of Herbert Gardner, was made the third defendant, asked whether the bequest of the testatrix's residuary estate to Herbert Gardner created a trust in favour of the defendants May Cunnington and Lancelot Brodrick, or whether Herbert Gardner became absolutely entitled to the testatrix's residuary estate, and the summons contained a further question as to the destination of Mabel O. H. Bayly's one-third share thereof.

The summons was adjourned into court, and came on to be heard before Eve, J., on Feb. 24, 1920.

It was decided by Eve, J., that the residue of the testatrix's estate passed to her husband, and in the event which had happened of his death intestate it had devolved on the persons entitled as his statutory next of kin. From that decision the testatrix's surviving nephew and niece appealed.

C. J. W. Farwell for the surviving nephew and niece.
C. D. Myles for the next of kin of the testatrix's husband.
H. T. Method for the trustees of the will.

LORD STERNDALE, M.R.—The question arises on the will of Elfrida Gardner. Her will is in these terms:

> "This is the last will and testament of me Elfrida Gardner. I give and bequeath all my real and personal estate of every description unto my husband Herbert Gardner for his use and benefit during his life knowing that he will carry out my wishes. I appoint my said husband sole executor of this my will and declare this writing to be my last will and testament."

That will seems to me to dispose of the life interest, and the life interest only. As to anything beyond the life interest the will does not dispose of it, and anything which is said in the will does not affect it. The words "knowing that he will carry out my wishes," when confined to the gift of the life interest, have possibly very much meaning.

There were no children of the marriage. The husband took the capital during his lifetime. He died four days after his wife without having proved her will, and therefore in his lifetime no question arose as to what he would have done with the capital. But it is said that he could only take it on the terms of disposing of it according to wishes which had been expressed to him by his wife and to which he had assented, those wishes being that the property should be divided among two nieces and a nephew, provided they were all living at the date of the will, but one of whom had died in the lifetime of the testatrix.

The evidence as to the expression of the testatrix's wishes to her husband, and his assent to them, is comprised partly in the evidence of Mrs. Whitlock, who was an executrix of the will, and partly in the evidence of the solicitor with regard to what he found after the husband's death. The evidence of Mrs. Whitlock was that she knew the testatrix and her husband very well, and that she remembered that the testatrix told her one day in her husband's presence that her property after Mr. Gardner's death was to be divided between her two nieces and nephew—then their names are mentioned—"and the said Herbert Gardner signified his assent." Mrs. Whitlock said that conversation took place, as far as she could remember, one afternoon early in 1909, and that the statement was made to her in the following circumstances: "The testatrix informed me that my husband [Mrs. Whitlock's husband] had witnessed her will," and it was in talking of the will

that she made this statement. That may or may not show that this conversation took place after or before the making of the will. I should be rather inclined to think that it meant that the conversation took place afterwards, because the witness said that the testatrix informed her that the witness's husband had witnessed the will. But it may very well be that it was only a repetition or only a statement of a communication made to the husband before the date of the will, the conversation taking place afterwards. I will assume that the communication was made after the will.

The evidence of the solicitor is that after the testatrix's death he found her will in her husband's safe, and with it there was a paper of which this is a copy:

> "My wishes are that the money I leave to my husband should on his death be equally divided among my nieces and nephews."

Then it gives their names: May Cunnington, Mabel Olive Hope Bayly and Lancelot Brodrick. Then it continues thus:

> "In the event of May Cunnington not surviving my husband then the money to be divided between Mabel Olive Hope Bayly and Lancelot Brodrick in equal parts."

That speaks of "The money I leave to my husband." She had only left him in fact a life interest in the money. But she, I should assume, knew pretty well that the result of not giving the corpus to anybody else would be that he would get it, and I think she may very well have described the whole "as money I leave to my husband." The question now is whether his next of kin or those three beneficiaries—or two and the representatives of one of them—are to be entitled to the money. It seems to me that the position is just the same as if there had been no gift to the husband for life, but that the whole of the money had come to him under an intestacy with an intimation of the intestate's wishes that he should have a life interest, and that after his death the money should be distributed according to her wishes, and he had assented to that. In that case I do not think that there can be any question that, whether the communication of her wishes and the assent to them took place at any time, the person getting the money would be bound to act according to the wishes of the intestate.

As I have said, the will does not dispose of anything but the life interest, and there is an intestacy as to the rest. The position, therefore, to my mind, with regard to that portion of the estate as to which there is an intestacy, is exactly the same as if there had been no will at all, and, as the husband did have communicated to him his wife's wishes and did assent to them, I think he, and as he is dead his representatives at law, are bound to act in accordance with them. He became a trustee, and they are trustees for the persons designated by the testatrix.

The authorities that have been cited where there is a gift by will to trustees, who are not beneficially interested, on certain trusts not named in the will, do not seem to me to have any bearing at all on the present case. The obligation in the present case on the husband and his next of kin seems to me to arise from this, that he takes the property in accordance with and on an undertaking to abide by the wishes of the testatrix, and if he were to dispose of it in any other way he would be committing a breach of trust, which has been called fraud in some of the cases. I do not think that it matters which you call it. The breach of trust or the fraud would arise when he or they attempted to deal with the money contrary to the terms on which he took it.

There is only one other point that has been mentioned to which I need allude. It is said, and rightly said, that to apply that doctrine the trusts on which the person takes the money must be clearly defined. It is said that there is here a difference between the evidence given by Mrs. Whitlock and the wishes of the testatrix as expressed in the document which I have read, because Mrs. Whitlock does not include in her evidence any statement of the provision that in the case of

A the death of May Cunnington in the lifetime of the husband the money was to be divided between the other two. I do not see any discrepancy between the two. I do not think that Mrs. Whitlock purported to be setting out every detail. She is only setting out the substance and expressing the substance of the wishes to which the husband had acceded, and the testatrix was not speaking as a lawyer. She was only expressing the substance of it, and she expressed the substance of B it quite correctly, that these three persons were to have the property divided between them after the husband's death. I think that there is nothing inconsistent with that, or making that too plain, in the fact that certain details of what was to happen if one of them died in the husband's lifetime were added in that document which was given to him and undoubtedly kept by him as the expression of his wife's wishes.

C I think, therefore, that this appeal should be allowed. The costs will come out of the estate as ordered in the court below. The form of the declaration will be settled afterwards.

WARRINGTON, L.J.—I am of the same opinion. I think that the case is a very simple one. I venture to think that in the court below it was to some extent D confused, partly by the view which the learned judge expressed on the construction of the will, and partly by the discussion which arose as to whether or not the document which was dated four days after the will could be referred to as expressing a trust imposed on the husband. I think that the question is really this: Can the husband, who, as the result of the particular form in which the testamentary disposition of the wife is made, takes at law for his own benefit the corpus of her E personal estate, properly refuse to carry into effect a wish as to the disposition of that property expresed to him by the wife before her death and assented to and accepted by him?

The principle is stated in extremely clear language by Lord Davey in the House of Lords in *French* v. *French* (1). Lord Davey said ([1902] 1 I.R. at p. 230):

F "The basis of the jurisdiction is, of course, that the testator has died leaving the property by his will in a particular manner on the faith and in reliance upon an express or implied promise by the legatee to fulfil his wishes, and your lordships will at once see that it makes no difference whatever whether the will be made before the communication to the legatee or afterwards, because, as was said, I think by Turner, V.-C., in one of the cases which were cited, G the presumption is that the testator would have revoked his will and made another disposition if he had not relied upon the promise express or implied made by the legatee to fulfil his wishes."

It is quite true that Lord Davey was there dealing only with the case of a legatee who takes a property by virtue of some direct gift in the will. But in my opinion it makes no difference to the principle whether the property which the person H in question takes is taken by virtue of an express gift in the will, or whether it comes to him as the result of the imperfect dispositions of the testator's property which the will has made. In the present case the testatrix gave all her real and personal estate of every description to her husband for his use and benefit during his life "knowing that he will carry out my wishes," and she appointed him her executor. That is the whole of the will.

I In my opinion on the construction of the present will there is neither any gift to the husband of the corpus of the estate, nor is there any expression by the testatrix on the face of the will of her wishes with regard to the disposition of the corpus of the estate. It seems to me that these words, "knowing that he will carry out my wishes," refer to the gift which she has made of the life estate. What those wishes were we do not know. They may have been to continue allowances or to continue charitable subscriptions. We do not know what they may have been. But, whatever they were, it seems to me that those wishes refer only to the life

estate. We have then the clear case of a will which by reason of the imperfection of its dispositions has the result that the husband during his lifetime takes this property for his own benefit. The only question is whether in accordance with the principle enunciated by LORD DAVEY in the case to which I have referred he can keep that property for his own benefit?

The evidence is, I think, quite clear that the testatrix wished that her property should be divided after her husband's death between three persons, two nieces—one of whom is one of the appellants and the other of whom died—and a nephew who is the other of the two appellants. That is evidenced by a document, dated four days after the date of her will, found in his safe, after her death, in an envelope which contained her will and a copy of her husband's will. It is also evidenced by a conversation deposed to by an intimate friend in whose presence the testatrix stated that her property after her husband's death was to be divided between these same people, and the husband signified his assent to that statement. In my opinion, taking those together, there is sufficient evidence that the testatrix communicated to the husband what her will was and what her wishes were outside the will, and that he assented to and undertook the obligation imposed on him by the fact that he would take the corpus of her property and under an express or implied promise to carry into effect the wishes she had so communicated to him.

The authorities which have been cited, such as *Johnson* v. *Ball* (2) and *Re Gardom*, *Le Page* v. *A.-G.* (3), appear to me to have no reference to a case such as the present. Those were cases in which the person on whom it was sought to impose the trust did not take under the terms of the will for his own benefit. He took expressly under the terms of the will as trustee. In that event the trust on which that trustee is to hold the property must be contained in the will itself, in some document in existence at the date when the will is made, or it may be—if *Re Fleetwood*, *Sidgreaves* v. *Brewer* (4) was properly decided—declared by parol and accepted by the trustees at or before the execution of the will. But that limitation "at or before the execution of the will" has no application, as was pointed out by LORD DAVEY in *French* v. *French* (1) ((1902) 1 I.R. at p. 230), to such a case as that with which we have to deal.

In my opinion, therefore, the order of EVE, J., ought to be set aside, and the two surviving appellants—the niece May Cunnington and the nephew Lancelot Brodrick—and the personal representatives of the deceased niece are entitled in equal shares to the estate left by the testatrix.

YOUNGER, L.J.—I am of the same opinion. The view that we take of this case relieves it of the difficulties which I think led EVE, J., somewhat reluctantly to come to the conclusion at which he arrived.

As the case presents itself to my mind it is really a simple one. That there was an agreement between the testatrix and her husband as to the way in which her property—which, be it remembered, was entirely personal estate—was to be disposed of after her husband's death, I have on the evidence which has been filed on this summons no doubt at all. The evidence of Mrs. Whitlock as to the conversation which took place on the subject between her and the testatrix in the husband's presence is, I think, quite express and satisfactory. But if one did have any doubt as to the substantial accuracy of her recollection, or as to the assent of the husband to the arrangement as then stated by the testatrix, that doubt would be removed by the fact that we have the arrangement reduced to writing in the form of a memorandum which was found, after the husband's death, in his own safe together with his own will. Subject to an unimportant variation in that memorandum from the terms of the conversation as remembered by Mrs. Whitlock, we have in these materials abundant evidence that an arrangement between the testatrix and her husband in the terms now sought to be enforced by the appellants was in fact come to. I cannot doubt that on the faith of that arrangement the

A testatrix's property, subject to her husband's own life interest therein, was left by her undisposed of by will, so that it devolved upon the husband jure mariti.

The trouble really arises by the method adopted by this retired clergyman and his wife to carry out their arrangement. The testatrix's will, as I have said, deals, in my view, on its true construction, only with the life interest, and I think that to the words which follow the gift to him of that life interest, "knowing that he B will carry out my wishes," it is not permissible for a court of construction to attach any meaning other than that the wishes referred to were wishes expressed with reference to the disposal of that life interest.

I think, however, that in all the circumstances of the present case it is almost pedantry to express any belief that that was what the testatrix really intended by those words. I cannot think that there were any wishes expressed by her at C all as to what her husband was to do with the fund during his own life. Everything points to the conclusion that he was to have that for himself. But, if it were permissible to act on that conclusion, still the only other meaning that could be attributed to these words "knowing that he will carry out my wishes" would be, "I have given him a life interest knowing that he will carry out my wishes with reference to what remains if by this my will I give him no more than such an D interest," an expression which would certainly impose no trust on him with reference to that property. The result, therefore, on any view of these words is the same.

With reference to the property now in question these has been no attempt by the testatrix in her will to impose any trust at all, and the question is whether the arrangement outside the will which was come to between the husband and his wife with reference to that fund—of which there is ample evidence—is now enforce- E able as against the husband's representatives he himself being dead. There being no trust anywhere declared with reference to the property, it is quite immaterial whether the assent which the husband gave, and is shown to have given, to the arrangement which his wife desired to have carried out was given before the will or was given after the will, and this too gets rid of the difficulty so much insisted upon by counsel for the next of kin of the husband in his very able argument, F that here the husband's representatives are entitled to keep this fund because, without fraud, the husband himself could have done so owing to the fact that there is some divergence between the particular manner in which, according to Mrs. Whitlock's recollection, the fund in one event was to devolve and the way in which by the memorandum it was to devolve in the same event. That difficulty, however, is, I think, got rid of by the fact that, it being quite immaterial when G the assent was given, the arrangement to which he did assent must be taken to have been that which is embodied in the memorandum kept by him in his own possession. But again this point is in the event purely academic. It is quite plain that according to the arrangement, whatever in other respects it was, no part of this reversionary interest was to be kept by the husband for himself. It was for H the two nieces and the nephew. And, as it happens, as between them the suggested discrepancy is in the event immaterial.

In accordance, therefore, with all the authorities it appears to me in these circumstances that the husband would not have been entitled to keep this fund had he lived. It would have been, as the cases say, a fraud on his part to do so. Equally would it be a fraud for those who claim under him as volunteers to do so. I Accordingly, in my opinion, the appellants succeed, and the appeal must be allowed, and the declaration made which the Master of the Rolls proposes to read.

LORD STERNDALE, M.R.—The declaration will be, according to the notice of appeal, "that a valid trust was created by the above-named testatrix, Elfrida Gardner, of her residuary estate after the death of Herbert Gardner in favour of the defendants May Cunnington, Lancelot Brodrick and Mabel Olive Hope Bayly, and that the defendants May Cunnington and Lancelot Brodrick and are now in the events which I have happened respectively absolutely entitled to one-third

part of the said residuary estate of the said testatrix, Elfrida Gardner, deceased." A

Appeal allowed.

Solicitors: *Burgess, Taylor & Tryon; Norman Orfeur*, for *Cunnington, Son & Orfeur*, Braintree; *Ernest W. Essell*, for *C. A. Gardner*, Canterbury.

[*Reported by* W. P. Pain, Esq., and E. A. Scratchley, Esq., *Barristers-at-Law.*] B

C

BROWN AND OTHERS *v.* GREGSON AND OTHERS

[House of Lords (Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin and Lord Moulton), March 9, 11, 12, May 6, 1920]

[Reported [1920] A.C. 860; 89 L.J.P.C. 195; 123 L.T. 465]

Equity—Election—Devise of foreign land—Trusts prohibited by foreign law—Beneficiaries taking by virtue of foreign law—Impossibility of surrender for trust purposes—Application of doctrine of election. D

A testator, domiciled in Scotland, by his trust disposition and settlement left the residue of his property in trust to be divided amongst his seven children, and directed that this disposition was to be accepted in full of legitim, and that if any of the children should repudiate the settlement and claim their legal rights, they should forfeit all title to any share of his estate which he could dispose of by law. By a codicil he directed that the trustees should hold the share of one of his daughters, Mrs. G., for her in life rent, and after her death divide it among her children. Part of the testator's estate consisted of land in the Argentine Republic. By the law of that country no trusts were recognised in respect of land, and accordingly on the death of the testator his children, including Mrs. G., succeeded automatically to the possession of the land in equal shares ab intestato. Mrs. G. claimed legitim and thus forfeited her interest under the will, but it had been decided in Scotland that her children could claim as independent legatees. Her children claimed that the other six children of the testator should surrender to the trusts of the will the shares of land which passed to them under the Argentine law, as a condition of taking their share of the residue of the property of the testator in Scotland. E F G

Held (Viscount Cave dissenting): as it was impossible for the testator's six children by any act of their own to render the lands subject to the trusts of the will which automatically became their property by Argentine law, they were not put to their election between their shares of the land in the Argentine and the benefits conferred upon them by the will. H

Decision of the First Division of the Court of Session in Scotland, 1919, S.C. 438, reversed.

Notes. Explained and distinguished: *Re Dicey, Julian* v. *Dicey*, [1956] 3 All E.R. 696.

As to doctrine of election, see 14 Halsbury's Laws (3rd Edn.) 588 et seq.; and for cases, see 20 Digest 403 et seq. I

Cases referred to:

(1) *Dundas* v. *Dundas* (1830), 2 Dow. & Cl. 349; 4 Wils. & S. 460; 6 E.R. 757; 20 Digest 406, *1431*.
(2) *Hewit's Trustees* v. *Lawson* (1891), 18 R. (Ct. of Sess.) 793.
(3) *Douglas' Trustees* v. *Douglas* (1862), 24 Dunl. (Ct. of Sess.) 1191.
(4) *Cooper* v. *Cooper* (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 22 W.R. 713, H.L.; 20 Digest 404, *1419*.

(5) *Ker* v. *Wanchope* (1819), 1 Bli. 1; 4 E.R. 1; 20 Digest 405, *1429*.
(6) *Re Lord Chesham*, *Cavendish* v. *Dacre* (1886), 31 Ch.D. 466; 55 L.J.Ch. 401; 54 L.T. 154; 34 W.R. 321; 2 T.L.R. 265; 20 Digest 423, *1535*.
(7) *Ex parte Pollard*, *Re Courtenay* (1840), 4 Deac. 27; Mont. & Ch. 239, L.C.; 11 Digest (Repl.) 375, *400*.
(8) *Pitman* v. *Crum Ewing*, [1911] A.C. 217; 80 L.J.P.C. 178; 104 L.T. 611, H.L.; 20 Digest 407, *1438*.
(9) *Douglas-Menzies* v. *Umphelby*, [1908] A.C. 224; 77 L.J.P.C. 64; 98 L.T. 509; 24 T.L.R. 344, P.C.; 20 Digest 433, *1610*.
(10) *Dewar* v. *Maitland* (1866), L.R. 2 Eq. 834; 14 L.T. 853; 12 Jur. N.S. 699; 14 W.R. 958; 20 Digest 445, *1702*.

Also referred to in argument:
Clouston's Trustees v. *Bulloch* (1889), 16 R. (Ct. of Sess.) 937.
Playfair's Trustees v. *Playfair* (1894), 21 R. (Ct. of Sess.) 836.
Steel's Trustees v. *Steedman* (1902), 5 F. (Ct. of Sess.) 239.
Codrington v. *Codrington* (1875), L.R. 7 H.L. 854; 45 L.J.Ch. 660; 34 L.T. 221; 24 W.R. 648, H.L.; 20 Digest 406, *1433*.
Re Ogilvie, *Ogilvie* v. *Ogilvie*, [1918] 1 Ch. 492; 87 L.J.Ch. 363; 118 L.T. 749; 20 Digest 423, *1532*.

Appeal from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Hunter) reported 1919 S.C. 438.

A testator, James Brown, domiciled in Scotland, directed his trustees to divide his residuary property equally among his seven children, with a provision that if any of them should repudiate the settlement and claim their legal rights they should forfeit all title to any share of his estate which he could dispose of by law. By a codicil he directed with regard to the share of one of his daughters, Mrs. Gregson, that the trustees should hold it for her in life rent and after her death divide it amongst her children. Part of the testator's estate consisted of land in the Argentine Republic. By the law of that country no trusts are recognised in respect of land, and on the death of the testator his children succeeded automatically to the possession of the land in equal shares, the provisions of the will having as regarded that property of the testator no effect. On the death of the testator Mrs. Gregson claimed legitim, and thus debarred herself from taking any interest under the will. Proceedings were taken in Scottish courts, and it was held that Mrs. Gregson's children could claim as independent legatees. Mrs. Gregson also became owner of her share of the land in the Argentine by virtue of the lex situs, and her children claimed that the other six children of the testator should surrender to the trusts of the will the share of the Argentine land which passed to them on the death of the testator, as a condition of taking their share of the residue of the property in Scotland.

In an action of multiplepoinding brought by the trustees, to have ascertained the persons entitled to the trust estate so far as it remained in their hands, the First Division of the Court of Session, reversing the judgment of the Lord Ordinary (Lord Hunter), rejecting the claim, held the six children of the testator being unfettered owners of the shares of the Argentine immovables taken by them as necessary heirs and consequently being unable to make those shares available for the purposes of the testator's testamentary writings could not claim the bequests in their favour unless they made available their shares in the Argentine property as a condition of taking their share of the residue of the property of the testator in Scotland.

The facts are more fully set out in the opinion of Viscount Haldane.

Alex Moncrieff, *K.C.*, and *William Watson*, *K.C.* (with them *J. S. Leadbetter*) (all of the Scottish Bar) for the appellants.

William Chree, K.C., and *T. Graham Robertson* (both of the Scottish Bar) for the respondents. A

The House took time for consideration.

May 6. The following opinions were read.

VISCOUNT HALDANE.—By his trust disposition and settlement James Brown of Barlay, domiciled in Scotland, left the entirety of his property of whatever nature and wheresoever situated, in trust, as regarded the residue, for his children and the issue of such as should have predeceased him. To his trustees he gave a power of sale, but there was no trust for conversion. He directed that the provisions for his children were to be accepted in full legitim and any other rights which they might assert by reason of his decease, and that if any of them should repudiate the settlement thus made and claim their legal rights or in any way prevent it from taking effect, they were to forfeit all title to any share of his estate which he could dispose of by law. He enabled his trustees to grant a power of attorney for managing and realising his estate in South America. By a codicil he directed his trustees, instead of paying over her share to Mrs. Gregson, his daughter, to hold it for her in life rent, and after her death to divide it among her children who should then be alive, and the issue of any who had predeceased her, per stirpes. B C D

Besides his property in this country the testator owned land in the Argentine Republic. The law of that country, which of course governs the disposition of immovables there, only permits a testator to dispose of by will of one-fifth of his immovables in Argentine, the remaining four-fifths passing to his children as of right on his death. That law in addition, does not permit trusts or contracts which restrict the free disposal of land by its owner. Nor can a testator appoint heirs to his heirs of such land, and the heir who becomes owner cannot bind himself not to dispose of the land. E

After the death of the testator proceedings were taken in the courts of the Argentine Republic to ascertain whether his testamentary dispositions of his immovable property were valid, and, on the intervention of the Attorney-General of the Republic, the trust disposition and settlement was declared to be null in so far as it purported to affect such immovables, as being contrary to the laws of the Republic regulating the transfer of heritable estate to and by the heirs to it. F

Mrs. Gregson has since claimed, not only her share under Argentine law in accordance with this declaration, but also a share by way of legitim in the movables under the law of Scotland. To these shares she is entitled, and she makes no claim at all under the trust disposition. The interest, however, of her children is one to which they have a title which is independent of hers. The appellants, who are five of the children of the testator, are claimants before the Court of Session in the action of multiplepoinding in which this appeal arises. The purpose of the action, which was brought by the trustees, is to ascertain the persons entitled to the trust estate, so far as it remains in their hands undistributed. G H

The effect of the judgment of the Argentine courts has been that the Argentine immovable property vested in seven children who survived the testator in equal shares.

The Court of Session has already decided on a special case, the judgment in which is not questioned, that Mrs. Gregson's children's rights as fiars in a one-seventh share of the residue under the general disposition are not affected merely by their mother's action. As the result the residue on which the trust disposition was capable of operating is divisible into seven portions, to five of which the appellants are entitled; to one of which a now deceased son has become entitled, and to another of which Mrs. Gregson's children are entitled. The question which remains is as to how the amounts of these seven shares ought to be ascertained. The respondents, who are Mrs. Gregson's children, contend that the appellants are put to their election between their claim under the distribution directed by I

A the will and their claim to the Argentine immovables as taken by them independently of it. The appellants maintain that to apply the principle of election would be to do circuitously what the Argentine law forbids to be done at all by making the land to which it applies subject to a trust for the children of children, which is forbidden both as a gift of this nature and as an admissible qualification of the title of the children to the land, which must, by the Argentine law, be free from B any restriction on the power to dispose of it freely.

The Lord Ordinary decided that the appellants could not be put to their election in the fashion claimed. The First Division recalled his interlocutor to this effect and held that the appellants and the representatives of the deceased son, who, though not appearing in the proceedings, were in the same position as the appellants, could not claim a share in the fund in medio, consisting of assets, the disposal C of which was governed by Scottish law, without bringing the value of their shares in the Argentine immovables into account for the purpose of a division under the scheme contained in the trust disposition.

I think the question thus raised is one of considerable nicety. Principles which at first sight seem to conflict have to be interpreted and reconciled. In *Dundas* v. D *Dundas* (1) this House decided what to-day is beyond question. A Scottish testator had executed a deed of settlement purporting to convey to trustees his whole property, including land in England. The deed was probative in Scotland, but as it was executed in 1818 before only two witnesses in place of three, as then required by the English law as to wills of land, it was therefore inoperative by English law. It was held that the heir to the land in England nevertheless could E not hold it against the provisions of the settlement and at the same time claim a provision made for him in that settlement. The reason was given, not that the Scottish courts could control the title of the heir, but that they could exclude him, unless he chose to bring his land in, from participation in the assets within their jurisdiction, on the ground that the heir was not entitled at once to approbate and to reprobate the terms of the testator's settlement. As I have said, that was F obviously within the competence of the Scottish courts, at all events so far as insistence on compensation went. The heir was by the law of England free to deal as he pleased with the land in England, and he could, if he chose, accept the terms which the settlement sought to impose on him as the condition of participation in the other assets of which the testator had effectively disposed. But suppose that the law of England had done more than merely regulate the G formalities of the kind of will that was required to deprive the heir of his title to succeed! Suppose that the English law had been to the effect that the heir should not use his land in such a fashion as to give effect to the purposes prescribed by the testator!

This further question arose in *Hewit's Trustees* v. *Lawson* (2). There, by a Scottish disposition, a testator had sought to make English realty available for H charitable purposes, and his disposition was consequently pro tanto bad under the Mortmain Act, which, as it then stood, declared void every gift to charitable use of land or any estate or interest in it. The Court of Session held that the heir was not put to any election, because the court must be satisfied, in order to put him to it, that it was in his power, by waiving his objection to the will, or refusing to make a claim adverse to it, to perfect the right of those who would make title I under the will. Where he was prohibited altogether from making over English land for charitable purposes he therefore could not be called on to make such a surrender of other assets as would indirectly bring about this result. The language of the then Mortmain Act was sweeping. It extended to every sort of interest arising out of English land. Every gift in a will which dealt with such an interest, in whatever country that gift was made, was struck at. The law applicable was the law governing the disposition of the land. It was not to be merely conjectured that the testator had intended, imposing the penalty of a forfeiture of other benefits,

to make his heir give the land for a purpose which would have been contrary to the provisions of the Act. Such an intention was not to be attributed to the testator, unless, indeed, he had plainly gone so far as to make the surrender of the land by the heir a definite condition of the right to participate in his estate. The doctrine of election, which extends only to an obligation to compensate, did not go so far as this. It really turned on a different principle, which was, however, inapplicable when the heir was not left by the lex loci at liberty to treat the testator's direction as one which he was free to carry out.

I think that this is the underlying meaning of the decision in *Hewit's Trustees* v. *Lawson* (2). The result turned on the character of the law of mortmain, which did not merely require formalities for the validity of the devise, as with the general law relating to wills of English land which was considered in *Dundas* v. *Dundas* (1), but prohibited the gift by laying down a principle relating not to evidence merely, but to substance—a principle invalidating altogether this class of gift.

In the earlier case of *Douglas' Trustees* v. *Douglas* (3) the Court of Session had taken an analogous view in refusing to put to his election an heir of entail who, had he attempted to carry out an alteration directed by the testator in the destination under which he held, must have found himself precluded by law from doing so. The court decided that in such a case the beneficiary was not put to his election, inasmuch as he could not make the election to do what was supposed to be demanded.

I think that the result here also is that such a demand by the testator was held not to be implied as an absolute condition. If he says in distinct language that the beneficiary is not to take at all if he cannot fulfil a condition, the fulfilment of which is impossible by law, such a condition may prevail, but it is not to be assumed as imposed in the absence of distinct language to that effect.

The doctrine of election rests on a different foundation. It is a principle which the courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. It is not merely the language used to which the court looks. A testator may, for instance, have obviously failed to realise that any question could arise. But the court will none the less hold that a beneficiary who is given a share under the will in assets, the total amount of which depends on the inclusion of property belonging to the beneficiary himself which the testator has ineffectively sought to include, ought not to be allowed to have a share in the assets effectively disposed of excepting on terms. He must co-operate to the extent requisite to provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share to which he is primâ facie entitled to an extent equivalent to the value of his own property if withheld by him from the common stock. As was said by CAIRNS, L.C., in *Cooper* v. *Cooper* (4) (L.R. 7 H.L. at p. 67), this condition arises not as on a

> "conjecture of presumed intention, but . . . on a rule of equity founded on the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will."

Such a principle is different from that under which a condition of forfeiture arises, for there an intention clearly expressed by the testator is requisite. And it is, I think, because the principle has not to be based on such an expression of intention that the court can mould its application. As LORD ELDON pointed out in *Ker* v. *Wauchope* (5), the limitation of the principle to compensation as distinguished from forfeiture is a subordinate principle which has been engrafted on the main one in order to make sure that what is ordered does not go beyond what substantial justice requires.

A According to the authorities which I have already discussed, the principle, being one the application of which the court has a discretion to mould, ought not to be applied when the testator could not effectively impose the condition on the beneficiary otherwise than by imposing an absolute condition which he has not expressed. On principle, I think that this is right. Not only do the authorities referred to imply it, but it was in accordance with the doctrine as I have stated it that CHITTY, B J., in *Re Lord Chesham, Cavendish* v. *Dacre* (6) decided that where a will purported to bequeath for the benefit of the testator's younger sons chattels which were settled in trust to go and remain as heirlooms with a house belonging to his eldest son and then made the eldest son his residuary legatee, the latter was not to be put to his election. For it would have been a breach of trust for the trustees of the settlement to allow him to make over the chattels, and without their assent he C was powerless to do it. His desire was to have the residue under the will, and he was allowed to do so without being compelled to elect to make compensation. The learned judge laid down that a Court of Equity will not decree something to be done which would amount to a breach of trust or be a mere idle act that could only lead to litigation. The reason why the eldest son could not make an assignment was because he had no assignable interest. "Election," said CHITTY, J., D "means free choice." When he takes under the will there is nothing for him to give up, for there is nothing which he can give up.

I think that the authorities which I have cited confirm the view that the real ground on which an election to submit to a deduction by way of compensation is compelled is the equitable principle of administration with the restriction I have E now referred to. If this be so, the question in the present case is simply whether the law governing the title to the testator's Argentine land permits the appellants to comply with the directions of the trust disposition. It seems to me clear that it does not. It is said that the appellants could sell their land or convey it to the trustees under the disposition. But they could not by doing so bring it effectively under the scheme of the instrument. If they were to try to do so the trustees F would either not get the land itself, or would get it free from any binding trust. The law of the Republic strikes at such a transaction as the settlement directs, and does not allow the title to be made which the testator directed. It is plain that it is this law which must govern the validity not only of the disposition, but of the trusts sought to be engrafted on the title to land, and of the directions to be carried out with regard to it. In this state of matters to say that the appellants G were bound to elect, or that they are reprobating the instrument by not doing what the law will not allow them to do, appears to me, both on principle and authority, to be wrong.

I think that we ought to reverse the judgment of the First Division, and to restore the interlocutor of the Lord Ordinary of Sept. 3, 1918. The appellants should have their costs here and before the First Division.

H **VISCOUNT FINLAY.**—This is an appeal from the decision of the Inner House reversing LORD HUNTER'S decision. The question is as to the application of the law of election or "approbate and reprobate," as it is termed in Scotland, and whether certain beneficiaries under the will are entitled to compensation out of the residue of the estate in respect of the loss of an interest given to them in land I in the Argentine. The Lord Ordinary held that the appellants were not bound to make such compensation while the Inner House held that they were.

The testator, James Brown, had a large estate, real and personal. Part of it consisted of various parcels of land in the Argentine, valued at £110,000, and he had also some heritable property in Scotland and movable property in both countries, which made the estate of the total value of about £200,000. By the trust disposition and settlement dated Mar. 5, 1910, the testator appointed trustees to whom he left the whole of his property on certain trusts. The fourth of these trusts was in favour of his children who should survive him equally, and it was

declared that this provision was to be in full of legitim and all other legal rights, with a forfeiture clause as follows:

> "And if any of them shall repudiate this settlement and claim their legal rights, or shall in any way prevent this settlement taking effect, then such child or children shall forfeit all right to any share of that part of my estate, means, and effects which I may dispose of by law, and they shall have right only to their respective legal provisions, and the share or shares of such child or children shall in that event accresce and belong equally to my other children or their issue."

The trustees were given power to sell the trust estate or any part of it, and were authorised to grant a power of attorney with full powers for the management and realisation of the estate in South America. The trustees were further authorised to hold the land in South America, and the settlement went on to provide:

> "But if they shall not have sold the same within six years after my death, I recommend them to sell as soon as conveniently may be thereafter, unless there be an exceptional depression in its value. . . ."

The proceeds of management and realisation were to be from time to time transmitted to the trustees in Scotland.

The testator died on Mar. 12, 1910, and was survived by seven children, one of whom was Mrs. Gregson. The fourth codicil to the will provided that Mrs. Gregson should have a life rent only in her share of the residue, which was to be held by the trustees and on Mrs. Gregson's death equally divided among her children then alive and the issue of any predeceased. There are two such children, both minors, and they are respondents on this appeal. The other children of the testator were the appellants and Oswald Stanley Brown, who was killed in action on Dec. 22, 1915. Mrs. Gregson repudiated the provisions of the will in her favour, and took her legitim. She thereby forfeited all rights under the will in her favour, and the income which she would have received by way of life rent became, during her lifetime, payable to the other members of the family. As was decided by the First Division on a special case, the forfeiture of her life interest did not affect the reversionary interest of her two children as fiars in one-seventh of the residue. The contest on the present appeal is between these two children of Mrs. Gregson as respondents and the appellants.

Proceedings were taken in the Argentine to have it declared what was the effect of the trust disposition and settlement on the land in the Argentine. In these proceedings it was decided, and the decision has not been questioned, that the testamentary dispositions in favour of the trustees of the will are invalid so far as land in the Argentine is concerned, as being contrary to the law of that country, which does not admit of trusts in land, and that the land vested in the seven children of the testator in equal shares absolutely, by descent ab intestato. All the seven children, including Mrs. Gregson, thus took an absolute interest in the Argentine land, each share being one-seventh. The provision in favour of Mrs. Gregson's children failed, as no such reversionary trust interest is permitted by law in that country, and these children now claim that this should be made good to them by the appellants.

The present proceedings were taken by the trustees under the will as pursuers, in order to have the decision of the Scottish courts as to the distribution of a balance of £6,474 4s. 11d. on the testator's estate other than the Argentine property. The condescendence annexed to summons set out the question as follows:

> "Owing to the foresaid decision of the courts of the Argentine Republic regarding the said Argentine immovable estate, and to Mrs. Gregson having claimed her legitim, a further question has now arisen. The seventh defenders maintain that the final division of the trust estate should be made upon the footing that the first six defenders are entitled only to one-seventh each of the

six shares of the Argentine immovable estate taken by them or their author as aforesaid, and that the value of the remaining seventh of the said six shares should be taken into account in computing the amount of the share of the trust estate to be held for Mrs. Gregson's children. The first six defenders maintain that the Argentine immovable estate should not be taken into account in the distribution of the residue of the trustee's estate. The present action has accordingly been rendered necessary."

All the members of the family were made parties, and the condescendence put in on behalf of the present appellants states their case thus:

"These claimants maintain that as a condition of claiming one-seventh each of the free movable estate of the testator, to which they maintain they are entitled under and in terms of his will, they are not put to any election, and in particular they are not bound to waive or surrender, or to realise and pay over any part of the one-seventh shares of the testator's Argentine immovable estate to which they are entitled as aforesaid by the law of the Argentine Republic, and also by the provisions of the testator's trust-disposition and settlement and codicils; and that in respect (1) that the bequest of the Argentine immovable estate in question is null and void and should be held pro non scripto; and (2) that in any event they have never made and are not now making any claim inconsistent with the scheme of the testator's testamentary writings. Further, they maintain that they are not put to their election, because in respect of the rules of the Argentine law above set forth it is not possible for the claimants to waive or surrender their shares of the Argentine immovable property or any part thereof to the purposes of the testator's testamentary writings, nor is it possible for the trustees to hold and administer the said immovable estate under and in terms of the said testamentary writings."

This case has been the subject of most careful and able argument, and after very full consideration I have come to the conclusion that LORD HUNTER's decision was right and that his interlocutor should be restored. The present case does not appear to me to be one in which the doctrine of election has any application.

The disposition made by the will and codicil with regard to the Argentine land was, by the law of the Argentine, a nullity. This appears clearly from the terms of the Argentine judgment at pp. 92 and 93 of the Appendix. The trustees under the will took nothing, and the children of the testator took, by succession, ab intestato. The reversionary interest in favour of the Gregson children disappeared. This was not brought about by any action on the part of the appellants, but automatically by virtue of the Argentine law. The appellants did not ask for any such decision; all that they did was to appear and submit to the decision of the court. If, by any action of theirs, the codicil in favour of the Gregson children had been invalidated the case might have borne a different aspect, but nothing of the kind took place. Mrs. Gregson, on the other hand, urged on the Argentine court the view that the testamentary dispositions as regarded the Argentine land should be declared null.

The result of which the respondents complain was not caused by any act of the appellants, and, indeed, it appears to be clear that it was impossible for them to undo the effect of the Argentine law in this respect so as to give effect to the provisions of the will and codicil as to the land. Three modes of doing so have been suggested (a) It was suggested that the appellants might sell the Argentine land and hand the proceeds to the trustees. This would be something quite different from what the testator contemplated by his will and codicil. He gave the trustees a power of sale, but it is obvious that he contemplated that the land might be retained by them in their own hands for some considerable time. A sale, possibly at great disadvantage, for the purpose of settling the proceeds is at variance with

the whole tenor of the will. What he provided in favour of the Gregson children was that to the extent of the one-seventh, a life rent in which he created in favour of their mother, the children should have a reversionary interest. No assent on the part of the appellants could make this possible as all trusts in land are illegal in Argentina, it being considered vital that the owner for the time being should have the absolute power of disposition. The immediate sale of the land and the settlement of the proceeds of the sale of the land is something quite different from the interest in the land in specie for which the testator provided until the trustees should think a sale expedient; (b) It was suggested in the second place that the appellants might convey the land to the trustees as individuals, taking from them a back-letter for the purposes of the will. I think the evidence is clear that any simulatio of this kind would be invalid. It would be a manifest attempt to evade the provisions of the law against trusts of land; (c) A third suggestion was made, viz., that the appellants should convey to the trustees so much of the Argentine land as would be equivalent to what the Gregson children would have taken under the testator's codicil, and that the trustee should execute as regards this land a declaration of trust in Scotland which, as regards all of them subject to the jurisdiction of the Scottish courts, could be enforced against them personally by proceedings in Scotland. It is quite true that the courts in Scotland or in England may, with regard to persons within their jurisdiction, make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here in personam so long as it is not contrary to the lex situs which, with regard to real property, must be the governing law. The law on this point was laid down by LORD COTTENHAM, L.C., in *Ex parte Pollard, Re Courtenay* (7) (Mont. & Ch. at p. 250):

> "It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate in rem; but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings in personam, which courts of equity here are constantly in the habit of doing; not thereby in respect interfering with the lex loci rei sitæ. If, indeed, the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."

As the law of the Argentine forbids all trusts of land there, it appears to me that it would be contrary to the comity of nations for a foreign court to endeavour by its jurisdiction in personam to make the land of the Republic subject to a system of trusts which its law prohibits. Some of these suggestions are further open to objection on a broader ground applicable to each of them. The view of the case which I have submitted as the result of the law as to election would lead to a result substantially in conformity with the wishes and intentions of the testator as far as they can be collected from his testamentary disposition, at all events, much more in conformity with them than would be reached under any of the suggestions made by the respondents. What the testator desired was the division of the Argentine estate, as well as the rest of his property, between his seven children equally, but with the settlement of Mrs. Gregson's one-seventh on her for life and then to her children. Mrs. Gregson has taken her seventh absolutely, and if she permits it to descend to her children a result not substantially in disaccord

with the testamentary disposition of the testator will be reached; if they are disinherited it will be by her act. If the contention of the respondents should prevail it would follow that in addition to the one-seventh which Mrs. Gregson has taken, the appellants would have to provide another one-seventh for Mrs. Gregson's children, so that Mrs. Gregson and her children between them would receive two-sevenths of the Argentine property, while the other six children of the testator would have their shares diminished to provide this second one-seventh for the Gregson children. Nothing can be imagined more opposed to the desires of the testator so far as they can be collected from his testamentary dispositions, and it would be remarkable if the law of election and compensation should entail any such departure from the general scheme of the testator with regard to the disposition of his property.

There are three authorities to which very special reference has been made in the course of the argument: *Douglas' Trustees* v. *Douglas* (3) with the comments on that case by LORD SHAW in the recent case of *Pitman* v. *Crum Ewing* (8); *Re Lord Chesham* (6); and *Hewit's Trustees* v. *Lawson* (2). *Douglas Trustees* v. *Douglas* (3) was thus explained by LORD SHAW in the passage to which I have already referred ([1911] A.C. at p. 239):

> "The true reason of the case was that the doctrine of 'approbate and reprobate' cannot be introduced where it is impossible for the person against whom it is applied effectively to exercise the election demanded."

The last paragraph of the rubic in *Douglas' Case* (3) in this:

> "Opinions, that a party cannot be said to reprobate the deed who is not put to his election by the will expressed or implied of the grantor of the deed, and who is not free to approbate and capable of approbating cum effectu."

In that case it was impossible to give effect to the arrangements made by James Monteith with regard to his brother Archibald's estate. So here it was impossible by the law of the Argentine to give effect to the trust for a reversionary interest in favour of the Gregson children. The attempt in the present case is to apply a doctrine of cy-près to the doctrine of election. The children of the testator, it is said, although they cannot render effectual the testator's devise of Argentine land on trust for the Gregson children, may do something else which would have a similar effect. No instance has been cited to your Lordships of any case of election in which such a doctrine has been laid down, and it appears to be on principle erroneous. For election there must be a free choice, and here it is the law which automatically does what is complained of, and it is out of the power of the appellants to give effect to the provisions of the will.

The same principle is illustrated in *Lord Chesham's Case* (6). There the testator had affected to dispose of certain chattels which turned out to have been settled as heirlooms in trust to go along with the mansion house. It was held in a very elaborate judgment of that most distinguished equity judge, CHITTY, J., that no case of election or compensation arose, as compliance with the will as to these chattels was by law impossible. He said (31 Ch.D. at p. 476):

> "But when he takes under the will there is nothing for him to give up, for there is nothing which he can give up. It seems to me to be absurd to say that he is put to his election merely for the purpose of making a deduction from his residuary legacy."

In the third of the cases cited, *Hewit's Trustees* v. *Lawson* (2), the testator gave legacies to his nephew, who was also his heir, and directed that the residue of his estate, part of which consisted of real property in England, should be divided among English charities. By the law of England, under the Statute of Mortmain, as it then stood, no interest in the land or its proceeds could pass to charity. The legacy was void and the land would pass to the heir, and if the heir refused it, it would be treated as undisposed of. It was held that the heir could not be put to his

election. LORD MACLAREN, in giving the judgment of the court, said (18 R. (Ct. of Sess.) at p. 804):

> "In order to put a legatee to his election, it must be in his power by waiving his objection to the will or adverse claim to perfect the right of the testamentary disponee. There is certainly no case in which a legatee who has not the right of perfecting the right of the disponee has been called on to give an equivalent benefit."

This appears to me to be right, and it is exactly applicable to the present case. The appellants could not in any way make good the gift of a reversionary interest on land in the Argentine to the Gregson children. It was a mere nullity. As the appellants cannot in any way make the provisions of the will as to the Argentine land effective it follows that there is no case for compensation out of the other estate which passes to them under the will. On the whole it appears to me that the appeal should be allowed and the interlocutor of LORD HUNTER restored, the appellants to have their costs here and in the Inner House.

VISCOUNT CAVE.—The facts in this case have been fully stated, and I proceed at once to consider the question of law raised by this appeal, that is to say, whether under the doctrine of election or (as it is commonly called in Scotland) of "approbate and reprobate," the appellants are disabled from claiming any share of the fund in medio representing the undistributed balance of the testator's movable estate in Scotland without making their shares of his immovable estate in the Argentine Republic available for division in accordance with the general scheme of his trust disposition and settlement.

The doctrine referred to has been frequently considered in this House, and was stated by LORD ELDON in *Ker.* v. *Wauchope* (5) as follows (1 Bli. at p. 21):

> "It is equally settled in the law of Scotland and of England, that no person can accept and reject the same instrument. If a testator gives his estate to A. and gives A.'s estate to B, court of equity hold it to be against conscience that A. should take the estate bequeathed to him, and at the same time refuse and avoid the implied condition in the will of the testator. The court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift."

The same doctrine has been affirmed by this House in a number of later cases, including *Dundas* v. *Dundas* (1), and *Pitman* v. *Crum Ewing* (8), and is now fully established as a part of the law of Scotland.

On the other hand it is, I think, equally clear, both on principle and on authority that when the person whom it is sought to put to his election cannot by any lawful means dispose of the estate belonging to him in his own right in such manner as to give effect to the testator's intention as expressed in the instrument in question, the doctrine of election does not apply. In *Douglas' Trustees* v. *Douglas* (3) Lord President INGLIS, then Lord Justice Clerk, stated his opinion that, in order to make a proper case of election the facts of the case must be such as to satisfy three conditions. He said (24 Dunl. (Ct. of Sess.) at p. 1208):

> "In the first place, I think the party who is put to his election must have a free choice, and that, whichever alternative he chooses, he shall have a right absolutely to that which he has chosen without the possibility of his right being interfered with or frustrated by the intervention of any third party. In the second place the necessity of making the election must arise from the will, express or implied, of someone who has the power to bind the person put to his election. And, in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied."

It is not, I think, the meaning of the third condition as laid down in the above opinion that the mere expression by the person put to his election of his willingness to give effect to the will or other instrument must be sufficient to give legal effect to the instrument, but only that a person who cannot by any lawful act on his part give effect to the instrument is not thereby disabled from taking a benefit under it. Effect was given to this exception in *Re Lord Chesham* (6) and *Hewit's Trustees* v. *Lawson* (2), and it is obviously both just in itself and consistent with the principle of the general doctrine.

In the present case the main argument put forward by the appellants is that, while they "approbate" the testator's settlement and are ready and willing to surrender their shares in the Argentine land to the trustees of that settlement for the purposes of their trust, they are prevented from so doing by the law of the Argentine Republic, where the land is situated; and accordingly that the third condition laid down by Lord President Inglis is not satisfied, and no case for election arises. It is obvious that such a plea requires close examination. The share of each of the appellants in the Argentine land is of an estimated value exceeding £18,000, and if they are permitted to retain those shares and also to share equally with the fiars of Mrs. Gregson's share in the remainder of the testator's estate, they will be placed (subject to an observation which I will make hereafter) in a position of great advantage. I have, therefore, thought it right to examine with care the evidence of Dr. Palacios, a barrister experienced in Argentine law, on which the appellants rest their case. That evidence satisfies me beyond any doubt that a conveyance of the appellants' share in the land to the trustees on the trusts of the settlement would be invalid under the Argentine law; and, indeed, that result seems to follow from the judgment of the Argentine court by which the testator's settlement was declared null and void. The same evidence appears to show, though less clearly, that a conveyance to the trustees, not as trustees, but as individuals, the trustees executing a back-letter or other document undertaking to hold the land for the purposes of the will, would be liable to be recalled by the grantors on the ground that the possession thereby given to the trusteees would be, not a real possession, but a "simulation of ownership" and contrary to the spirit of the Argentine Civil Code. On the other hand, I do not think it is proved that a simple conveyance to the trustees without any back-letter or other document limiting their complete control of the property for all the purposes of Argentine law would be ineffectual merely because they would be liable as trustees to account to the Scottish courts for their dealings with the estate. This point was not put to Dr. Palacios; and I am not prepared to assume without evidence that such a conveyance, which would not appear to violate any principle of the civil code would be invalid.

But even if it be assumed that a direct grant by the appellants of their shares in the Argentine land to the trustees, in whatever form it might be made, would be ineffective, there is another method by which, as pointed out by the learned judges of the First Division, the property could be made available for the purposes of the trust disposition and settlement. By the settlement the testator empowered his trustees to sell his estate or any part of it, and to give a power of attorney for realising his estate in South America; and, while he authorised his trustees to hold his land in that country, he recommended them, if they should not have sold the land within six years after his death, to sell it as soon as conveniently might be thereafter, unless there should then be an exceptional depression in its value, and directed that the net proceeds of such realisation should be transmitted to his trustees in Scotland. By the codicil settling Mrs. Gregson's share the trustees are directed to "invest" it in their own names—a direction which assumes that it will be turned into money. It is plain, therefore, that, as Lord Mackenzie says, what was in the testator's mind was conversion of the land and not enjoyment in specie. Now, if I correctly understand the evidence as to Argentine law, there is nothing whatever in that law

which prevents a holder of land in the Republic from entering into a binding contract to sell it or from executing a power of attorney enabling another person to sell it for him; and I see no sufficient reason why the appellants, who are absolute owners of their shares, should not give effect to the dominant purpose of the settlement by selling their shares, or giving a power of attorney for that purpose, to a nominee of the trustees, and remitting the proceeds to this country.

Against this it is objected, first, that this course would impose on the appellants the liabilities of vendors; and, secondly that there is no equity which compels them to give effect to the testator's intention otherwise than by a simple relinquishment of the estate. The former objection would be amply covered by an indemnity which could be given by the trustees on behalf of the testator's estate. The second objection is more serious, and it is on this point that I have found the case most difficult to determine—the more so as the conclusion at which I have arrived differs from that which commends itself to some, if not all, of your Lordships; but, after full consideration, I am not satisfied that the duty to elect is limited in the manner suggested. The equitable doctrine of election is founded, not on any technical ground, but on a consideration of what is fair and just; and I think that it should receive a liberal interpretation. LORD ELDON, in the passage above cited from *Ker* v. *Wauchope* (5), treated the rule as one of "conscience." LORD CAIRNS, in *Cooper* v. *Cooper* (4) referred to it as proceeding, not on an expressed or presumed intention, but on "the highest principles of equity." And LORD ROBERTSON, in *Douglas-Menzies* v. *Umphelby* (9), stated that the doctrine "rests on no artificial rule but on plain, fair dealing." If this be so, it seemes to follow that no formal objection to the application of the rule should prevail, and that, if there is any method by which a claimant under a will or other trust instrument can, without illegality or breach of trust, give effect in substance to the intention of the trust instrument as affecting his own property, he ought to adopt it. This view is supported by the consideration that, where a beneficiary put to his election has elected in favour of the trust instrument, he is held to be a trustee of the property in his hands, and is, therefore, bound to dispose of it as the trustees of the trust instrument may reasonably direct: see *Dewar* v. *Maitland* (10) and Trustee Act, 1893, s. 31. On the whole, I am of opinion that in the present case it is within the power of the appellants to make their property in the Argentine available for the purpose to which it was destined by the testator's settlement, and accordingly that the doctrine of election is not excluded.

In reaching the above conclusion, I have not omitted from consideration two points which, though not pressed on your Lordships in argument, were mentioned in the course of the discussion, viz. (i) that the shares of the Argentine land which the appellants have taken as heirs of the testator are precisely the shares which the testator provided by his settlement that they should receive; and (ii) that the share claimed by Mrs. Gregson may not improbably pass by succession or testamentary disposition to her children, and that if this should happen and the doctrine of election should be held applicable, they would succeed to a double portion of the testator's estate. The answer to the first point appears to be that, as the testator's disposable estate has been reduced by the action of Mrs. Gregson, his settlement takes effect upon what remains—that is to say, on six-sevenths only of the Argentine land—and the right of the beneficiaries must be ascertained on that footing. As to the second point, it was admitted—and I think properly admitted—on behalf of the appellants, that Mrs. Gregson and the persons (whoever they may be) who will succeed under the settlement to her share, must, for present purposes, be treated as separate and independent beneficiaries, and that no valid legal argument can be founded upon a speculation as to what may happen to her estate on her death.

For the above reasons, I am of opinion that the interlocutor of the First Division is right, and I would dismiss this appeal.

A **LORD DUNEDIN.**—I have had the advantage of reading the judgment which has been delivered by my noble and learned friend on the Woolsack. I concur in that judgment and I have really only one sentence to add.

I think the respondents fail here because what they propose should be done fails to comply with the third requisite laid down by Lord President Inglis in *Douglas' Trustees* v. *Douglas* (3) when he said that the result of election must be to give B legal effect and operation to the will as expressed or implied. That cannot here be done in terms, and I do not think a sort of cy-près doctrine is one that falls to be applied in such a case.

LORD MOULTON.—The facts of this case are simple. By his original will the C testator, James Brown, left his property in trust in the first place for purposes which are not material to the matter under consideration in this appeal, and after they had been accomplished, directed that the residue should be equally divided among his seven children with a provision that if any of them should repudiate that settlement and claim their legal rights, such child should forfeit all right to any share of the trust fund. By a codicil he varied this division of the residue by directing that with D regard to the share of one of his daughters, Mrs. Gregson, the trustees should pay the income to her during her life and on her death the capital should pass to her issue. The aim of the testator, therefore, was originally an equal division of the residue and this was modified only in one respect by the codicil, namely, that while the equal division should be preserved in respect of the stirpes of his children the shares should go direct to them in the case of all but Mrs. Gregson, but that in her E case the trustees should hold her share during her life, subject to paying her the income and should hand over the corpus of her share to her children only after the termination of her life interest. The estate of the testator consisted to a large extent of land in Argentina. By the laws of Argentina, no trusts are recognised in respect of land, and accordingly on the death of the testator the children succeeded automatically to the possession of the land in equal shares, and the provisions of the F will were of no effect since they involved the creation of a trust ownership of the lands. The inherent failure of the trust dispositions of the will applies equally to the shares of the children of the testator and to the share of the children of Mrs. Gregson who, it has been decided, claim as independent legatees.

On the death of the testator Mrs. Gregson elected to take legitim, and thus debarred herself from taking any other interest under the will. But she became G owner of her share of the land in Argentina by virtue of the Argentine law in the same way as the other seventh shares in that land passed automatically to the other children. The present claim is on behalf of the issue of Mrs. Gregson (who is still alive) who claim that the other six children should surrender to the trusts of the will the shares which passed to them on the death of the testator under the Argentine law as a condition of taking their share of the residue of the property in Scotland. H The Lord Ordinary found against this claim, but on appeal the Court of Session recalled his interlocutory and found in favour of the claim of the respondents. It is evident that if this finding is supported the effect will be to render more unequal the division of the testator's property among his children. This, of course, is not conclusive, but it is not to be forgotten that the justification of the doctrine of election is that it is carrying out what it is supposed the testator (judging from the provisions I in his will) would have intended to happen under the new state of things, I am convinced that he would have not so intended.

In the first place, it is evident that it is impossible for the appellants to surrender their shares of the Argentine land to the uses of the will. By the law of Argentina this is impossible. The way in which the judges of the Court of Session proposed to effect it is by the children granting a conveyance of the land in favour of the trustee, the latter granting unico contextu the appropriate declaration of trust. To my mind such a proceeding would be an evasion of the Argentine law, and I cannot

think that it is permissible to our courts to lend themselves to a sham which would in reality place the Argentine lands in the hands of a nominal owner whose true position was only that of a trustee. It must be remembered that the refusal of Argentina to permit lands to be held by a trustee is based on grounds of public policy. They insist that the person in whose name the lands stand shall be the true owner. Our ideas of land tenure may not agree with theirs, but we are bound to accept and act loyally up to the laws as to land which obtain there. I am therefore of opinion that the proposed solution of the question is quite unacceptable. A B

Nor do I see any other way in which the lands could be made effectively subject to the trust of the will. The terms of the will are such that it is clear to me that it was the intention of the testator that they should be capable of being held as lands until favourable conditions arose for converting them into money and I can see no reason why these matters should be passed by in considering whether or not the lands could in substance or in form be put under the trust provisions of the will, so as to carry out the the intentions of the testator. C

I therefore come to the conclusion that it is impossible for the appellants, by any act of their own, to render the lands subject to the trusts of the will. The lands have become theirs, not by their own act, but automatically by the effect of the Argentine law, and as they cannot undo this in such a way as to allow the trust of the will to operate on them, the doctrine of election does not apply to them. D

I am of opinion, therefore, that this appeal should be allowed, that the interlocutor of the Lord Ordinary should be restored, and that the respondents should pay the costs here and in the court below.

Appeal allowed.

Solicitors: *John Kennedy*, W.S., London, for *Thurburn & Fleming*, Solicitors, Keith, and *Macpherson & Mackay*, S.S.C., Edinburgh; *Holmes, Son & Pott*, London, for *Alex. Morison & Co.*, W.S., Edinburgh.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

DUNLOP RUBBER CO., LTD. *v.* DUNLOP

[House of Lords (Lord Birkenhead, L.C., Lord Atkinson, Lord Moulton, and Lord Buckmaster), December 20, 1920]

[Reported [1921] 1 A.C. 367; 90 L.J.P.C. 140; 124 L.T. 584; 37 T.L.R. 245]

Practice—Service out of the jurisdiction—Discretion of court—Exceptional exercise—Writ for injunction to restrain publication of libel within jurisdiction—Review by appellate court of exercise.

An appellate court will only interfere with the order of a judge allowing service of process out of the jurisdiction if it be satisfied that the judge exercised his discretion to allow such service on a wrong principle.

The discretion of the court to allow service out of the jurisdiction of a writ of summons for an injuction to restrain the publication of a libel within the jurisdiction will only be cautiously and sparingly employed, and leave for such service will be given only in a very exceptional case.

A company registered and carrying on business in England, but having a branch office in Dublin, had for the purposes of advertisement used a pictorial poster containing a figure which the respondent, who was resident in Ireland, complained was a caricature and libel upon him as exposing him to ridicule and contempt in Ireland. The respondent issued a writ in Ireland claiming an injunction to restrain the company from publishing or exhibiting the caricature in Ireland, and an Irish judge gave leave, under R.S.C., Ord. 11, r. 1 (g), for the writ to be served on the company in London, i.e., out of the jurisdiction of the Irish court. On appeal,

Held: this was a case which the judge could have considered very exceptional; it had not been shown that his discretion had been exercised on a wrong principle; and so the appeal must be dismissed.

Decision of the Court of Appeal (Ireland), [1920] 1 I.R. 280, affirmed.

Notes. As to the court's discretion to give leave for service out of the jurisdiction, see 30 Halsbury's Laws (3rd Edn.) 326, as to such discretion in libel cases see ibid., vol. 24, p. 124, and for cases see Digest (Practice) 353.

Cases referred to in argument:

Saxby v. *Easterbrook and Hannaford* (1878), 3 C.P.D. 339; 27 W.R. 188; 32 Digest 181, *2225.*

Marshall v. *Marshall* (1888), 38 Ch.D. 330; 59 L.T. 484, C.A.; Digest (Practice) 354, *683.*

Kinahan v. *Kinahan* (1890), 45 Ch.D. 78; 59 L.J.Ch. 705; 62 L.T. 718; 38 W.R. 655; Digest (Practice) 364, *753.*

Monson v. *Tussauds, Ltd.*, *Monson* v. *Louis Tussaud*, [1894] 1 Q.B. 671; 63 L.J.Q.B. 454; 70 L.T. 335; 58 J.P. 524; 10 T.L.R. 227; 9 R. 177, C.A.; 32 Digest 11, *23.*

Logan v. *Bank of Scotland*, [1906] 1 K.B. 141; 75 L.J.K.B. 218; 94 L.T. 153; 54 W.R. 270; 22 T.L.R. 187, C.A.; Digest (Practice) 83, *698.*

Watson & Sons v. *Daily Record (Glasgow), Ltd.*, [1907] 1 K.B. 853; 76 L.J.K.B. 448; 96 L.T. 485; 51 Sol. Jo. 306; 23 T.L.R. 333, C.A.; Digest (Practice) 353, *675.*

O'Connor v. *Star Newspaper Co.* (1891) 30 L.R. Ir. 1.

Tozier v. *Hawkins* (1885), 15 Q.B.D. 680; 55 L.J.Q.B. 152; 34 W.R. 223, C.A.; Digest (Practice) 354, *686.*

Cook v. *Ward* (1830), 6 Bing. 409; 4 Moo. & P. 99; 8 L.J.O.S.C.P. 126; 130 E.R. 1338; 32 Digest 85, *1159.*

Société Générale de Paris v. *Dreyfus Bros.* (1887), 37 Ch.D. 215; 57 L.J.Ch. 276; 58 L.T. 573; 36 W.R. 609; 4 T.L.R. 177, C.A.; Digest (Practice) 352, *673.*

Re Burland's Trade Mark, Burland v. *Broxburn Oil Co.* (1889), 41 Ch.D. 542; 58 L.J.Ch. 591; 60 L.T. 586; 37 W.R. 470; 5 T.L.R. 433; 1 Meg. 125; 6 R.P.C. 482; Digest (Practice) 365, *761.*

Capital and Counties Bank v. *Henty* (1882), 1 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, *121.*

Interlocutory Appeal by the defendants in the action from an order of the Court of Appeal in Ireland, reported [1920] 1 I.R. 280, affirming an order of POWELL, J.

The appellants, the defendants, were a limited company having their registered address in London and the respondent, the plaintiff, resided in Dublin. On Jan. 16, 1920, the plaintiff obtained leave by an order made in the Chancery Division in Ireland to serve a writ of summons on the defendants in an intended action between the plaintiff and the defendants for an injunction to restrain the defendants from printing, publishing or exhibiting in Ireland any advertisements, placards, books, or circulars, containing pictures representing him in absurd or unsuitable costumes or attitudes or caricatures of him or otherwise calculated to expose him to public ridicule or contempt by misrepresenting his appearance or costume. The plaintiff, who had invented a pneumatic tyre, had assigned his interest in the invention to the defendant company, and the pictures he complained of were used by them as advertisements of the tyre. The plaintiff is support of his application for leave filed an affidavit in which he deposed that he was the inventor of a pneumatic tyre and that in 1891 he presented the defendants' predecessors in title with a portrait bust of himself and his signature to be used as a trade mark, and that for some time past the defendants, without his permission, had been exhibiting in Ireland and elsewhere advertisements containing pictures intended to represent him, the features being adopted from the portrait bust, but that the features were placed upon a body of a very tall man dressed in an exaggeratedly foppish manner, wearing a tall white hat, a white waistcoat and carrying a cane and an eye-glass, none of which was it his custom to wear or carry; and that the gradual extension of these advertisements had caused very great annoyance to him and his relatives. There was a claim for damages, which was, however, abandoned. On being served with the writ of summons at their registered office in London, the defendants moved to discharge the order of Jan. 16, 1920, and to set aside the writ and the service thereof. POWELL, J., refused the application, and his refusal was affirmed by the Court of Appeal in Ireland (CAMPBELL, L.C., and RONAN and O'CONNOR, L.JJ.).

Sir John Simon, K.C., T. M. Healy, K.C., and *Wrottesley* (the latter of the Irish Bar) for the defendants.

S. L. Brown, K.C., and *A. E. Newett* (both of the Irish Bar) for the respondent.

LORD BIRKENHEAD, L.C.—This is an appeal from an order of the Court of Appeal in Ireland dated April 29, of the present year, affirming an order of POWELL, J., which was made on Mar. 19 in an action in the Chancery Division. The respondent is a Mr. John B. Dunlop, whose address is in Dublin, and the appellants are the Dunlop Rubber Co., Ltd., a firm whose principal place of business is in London. The claim in the writ is for an injunction to restrain the appellants from publishing or exhibiting in Ireland any advertisements or placards, books, or circulars containing pictures representing the plaintiff in absurd and unsuitable costumes or attitudes or caricatures of him, or otherwise calculated to expose him to public ridicule or contempt by misrepresenting his appearance or costume. The question which requires decision is whether, in terms of the order, to which I will more particularly direct attention in a moment, there has been a proper exercise of discretion made by the Irish courts in allowing an injunction under the circumstances which I have indicated. The material paragraph of R.S.C. Ord. 11 (Ireland), 1905, is r. 1 (g).

A "Service out of the jurisdiction [so it is provided by r. 1] of a writ of summons or a notice of a writ of summons may be allowed by a court or judge whenever: (g) Any injunction is sought as to anything to be done within the jurisdiction or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are not also sought in respect thereof."

B It is convenient to make it plain at this stage that although a claim for damages is included in the writ (which has not been the subject of formal amendment) it was made clear before your lordships, and in the courts below, that the respondent in fact did not intend to persevere in that claim.

The question which arises here is whether or not the judges in Ireland have made a wrong exercise of a discretion. It is true that in one period of his argument C counsel for the defendants carried the matter further, and contended that there was no power, having regard to the terms of Ord. 11, r. 1 (g), to grant an injunction under the circumstances which arise in this case; but he did not make a serious attempt by argument to satisfy your lordships that such was the case, and I am persuaded that it is not possible, on the plain words of the order, to form such a contention successfully. We must, therefore, approach the matter on the basis D that there is such a jurisdiction, but that it is a jurisdiction which would naturally —especially on the Chancery side—be cautiously and sparingly employed. The judges below have made an exercise of their discretion, and the question, therefore, that I have to ask myself is this: Am I able to say that they have exercised their discretion so evidently on a wrong principle that that which they have done must be corrected? I am able to lay down no such rule. It is not necessary for E me to say, and I do not say, whether, if I had been trying this case myself, I should have reached a similar conclusion. All that it is necessary for me to say is that I am able to discern no ground of any kind for the conclusion, nor did the learned counsel supply me with any such ground in argument, that the judges below exercised their discretion upon principles so manifestly unsound that their decision must be reversed. Counsel for the appellants attempted to avoid this F difficulty by saying that the discretion which had been exercised faultily had been so exercised, not so much in relation to any one particular point as to an accumulation of small objections, the aggregate result of which, if I understood his contention aright, must be to show that it was exercised on indefensible principles; but if there is one trivial and unsustainable objection to a course which has been adopted, it does not, in my opinion, strengthen it if one adds another equally trivial cause G of objection. I myself am unable to gather in the whole course of the argument any real or substantial ground on which the judgments of the courts below can be impeached, having regard to the principle on which our examination of them must proceed. It was said in the courts below, and it has been said in other cases which were cited to us as authorities, that such an injunction would not be granted, and ought not to be granted, unless the court was satisfied of the existence of a H serious libel, unless, indeed, it was prepared confidently and completely to anticipate what the view of the jury would be when it tried the case. I am not sure that in some passages cited the case was not in this particular put rather too high. It is sufficient for me to say that the judges who tried this case have reached the conclusion (and I agree with them) that the exhibition of these pictures constituted a circumstance in which that which was done was at least capable of a defamatory I meaning. The judges in the court below properly and cautiously abstained from any indication of feeling which might in any way prejudice the hearing of such a case, if ever it reaches a later stage. And I think it is desirable to repeat here the caution which was insisted upon in the court below, and to make it plain to the parties that they would do well not to place an excessive reliance on the dicta proceeding from their lordships in the course of this argument, for they are, in the nature of the case, dicta which were made obiter.

A further point requires a moment's observation. It was contended here, and

apparently the view was acquiesced in by two members of the Irish Court of Appeal, that the result of making such an order as the present was to diminish or weaken the admitted right of the plaintiff in such an action that the issues therein shall be determined by a jury. That right in Ireland and in England is of great antiquity, and it is not necessary, because there is no controversy as to its existence to trace its history. It is perfectly true that the terms of Fox's Act dealt only with criminal matters, but long practice and a succession of authorities, little likely at this day to be questioned, have treated it as being of equal force and validity in civil matters. The question then with which we are confronted is this, that the appellants here say that we are leaving to the discretion of a judge to determine that which a plaintiff is at present, having regard to the proviso to the Irish Judicature Act of 1877, entitled to insist upon as a right. This objection is ill-founded. The matter, it is true, is committed to the discretion of a Chancery judge, but to what circumstances has he to apply his discretion? He has to ask himself, Am I to grant or am I to withhold, a jury to the plaintiff who, under the existing law, is entitled ex debito justitiæ to a jury? How can it be contended that a judge would be making a proper or a defensible exercise of his discretion if he used it to deny to a plaintiff that to which, under the law of the land, a plaintiff is properly entitled to? If such a discretion were so exercised, it may be anticipated that the Court of Appeal in Ireland would deal suitably with the matter, and it may be confidently anticipated that if the Court of Appeal in Ireland failed to do so, such an exercise of discretion would be corrected by your lordships in this House. The objection, therefore, which is taken under this head possesses no substance.

I am for these reasons of opinion that the discretion which was exercised in the courts below has not been successfully assailed. I agree that the discretion is one that is to be sparsely exercised: it ought not to be used unless in a very exceptional case. It may be thought it is not for me to decide, that this is such an exceptional case. The respondent in this case is an old gentleman who resides in Ireland: he professes himself to be indifferent to ridiculous reproduction of his appearance in any country but Ireland; it is to their production in Ireland that this complaint in these proceedings is confined. There is, in fact, considerable reason for supposing that the order which is now under consideration may have been intended to deal with a case such as this, where the complaint is locally made, whether the mischief complained of is only resented locally, and where the remedy which is given may be made effectual locally.

I only make one further observation. At one period in the course of the case counsel for the respondent indicated that their client was prepared to content himself with the injunction which had been obtained, and did not propose either in these or any other proceedings to make a complaint of the reproduction of these or similar pictures in any country other than Ireland. As I understand what was said this amounted to an offer which would have been a term in the settlement of the proceedings with which I am now dealing had such a settlement been reached. I want to make it clear so far as I am concerned, and so far as anything which has taken place before your lordships to-day goes, that nothing has been conceded by the respondent, and he is still in full possession of any legal right which, having regard to the history of these proceedings, he enjoyed when he entered your lordship's House. What was offered was offered as a term of settlement, and no offer of settlement has apparently been forthcoming. For the reasons I have given, I think this appeal fails, and should be dismissed, and I move your lordships accordingly.

LORD ATKINSON.—I concur. The order appealed from was a discretionary order. It should not be disturbed unless the House is of opinion that that discretion has been wrongly exercised. I am entirely unable to come to that conclusion in this case. With regard to the matter that apparently has disturbed or caused the

apprehension of the defendants here and induced them probably to lodge this appeal —namely, whether their right to a trial of a libel action by jury was either infringed or jeopardised—I wish to say that, in my opinion, the form which these proceedings have taken cannot deprive a litigant of any right to trial of a libel action by a jury which he may have either under statute or by common law.

LORD MOULTON.—I concur. I should be very loath to take away from an inhabitant of one part of the United Kingdom his right to have actions brought against him in a court of his own country. There is, however, clearly a discretion in the courts to permit it, and there are circumstances in this case which the courts in Ireland thought sufficient to justify the exercise of their discretion. I am very unwilling to interfere with such a discretion, and I do not think this is a case in which we should do so. The libel that the respondent complains of is, of course, a libel by publication in Ireland; he does not seek damages, and considering all the circumstances of the case, I think the leave was granted rightly.

The Lord Chancellor.—I ought to inform your Lordships that I generally informed **LORD BUCKMASTER** of the nature of the judgment I proposed to deliver, and he assents to the views I have expressed.

Appeal dismissed.

Solicitors: *John B. & F. Purchase & Clark*, for *H. C. Neilson & Son & Dawson, Dublin; Cattarns & Harris*, for *Frederick G. Sharpe*, Dublin.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

Re WAKLEY. WAKLEY *v.* VACHELL

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), February 4, 5, 6, 9, 23, 1920]

[Reported [1920] 2 Ch. 205; 89 L.J.Ch. 321; 123 L.T. 150; 36 T.L.R. 325; 64 Sol. Jo. 357]

Will—Maintenance—Direction to maintain out of one fund—Power to maintain out of another—When recourse may be had to second fund.

Administration of Estates—Apportionment of dividends—Cumulative preferred and deferred shares—Dividend declared after death of testator to cover dividends unpaid in testator's lifetime—Apportionment Act, 1870 (33 & 34 *Vict.*, *c.* 35), *s.* 2.

By his will dated Oct. 16, 1903, a testator bequeathed a fund called his "business trust fund" to his trustees in trust for his son R., to be absolutely vested in him on his death, but not to be payable or transferable to him until he attained a certain age. The testator directed his trustees "to accumulate during the minority of my said son any income of the said [business trust fund] . . . to be applied by them in or towards his maintenance or education or otherwise for his benefit during his minority by investing the same and to add the accumulations thereof to the capital of the said [business trust fund]." The testator directed that his residuary estate should be held in trust for all his children and provided that it should be lawful for his trustees "to apply in or towards the maintenance or education or otherwise for the benefit of each child of mine . . . the whole or any part of the annual income" of his or her share of the residuary estate and further directed the accumulation of surplus income.

Held: on the true construction of the will the trustees were not entitled to resort to the income of the residuary estate for the purpose of providing maintenance for R., until they had exhausted the income of the business trust fund,

Decision of PETERSON, J. (1920), 123 L.T. 150, affirmed.

At the date of his death on Nov. 7, 1905, the testator possessed preferred ordinary and deferred ordinary shares in M.W., Ltd. M.W., Ltd., made a profit in the year ending December, 1904, but declared no dividend. In the year ending December, 1905, M.W., Ltd., sustained a loss, but in each of the next two years a substantial profit was earned. The memorandum of M.W. Ltd., provided that the profits or other moneys available for dividend which it should from time to time be determined to distribute were to be applicable, first, to the payment of a fixed cumulative dividend at the rate of six per cent. per annum on the capital paid up on the preferred ordinary shares; secondly, to the payment of a fixed cumulative dividend at the rate of twelve per cent. per annum on the capital paid up on the deferred ordinary shares. The articles of association of M.W., Ltd., provided among other things that the directors might, with the sanction of the company in general meeting, declare a dividend to be paid to the members in accordance with their rights and interests in the profits and other moneys available for that purpose. Payment of dividends except out of profits was prohibited. On Dec. 2, 1907, the directors resolved to declare and forthwith pay an interim dividend at the rate of eighteen per cent. on the preferred and twenty-four per cent. on the deferred ordinary shares "which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906." On Feb. 4, 1908, it was resolved by M.W., Ltd., in general meeting, to distribute a further dividend of three per cent. on the preferred ordinary and eighteen per cent. on the deferred ordinary shares "which would wipe off all arrears of the cumulative dividends on both classes of shares up to Dec. 31, 1907." The executors of the testator's will claimed that the dividends so payable must be apportioned and that accordingly they were entitled to receive the part apportioned to the relevant period of the testator's lifetime.

Held: no right to dividend was acquired by shareholders until profits were made and a dividend declared, and a dividend when declared was so declared in respect of the current year; it followed that, notwithstanding the Apportionment Act, 1870, s. 2, no part of the dividends was to be apportioned to the testator's lifetime.

Decision of PETERSON, J. (1920), 123 L.T. 150, reversed.

Notes. As to the application of trust income for infant's maintenance, see 21 HALSBURY'S LAWS (3rd Edn.) 174; as to apportionment of dividends, see 16 HALSBURY'S LAWS (3rd Edn.) 329; as to apportionment of income, see 34 HALSBURY'S LAWS (3rd Edn.) 630; and for cases, see 40 DIGEST 677 et seq.

Cases referred to:

(1) *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300; 46 L.J.Ch. 556; 36 L.T. 564; 25 W.R. 516, H.L.; 43 Digest 877, *3211*.

(2) *Re Taylor's Trusts*, *Matheson* v. *Taylor*, [1905] 1 Ch. 734; 74 L.J.Ch. 419; 92 L.T. 558; 53 W.R. 441; 49 Sol. Jo. 418; 40 Digest (Repl.) 760, *2458*.

(3) *Re Sale*, *Nisbet* v. *Philp*, [1913] 2 Ch. 697; 83 L.J.Ch. 180; 109 L.T. 707; 58 Sol. Jo. 220; 40 Digest (Repl.) 760, *2459*.

(4) *Re Grundy*, *Grundy* v. *Holme* (1917), 117 L.T. 470; 40 Digest (Repl.) 760, *2460*.

(5) *Bishop* v. *Smyrna and Cassaba Rail. Co.*, [1895] 2 Ch. 265; 64 L.J.Ch. 617; 72 L.T. 773; 43 W.R. 647; 11 T.L.R. 393; 39 Sol. Jo. 469; 2 Mans. 429; 13 R. 561; 10 Digest (Repl.) 1068, *7405*.

(6) *Re Crichton's Oil Co.*, [1901] 2 Ch. 184; 70 L.J.Ch. 639; 84 L.T. 864; 8 Mans. 319; affirmed [1902] 2 Ch. 86; 71 L.J.Ch. 531; 86 L.T. 787; 18 T.L.R. 556; 9 Mans. 402, C.A.; 10 Digest (Repl.) 1068, *7406*.

Also referred to in argument:

Lucas v. *King* (1863), 8 L.T. 623; 11 W.R. 818; 28 Digest (Repl.) 584, *967*.

Re Wells, Wells v. *Wells* (1889), 43 Ch.D. 281; 59 L.J.Ch. 113; 61 L.T. 806; 38 W.R.; 28 Digest (Repl.) 573, *871*.

Foljambe v. *Willoughby* (1824), 2 Sim. & St. 165; 57 E.R. 308; 28 Digest (Repl.) 584, *965*.

Re Ashley (1830), 1 Russ. & M. 371; 39 E.R. 144, L.C.; 33 Digest 199, *1026*.

Re Muirhead, Muirhead v. *Hill*, [1916] 2 Ch. 181; 85 L.J.Ch. 598; 115 L.T. 65; 20 Digest 282, *410*.

Rawlings v. *Goldfrap* (1800), 5 Ves. 440; 31 E.R. 671; 28 Digest (Repl.) 585, *972*.

Re Oppenheimer, Oppenheimer v. *Boatman*, [1907] 1 Ch. 399; 76 L.J.Ch. 287; 96 L.T. 631; 14 Mans. 139; 9 Digest (Repl.) 635, *4230*.

Appeal.

This was an appeal from an order of Peterson, J. The plaintiffs, the trustees of the will of W. J. Wakley, took out an originating summons to determine whether the trustees of the will were entitled at their discretion to maintain Ronald Ford Wakley, a son of the testator, during his infancy out of the income of the fund which was described in the will as the "business trust fund" to the exclusion of his share of the income arising from the residuary trust fund. The two defendants, Arthur Cadogan Vachell and Robert Tomlinson, the executors of the will of Ronald Ford Wakley, also took out a summons asking for a declaration that a sum of £6,210 6s. representing the dividends paid on the preferred and deferred ordinary shares in Morgan Wakley & Co., Ltd., in December, 1907, was wholly income of the share of R. F. Wakley and that no part of the same ought to be treated as capital of the estate of William John Wakley (deceased) on the ground that the same was wholly earned after the death of the said William John Wakley. Peterson, J., held that the trustees were not entitled to apply income of the residuary trust fund to maintain the said Ronald Ford Wakley until the income of the business trust fund had been exhausted for that purpose. He also held that an apportionment of the dividends ought to be made.

The defendants, the executors of R. F. Wakley's will, now appealed. The facts appear in the judgments.

Hughes, K.C., and *F. Whinney* for the appellants.

Romer, K.C., and *H. S. Preston* for the respondents, the other children of the testator.

D. D. Reid for the respondents, the trustees.

Cur. adv. vult.

Feb. 23. The following judgments were read.

LORD STERNDALE, M.R.—This appeal from Peterson, J., raises two questions, one concerned only with the construction of the particular will under consideration, the other a question of general importance. I propose to deal with the question of construction first.

The testator by his will recited that he was a shareholder and director of a company called Morgan Wakley & Co., Ltd., and that he was desirous that his son Ronald Ford Wakley should take an active part in the business of the company. He then bequeathed all the shares held by him in the company to his trustees for sale and investment, and to stand possessed of the investments in trust for his son Ronald to be absolutely vested in him on the testator's death, but not to be payable or transferable to him until a certain age. Ronald attained that age and became entitled to the absolute interest under the trust. The will then contained a proviso that notwithstanding the previous trusts the trustees should immediately after the testator's death procure themselves to be registered as the holders of the shares and stand possessed of the said shares and postpone the sale thereof

until his son should attain the age of twenty-two years, and on that event happening should transfer the said shares to him provided he should when that event happened be then actively engaged in the business of the said company as director, manager, clerk, or otherwise.

Under the will there was a power in the trustees to transfer the shares to Ronald before he attained twenty-two on the same conditions and this was eventually done. Then followed this clause:

> "And I direct my trustees to accumulate during the minority of my said son any income of the said shares or of the investments representing the same hereinbefore bequeathed in trust for him to be applied by them in or towards his maintenance or education or otherwise for his benefit during his minority by investing the same and to add the accumulations thereof to the capital of the said trust property so bequeathed in trust for him."

There then followed certain provisions as to the residue by which it was to be held in trust for all his children, and in case of Ronald's death without children (which happened) his share should be held in trust for the other children who should attain twenty-one or, being daughters, should marry. There was also this provision.

> "Provided always that it shall be lawful for my trustees to apply in or towards the maintenance or education or otherwise for the benefit of each child of mine entitled under the last-mentioned trust to a share in the residuary trust funds not absolutely vested the whole or any part of the annual income of such share, and I direct my trustees to accumulate the unapplied surplus of such income in augmentation of the capital when such income shall have proceeded."

The question arises on the construction of the two clauses as to maintenance which I have set out, and it is whether there was in the first clause a direction to the trustees to apply the income of the shares towards Ronald's maintenance, and if so whether that direction prevented the trustees from having recourse to the income of the residue for that purpose so long as the income of the shares was sufficient.

The testator died on Nov. 7, 1905, and in 1905–6 no income was received at all and £220 odd was spent for maintenance. In 1906–7 there was no income from the shares, but there was received from the income of the residue £404 1s. 7d., and there was expended on Ronald's maintenance £307 odd, making, with the amount expended in the previous year, £527 odd. It is admitted that in that year the trustees must be taken to have exercised their discretion by applying the income of the residue to Ronald's maintenance as there was no other fund which they could apply. In the next two years large sums far more than necessary for maintenance were received from the shares and the balance was carried to capital account and invested. After that no more income was received from the shares, and the only fund which could be applied for maintenance was the income from the invested surplus, the capital of the invested accumulations, if they were entitled to resort to it, and the income from the residue.

The trustees stated that after the first year, acting on the advice of one of them who was a solicitor, they never considered the question of applying any part of the income of the residue towards maintenance because they were of opinion that under the will they were bound to apply the income of the shares in maintaining Ronald, and they believed that the income so derived was sufficient. The question is whether the trustees not having exercised their discretion the court will exercise it by selecting the fund from which it is most to the benefit of the infant that the maintenance should be deducted; in this case the income of the residue in which he was partly interested and not that of the shares which would be entirely his own. This is undoubtedly the rule unless such a course be opposed

to the terms of the will—that is, if there be not a direction to employ one fund for the purpose: see *Gisborne* v. *Gisborne* (1).

Whether there is such a direction depends on the construction of the first clause as to the application of the income of the shares and particularly the words "to be applied by them in or towards his maintenance or education or otherwise for his benefit during his minority."

The clause is not very well drawn up, but I think that the view taken of it by Peterson, J., is correct. I think that it is a direction so to apply the income mentioned, and that the direction to accumulate and the direction to apply relate to the same subject-matter—that is, the income of the shares and the income arising from the investments of any surplus income. The latter income obviously comes within the direction to accumulate, and therefore, in my opinion, it comes also within the direction to apply for maintenance. This being so, the trustees could not resort to the income of the residue, as to which they had only a discretion until they had exhausted the fund to which the direction applied.

Another question which apparently was not before Peterson, J., was raised before us—that is, whether the direction applies also to the capital sum formed by the investment of the surplus income. I am of opinion it does not. There is a well-known clause to be found in many wills and settlements directing or empowering trustees to deal with such accumulations in the same manner as the income, and there is no such clause in this will. In the absence of such a clause, I think that the direction is confined to income unless there be words from which it can clearly be implied, and I find no such words in this case.

There seems to be a question of fact whether in some years—i.e., 1909–10 and 1910–11—the income from the sources I have mentioned as subject to the direction (the income of the shares and of the accumulations) was sufficient to meet the maintenance. If it were not and the trustees therefore necessarily applied some part of the income of the residue to that purpose, they must be taken to have exercised their discretion so to apply it as in the case of the £404 odd applied in the first year. I think the construction placed on the will by Peterson, J., was correct and that the appeal on this point should be dismissed.

The other question is one of general importance, and it is whether the Apportionment Act, 1870, applies to certain dividends paid on shares held by the testator, i.e., whether his estate is entitled as against the persons interested under his will to a portion of those dividends as having accrued before his death.

The facts are as follows: The company made a profit for the half year ending Dec. 31, 1904, of £1,600, but no dividend was declared. In the next year ending Dec. 31, 1905—the year in which the testator died on Nov. 7—there was a loss of over £14,000. In the year ending Dec. 31, 1906, there was a profit of £16,617. For the first half year of 1907 there was a profit of over £20,000 and apparently a still larger profit for the latter half of the year. The shares were cumulative preference shares, and the result of the large profits was that there was paid in 1907 a dividend sufficient to cover not only the dividend on that year, but also the dividends which had not been paid in the two previous years. If this dividend was paid in respect of each year the testator's estate is entitled to a sum representing the amount accrued in 1905 up to the time of his death. But if it were paid only in respect of 1907, although sufficient in amount to cover the unpaid dividends of the previous years, then the testator's estate is not entitled to any part of it.

In order to decide this question it is necessary to consider the terms of the Apportionment Act, 1870, and also the provisions of the memorandum and articles of association of the company in order to ascertain the rights of the shareholders and the powers of the directors as to dividends. By cl. 5 of the memorandum it was provided that

"The capital of the company is £75,000 divided into two thousand preferred ordinary shares and five thousand five hundred deferred ordinary shares of

£10 each. The profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute are, subject to the rights of the holders of any shares which may hereafter be created and issued, to be applicable, first, to the payment of a fixed cumulative dividend at the rate of 6 per cent. per annum on the capital paid up on the said preferred ordinary shares; secondly, to the payment of a fixed cumulative dividend at the rate of 12 per cent. per annum on the capital paid up on the said deferred ordinary shares; thirdly, of the surplus one-sixth shall be applicable to the payment of a further dividend on the said preferred ordinary shares rateably as aforesaid, and five-sixths shall be applicable to the payment of a further dividend on the said deferred ordinary shares rateably as aforesaid."

Articles 119, 120 and 121 are as follows:

"119. The directors may, with the sanction of the company in general meeting, from time to time declare a dividend to be paid to the members in accordance with their rights and interests in the profits and other moneys available for that purpose. 120. No dividend, instalment of dividend, or bonus shall be payable except out of the profits arising from the business of the company. No larger dividend shall be paid than shall be recommended by the directors. 121. The directors may, if they think fit, from time to time determine on and declare an instalment to be paid to the members on account, and in anticipation of, the respective dividends for the current year."

Then art. 126 provides: "No unpaid dividend, bonus, or interest shall bear interest as against the company"; but this, I think, refers only to dividends which have been declared and so become payable.

The sections of the Apportionment Act, 1870, which relate to this matter are ss. 2 and 5. Section 2 provides:

"From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Section 5 provides:

"The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made."

I agree with PETERSON, J., that under these sections the important matter to be considered is not the period in which the divisible revenue may be earned, but the period in or for which the payment of such divisible revenue shall be declared or expressed to be made. It is, however, admitted that such declaration must be made in accordance with the powers conferred on the directors, and that a declaration that the dividend was paid in respect of a period by which in law it could not be paid would be of no effect. It is necessary, therefore, to see what is the effect of the provisions as to cumulative dividends. The two views maintained before us may, I think, be stated thus: The respondents' view is that the shareholders acquire a right in each year to a 6 per cent. or 12 per cent. dividend, but that it can only be paid when profits are earned and a dividend declared, and that when the dividend is declared it is declared and paid in respect of each year in which no dividend has been paid. The appellants, however, contend that no right

A to dividend is acquired at all until profits are made and a dividend declared and that when such dividend is declared in respect of the current year the shareholder, by virtue of the provision that dividends shall be cumulative, then, and not till then, acquiring a right to have for that year not 6 per cent. or 12 per cent., but that sum with an addition of the amount of the dividends which they did not receive in the previous years.

B I think the latter is the correct view. The shareholders, in my opinion, acquire no right to any dividend until there are, in the language of cl. 5 of the memorandum

> "profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute."

C It was argued that they had an inchoate right which became absolute on the happening of the events mentioned. I am not sure that I understand clearly the nature of an inchoate right. But if there is a right which must be qualified by an adjective I think it is more correctly described as a conditional right for, in my opinion, it does not arise until the two conditions of the existence of profits and the determination to distribute come into existence. When these conditions D are fulfilled the shareholders acquire the right to add to the dividend for the year the same amount for each year in which no dividend has been paid. If this be correct the dividend which is paid is not in respect of each year, but in respect of the year in which profits are declared for division, the amount being by virtue of the cumulative clause determined by the whole amount of dividends unpaid.

E Reliance was, however, placed on the terms of the directors' declarations of dividend which were in these terms :

> "Directors' meeting, Dec. 2, 1907. It was resolved to declare and forthwith pay an interim dividend at the rate of 18 per cent. on the preferred and 24 per cent. on the deferred shares which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred F for two years ending 1906."

That was a directors' meeting. Then the next one is :

> "General meeting, Feb. 4, 1908. The chairman intimated that it was proposed to distribute a further dividend of 3 per cent. on the preferred ordinary, and 18 per cent. on the deferred ordinary shares which would wipe off all arrears G of the cumulative dividends on both classes of shares up to Dec. 31, 1907, leaving a balance of undivided profit of £24,758 1s. 11d. to be carried forward to new accounts."

It was argued that the effect of these declarations was that the dividends were declared in respect of each year in which there were unpaid dividends. I doubt very much if this is the correct interpretation of these declarations. They seem to H me to be declarations of an interim dividend of 18 per cent. and 24 per cent., and a final dividend of 3 per cent. and 18 per cent. for the year with an explanation that this amount is made up by taking into account the unpaid dividends of former years, and, if so, they are in accordance with what I think was the only declaration which the directors had power to make.

I As I have before pointed out, if they bear the meaning contended for by the respondents—that is, that the declaration was in respect of each year—I think they exceeded the powers of the directors and, if so, they cannot alter the legal position of the shareholders. If the declaration be as I think it is and must be in respect of the year in which divisible profits exist, the Apportionment Act, 1870, does not apply to the dividends so declared.

I ought to notice the argument placed on the word "arrears." It is a convenient expression and is often used in cases of this description. But it cannot be taken as meaning in the strict sense of the word which I take to be sums of money in

respect of which the date of payment has passed. For, as I have already pointed out, no dividends were due or payable in the earlier year because the conditions essential to payment had not been performed.

So far, I have dealt with the matter apart from authority. But there is authority in favour of the view which I have expressed. In *Re Taylor's Trusts*, *Matheson* v. *Taylor* (2), BUCKLEY, J., dealing not with a question of dividends but of interest, on a bond payable only out of net earnings of the company which gave the bond, with a proviso that any unpaid interest should be paid out of the net earnings of any subsequent year, used these words ([1905] 1 Ch. at p. 738):

> "Suppose that in the year 1904 there was no fund available, and the tenant for life died on December, 1904. There was no income, I apprehend, payable to that tenant for life, because the obligation is to pay out of a fund, and there was no fund. If in the year 1905 a fund came into existence, the interest calculated for the year 1904 would be payable, I agree; but it would be income of the year 1905, and not income of the year 1904. And if a second tenant for life were in enjoyment of the property in 1905, that tenant for life, and not the previous tenant for life, would, it seems to me, take that interest."

It is true that in that case there was no question of the Apportionment Act, 1870, but the principle stated in that passage is equally applicable to cumulative dividends and to the cumulative interest in that case. This statement of the learned judge was said to be obiter and not necessary for the decision of the case. It may be that he might have arrived at the same conclusion on grounds which would not require the application of the principle stated in the words I have quoted. But I am inclined to think that his decision was really based on the principle there stated. This is, however, immaterial, for whether it be a dictum or a part of the judgment it is, though the statement of an eminent judge, not binding on us as he was then sitting in a court of first instance. We have, therefore, especially in view of its application by EVE, J., in a case to be mentioned later, to consider whether it is correct.

In *Re Sale*, *Nisbet* v. *Philp* (3) ASTBURY, J., adopted and followed this statement of BUCKLEY, J. I think that the case might have been decided by that learned judge without resort to that principle. But the concluding words of his judgment seem to me to show that he adopted it as correct. They are as follows ([1913] 2 Ch. at p. 703):

> "The resolution creating the cumulative preference shares is in common form, and the articles provide for the declaration of dividends in the usual way out of profits and for the creation of a reserve fund at the directors' discretion. The life tenant has no right to a fixed dividend charged on profits in any event. She had merely a right to a preferential dividend as and when the directors of the company chose to declare it, and no dividend for any part of the life tenancy period was in fact earned or declared. . . . On the true construction of the will the testatrix in my judgment intended that on the life tenant's death the shares and all dividends declared for periods subsequent to that date should belong to the remaindermen absolutely. The claim of the life tenant's executors therefore fails."

Finally, in *Re Grundy*, *Grundy* v. *Holme* (4) EVE, J., following the decision of ASTBURY, J., applied this principle to a case which is exactly similar to that now under our consideration. And it was conceded that in order to adopt the respondents' contention in the present case we must overrule the decision in *Re Grundy* (4), I think we ought not to do so, and that the statement of the law by BUCKLEY, J., in *Re Taylor's Trusts* (2) was correct.

I wish to mention, in order to show that I have not overlooked them, the expressions of the other learned judges to which we were referred of "interest" and "arrears" as apply to cumulative dividends. The point under our consideration

was not before those learned judges in those cases and I do not think that they had any intention of using the words "arrears" in the strict sense which I have already mentioned, or "interest" as meaning interest which became due and payable in the years in which the dividends were unpaid. These amounts clearly did not become due or payable in those years for they were only payable out of divisible profits and there were none.

I think on this second point the appeal should be allowed and that there should be a declaration that the Apportionment Act, 1870, does not apply to these payments of dividend.

WARRINGTON, L.J.—Two questions have to be decided, one of general interest, the other one of construction on the particular will.

The first question is whether a cumulative dividend of an amount large enough to cover unpaid dividends for two years and a half prior to that on which it was declared and paid is for the purposes of the Apportionment Act, 1870, to be treated as accruing from day to day during the period of three years or only during the year in which it was declared.

The testator, who died on Nov. 7, 1905, was possessed of preferred ordinary and deferred ordinary shares in a company carrying a cumulative dividend in the case of the preferred shares at the rate of six per cent. per annum and in the case of the deferred ordinary shares at the rate of 12 per cent. per annum. By his will he bequeathed these shares to his son Ronald, who died on April 9, 1918. The appellant is his executor.

The memorandum of association contains the following provision:

> "The capital of the company is £75,000 divided into two thousand preferred ordinary shares, and five thousand five hundred deferred ordinary shares of £10 each. The profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute are subject to the rights of the holders of any shares which may hereafter be created and issued to be applicable first to the payment of a fixed cumulative dividend at the rate of 6 per cent. per annum on the capital paid up on the said preferred ordinary shares; secondly, to the payment of a fixed cumulative dividend at the rate of 12 per cent. per annum on the capital paid up of the said deferred ordinary shares,"

with provisions for the division of any surplus.

The material article is No. 119:

> "The directors may, with the sanction of the company in general meeting, from time to time declare a dividend to be paid to the members in accordance with their rights and interests in the profits and other moneys available for that purpose."

Article 120 prohibits the payment of dividends except out of profits, and art. 121 authorises the directors to declare "an instalment to be paid to the members on account and in anticipation of the respective dividends for the current year." Provision was made for an annual balance-sheet and an annual audit. In the first half of 1904 an interim or instalment dividend was paid on both classes of shares. In the second half of that year there was a small profit, but no dividend was declared. In 1905 there was a loss; in 1906 there was a profit, but little more than enough to make good the previous loss. No dividend was declared in either of those two years. In 1907 during both half years there was a large profit. On Dec. 2, 1908, the directors resolved to declare and forthwith pay an interim dividend at the rate of 18 per cent. on the preferred and 24 per cent. on the deferred shares,

> "which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906."

On Feb. 4, 1908, it was resolved by the company in general meeting

"to distribute a further dividend of 3 per cent. on the preferred ordinary and 18 per cent. on the deferred ordinary shares, which would wipe off all arrears of the cumulative dividends on both classes of shares up to Dec. 31, 1907."

The payment of the interim dividend was accompanied by a letter of the secretary of the company dated Dec. 3, 1907, in the following terms:

"I have the pleasure to inform you that your directors have decided to distribute an interim devidend at the rate of 18 per cent. on the preferred ordinary shares (being 6 per cent. per annum for three years ending June, 1907) and 24 per cent. on the deferred ordinary shares (being 12 per cent. per annum for two years ending June, 1906) and I now beg to inclose cheque for the interim dividend due on your holdings."

Then he gives particulars of the cheques.

The executors of the testator claim that these dividends must be apportioned and that they are entitled to the part apportioned to the period which elapsed from July 1, 1904, to Nov. 7, 1905. PETERSON, J., has adopted this view, and the executors of the legatee appeal.

The judgment of PETERSON, J., is founded on the terms of the Apportionment Act, 1870. The material parts of that Act are ss. 2 and 5. Section 2 is as follows:

"From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Section 5, which is the definition clause, is this:

"The word 'dividends' includes (besides dividends strictly so-called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'dividend' does not include payments in the nature of a return or reimbursement of capital."

The first question to be considered is what is the nature of a shareholder's right to a cumulative dividend. It is, in my opinion, nothing more than a right to participate in profits available for dividend which in accordance with its regulations the company has from time to time determined to distribute. In fact the shareholder has no right to a dividend whether cumulative or otherwise until there are profits available and the company, by the proper authority, has determined to distribute them. It follows when profits are available and the company determines to distribute them, it is the shareholder who is then entitled to the shares who takes the dividend and not the person entitled to them in past years, though the dividend may in the case of cumulative dividend be large enough to cover the amount which would have been paid in past years if there had been profits available, but which were not paid because there were no such profits: see *Re Taylor's Trusts, Matheson* v. *Taylor* (2); *Re Sale, Nisbet* v. *Philp* (3); *Re Grundy, Grundy* v. *Holme* (4).

The articles, in my opinion, contemplate annual accounts and the practice of the company was in accordance with that view. When in 1907, after an interval of two years and a half, during which there were no profits applicable for dividend, a dividend was at last declared, it was, in my opinion, not three dividends, but one dividend, although its amount was conditioned by the fact that in previous years no dividend had been paid.

In my opinion, therefore, the interim dividend declared in December, 1907 and the final dividend declared in February, 1908 were both for or in respect of the year 1907. But PETERSON, J., while admitting the correctness of the decisions above referred to, thought that they did not govern the present case, in which the point to be decided is whether the Apportionment Act, 1870, is to be applied. But, under s. 5 of that Act, if the payment of divisible revenue is declared or expressed to be made for a particular year that is the period during which the divisible revenue is to be deemed to have accrued by equal daily increment; and the dividend, which is only a part of that divisible revenue, must be considered as accruing from day to day during the same period. For I think it is clear that the provision as to the accrual of divisible revenue is intended to fix the period during which dividends are to be considered as accruing for the purpose of s. 2.

As I have already indicated, I think the true view of the resolution of the directors as to the interim dividend and that of the company confirming the recommendation of the directors as to the final dividend is that the payment thereby declared and expressed to be made was for or in respect of 1907. The statement as to what the dividend would "cover" or "wipe off" is in my opinion nothing but an explanation of the rate per cent. at which the dividend was calculated. I think the same may be said of the secretary's letter. But if it goes further it cannot, in my opinion, alter the effect of the formal resolution. No dividend, therefore, having been accruing at the death of the testator there is no ground for apportionment and, in this respect, the order of PETERSON, J., must, in my opinion, be reversed.

With regard to the other point which is one of construction only, I have had an opportunity of considering the judgment of the Master of the Rolls, and as I agree with it and with the judgment of PETERSON, J., it is unnecessary for me to add anything on my account.

I agree that in this respect the appeal fails.

YOUNGER, L.J.—On the question whether the maintenance of the testator's son Ronald is, on the true construction of the will, primarily chargeable upon the income arising from the shares in Morgan Wakley & Co., Ltd., I find myself in agreement with the conclusion at which PETERSON, J., arrived. I have with the learned judge arrived at the conclusion—paraphrasing the words of LORD O'HAGAN in *Gisborne* v. *Gisborne* (1)—that the principle that as between two funds in favour of an infant his maintenance must be provided for according to his greater interest in one of them has, in the main, no relevancy here, the reason being that there is on this will an intention manifested with sufficient clearness that the income of the shares in question together with the income of investments representing accumulations of that income not applied in maintenance is subject to an imperative direction for application in or towards Ronald's maintenance or education or otherwise for his benefit; while as to the income of Ronald's settled share in residue, the executors are merely empowered to apply it for these purposes. But I confess that it is not without some hesitation that I have reached this conclusion. The principle referred to by LORD O'HAGAN is well settled and not lightly to be disregarded, and as PETERSON, J., points out, the clause in this will containing the so-called imperative direction is not happily expressed. In the matter of the amount applicable for maintenance thereunder there is clearly a discretion in the executors, and, moreover, a very slight change in phraseology would have made the reference to maintenance in the gift of the shares identical in terms with the reference to maintenance in the gift of residue, while the latter admittedly confers upon the executors a power only.

Further with reference to Ronald's share in residue the power contains no identification express or implied that its exercise is to be in any way limited to a period during which the income of the shares as the primary fund may in the whole or in part be sufficient for the purpose. Nevertheless on the whole I conclude that the words used by the testator with reference to the income of the shares can only be properly satisfied by holding that they amount, inartistic as they are, to an

imperative direction; while the absence of any qualifying words in the powers conferred on the executors with reference to the application of the income of residue is, I think, sufficiently explained by the fact that that clause is general, dealing comprehensively with the share in residue of each one of the testator's children and not with that of Ronald only, I agree, with PETERSON, J.'s, conclusion. But the declaration he has made upon the subject may, it seems, require some expansion.

It is said that the accounts properly taken will show that in one or more years after the year succeeding the testator's death the actual income from the shares received with the income of accumulations for the same year did not suffice of itself to provide the sums applied for Ronald's maintenance and education during the year. If that be so, then in my opinion the principle referred to by LORD O'HAGAN in *Gisborne* v. *Gisborne* (1) does not apply to the deficiency. That, in my opinion, is chargeable against the concurrent income or, if necessary, the accumulations of income of Ronald's interest in residue and not against income of the shares subsequently received or against invested accumulations of such income previously made. And to avoid any further question on this point it may be convenient that a declaration to this effect be now made so that in finally adjusting the accounts as between the two funds due regard may be had to that declaration should it turn out that the occasion calls for it.

The second question raised by the appeal is of more general interest and on it I find myself, I regret to say, at variance with the learned judge in the court below. That is the question whether the dividends received on the testator's shares in Morgan Wakley & Co. belong to the estate of Ronald as the specific legatee of these shares, or whether to any extent they form, under the Apportionment Act, 1870, part of the testator's general estate.

The facts which raise this question are simple. For convenience they may be partly restated: The testator was the holder in the company of 847 preferred shares, 1,920 deferred shares and of a moiety of five preferred shares. All these shares he bequeathed to Ronald, and in the event they became with all dividends accruing thereon from the date of his death, Ronald's absolute property. The financial year of the company ends on Dec. 31. The testator died on Nov. 7, 1905. Dividends on the shares were paid up to June 30, 1904. In respect of the period from June 30, 1904 to Dec. 31, 1904 a profit of £1,616 1s. 4d. was made, but no dividend was paid. For 1905, the year of the testator's death, a loss of £14,565 3s. 2d. was made. In 1906 a profit of £16,617 12s. 3d. was made, but no dividend paid. In 1907 from January to June a profit of £21,095 1s. 6d. was made, and in the same year from July to December the company earned a profit of £32,885 11s.

The question arises with reference to a so-called interim dividend paid on Dec. 31, 1907 as a result of these profits earned in 1907. I need not again read the directors' resolution for payment of the interim dividends nor the letter of the secretary transmitting them. These have already been set forth. The question is whether the interim dividends on both classes of shares so resolved upon by the directors on Dec. 2, 1907 and paid on the third were as to any part of them paid in any true sense in respect of the period from June 30, 1904 to Nov. 7, 1905, the date of the testator's death, or whether they were paid in respect of the financial year of the company ending Dec. 31, 1907 in the course of which they were in fact distributed.

If art. 121 is alone to be regarded these dividends must be taken to have been "paid to the members on account and in anticipation of the respective dividends for the current year." That is the only power which the article gives to the directors. But the question was in argument dealt with on more general grounds, and it is, I think, right so to deal with it.

In the case of this company the broad provisions as to preferred dividends are in a form very usual. Taking for convenience of statement the dividend rights of the preferred ordinary shares, the memorandum of association provides that

A "the profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative dividend at the rate of 6 per cent. per annum on the capital paid up"

on these preferred ordinary shares. That dividend is payable only out of profits B (art. 120) and it is only payable if the directors with the sanction of a general meeting think fit to declare it (art. 119) or if they determine on and declare an instalment by way of interim dividend (art. 121).

Other articles of the company contain usual provisions for the making out of a balance-sheet every year to be laid before the company in general meeting (art. 132) for the examination thereof by the auditors (art. 141), and for a report by them on C the balance-sheet to be read at every ordinary meeting (art. 143). In other words the article contemplates annual distributions by the directors with the authority of the company given at the annual ordinary general meeting, and interim distributions in anticipation thereof made on the authority of the directors alone. But no shareholder in this company, preferred or otherwise, is entitled to any dividend unless there are profits existing, and made available for its payment in one or D other of the ways just mentioned, a preferred ordinary shareholder being further entitled to this right that if and so soon as profits are so made available for dividend they have first to be applied rateably in payment of the dividend on the preferred ordinary shares.

This, therefore, is clear, that either if there are no profits or if there are none made available for payment of dividend as above, no preferred ordinary dividend E cumulative though it be can be truly said to be in arrear if, by that expression, it is connoted that the company has made default in payment of the dividend in question. There has not been any such default because in the case supposed no obligation to pay has arisen. Putting it otherwise, there is in this essential particular no real analogy between the expressions "arrears of preference dividend" and "arrears of interest," although doubtless, it is from this last expression that the first has for F common parlance undoubtedly been borrowed. But the preferred ordinary dividend is cumulative.

How then is effect to be given to that right if although not punctually paid the dividend is still not "in arrear." Easily enough, I think, if the true nature of such a dividend is borne in mind. The cumulative preferred dividend is, I think, correctly decribed as one which gives to the holder of the preferred share G *pari passu* with all other holders of shares of the same class a right to receive out of a fund of profits made available for dividend under the acts of the company and in priority to the holders of all junior shares in it a sum measured by the percentage rate and the period of time over which the dividend has not been paid in whole or in part. The dividend when paid—not being in any true sense in arrear up to that moment—is paid out of the fund then made available for its payment for the year H or other financial period of the company in which it is paid. It is not paid in respect of any previous period of non-payment—when it was neither due nor payable—it is paid exactly in the same way as is a dividend at the same time paid out of any residue of the dividend fund to holders of ordinary shares in respect of which there has been no distribution for the same or it may be even a longer period. In other words in respect of the time with reference to which dividends are paid there is no I difference between a cumulative preference and an ordinary dividend. Each is a dividend for the year or other financial period of payment: that the preferred dividend is preferential, fixed and cumulative means only this that these are the factors by which the priority and the amount of the share of the dividend fund appertaining to the preference shareholder are ascertained.

These general views are very clearly expressed in the regulations of the company. The fixed cumulative dividend here is by the memorandum one dividend, and not any dividends—not a cumulation of separate dividends as senior counsel for the

respondent, the other children of the testator phrased it—and the surplus "sixth" in its nature an ordinary dividend is expressed to be a "further" dividend. And for this view of the matter there is high authority. The principle is enunciated by BUCKLEY, J., in *Re Taylor's Trusts, Matheson* v. *Taylor* (2) where dealing with what is called an income bond he used the words already cited by the Master of the Rolls. PETERSON, J., treats these words as obiter dicta. But in my view they lay at the root of the decision. BUCKLEY, J., there had to determine whether a tenant for life was entitled to any part of the purchase money of certain settled income bonds sold for a sum representing less than the amount of principal secured with interest to date. BUCKLEY, J., decided that the tenant for life was entitled to nothing out of the purchase price only, because he held that so long as there was no income fund of the company available for its payment there was no interest due or "in arrear" on the bonds, and I believe the principle upon which BUCKLEY, J., proceeded to be correct, and to be directly applicable to such a case as the present. The only difference here is that in this instance the profits are only divisible if made available for dividend. In that case they were divisible if earned. In other words, the bond there was like the preference share in *Bishop* v. *Smyrna and Cassaba Rail. Co., Ltd* (5). Here its shares are similar to those in *Re Crichton's Oil Co., Ltd.* (6). BUCKLEY, J.'s, decision has been followed and so applied by ASTBURY, J., in *Re Sale, Nisbet* v. *Philp* (3), and, under circumstances identical with the present case, by EVE, J., in *Re Grundy, Grundy* v. *Holme* (4)—a case not cited to PETERSON, J.

That learned judge decided that the dividend here was apportionable, not so much, I think, because he disagreed with any of the views here expressed, as because he felt himself constrained so to hold by the express terms of s. 5 of the Apportionment Act, 1870 which provides that:

> " . . . all such devisible revenue shall for the purposes of this Act be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made."

PETERSON, J., was of opinion that in the present case the payment of the interim dividend was in the directors' resolution expressed to be made in respect of a period prior to the testator's death, and although it is clear as above appears that no part of the divisible revenue had in fact been earned during that period he felt compelled to hold that the rights of the parties were under the statute fixed by that expression of the directors.

I take a different view and for several reasons: First, I do not so read the directors' resolution of Dec. 2, 1907; nor do I so read the secretary's letter of the 3rd—although that letter can, in my judgment, have no effect upon the case. But further in my opinion, the directors had no power under the articles here to make any such allocation, if in fact they made it. Their power was, as I have already pointed out, "to declare an instalment to be paid to the members on account and in anticipation of the respective dividends for the current year." And senior counsel for the respondents, the other children of the testator did not contend before us that under the Act a declaration or expression which it was not competent for directors to make could have any effect in determining rights. Accordingly, being clear as I am that the interim dividend, both of the preferred and the deferred ordinary, shares, was in fact, only a dividend in anticipation of that for the year 1907, there is here, in my opinion, no case for apportionment. The dividends belong altogether to the testator's son, and the declaration of the learned judge in the court below should, I think, be altered in that sense.

Perhaps I ought to say a word with reference to one matter alluded to by junior counsel for the respondents, the other children of the testator which may be thought to be affected by the present decision. He instanced in his argument the case of a class of cumulative preference shares some issued and paid up say in 1915, others issued and paid up say in 1917, no dividends paid in 1915, 1916, 1917,

or 1918, but profits earned in 1919 sufficient in amount for payment of a dividend on the shares issued in 1915, both for that year and for 1916, but no more. On that junior counsel contended that if the principle now adopted in this judgment were to be held applicable the holders of the 1915 shares would not receive the whole fund available for dividend, although in such circumstances it had always been assumed that they were so entitled, and many distributions had been made on that footing. I agree, but such distributions remain, in my judgment perfectly right on the principle of this judgment. The shares supposed are all of the same class; some of them by reason of their earlier issue and payment up of capital have a larger claim on the dividend fund than others. It is proper distribution as between two sets of such shares to apply the first available dividend fund in producing equality amongst them all—that is, by first extinguishing the excess. The principal here enunciated has in these distributions, although, perhaps, unconsciously, been in this respect in no way disregarded.

Appeal on the first question dismissed. Appeal on the second question allowed.

Solicitors: *Lowless & Co.*, for *Vachell & Co.*, Cardiff; *Woodcock, Ryland, & Parker*, for *Wade & Son*, Newport, Mon.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

NESOM *v.* METCALFE

[KING'S BENCH DIVISION (Rowlatt and McCardie, JJ.), November 18, 1920]

[Reported [1921] 1 K.B. 400; 90 L.J.K.B. 273; 124 L.T. 606; 37 T.L.R. 111]

Execution—Committal for debt—Need of evidence of means at date of committal—Instalment order—Evidence as to means since order made—Debtors Act, 1869 (32 & 33 *Vict.*, *c.* 62), *s.* 5.

In May, 1918, a creditor obtained a judgment in the High Court against a debtor. In January, 1920, the creditor took out a judgment summons against the debtor in the county court, and in July, 1920, an order was made for payment of the judgment debt by monthly instalments. The debtor made default in payment of two instalments, and in October, 1920, the creditor took out another judgment summons, which came before the county court on November 8. The debtor then stated on oath that he had not the means to pay. No evidence was given on behalf of the creditor as to the debtor's means, but the judge stated that he was satisfied at the hearing of the previous judgment summons that the debtor could pay, and made a committal order.

Held: the judge had no jurisdiction to make the order for the committal of the debtor in the absence of some affirmative evidence of a direct kind, given at the date of the committal order, that the debtor had, at that date, or had had since the date of the instalment order, the means to pay the instalments becoming due.

R. v. *Brompton County Court Judge* (1) (1886), 18 Q.B.D. 213, applied.

Notes. The practice on application for prohibition has now been altered: see R.S.C., Ord. 53.

As to the facts to be proved on a judgment summons before a committal order can be made, see 2 HALSBURY'S LAWS (3rd Edn.) 642, and for cases see 5 DIGEST (Repl.) 1113–1115. For the Debtors Act, 1869, see 2 HALSBURY'S STATUTES (2nd Edn.) 292.

Cases referred to: A

(1) *R.* v. *Brompton County Court Judge* (1886), 18 Q.B.D. 213; 51 J.P. 547; sub nom. *Reeves* v. *Fowle*, 56 L.J.Q.B. 49; 55 L.T. 663; 35 W.R. 130; 3 T.L.R. 143, C.A.; reversed sub nom. *Stonor* v. *Fowle* (1887), 13 App. Cas. 20; 57 L.J.Q.B. 387; 58 L.T. 1; 52 J.P. 228; 36 W.R. 742; 4 T.L.R. 109, H.L.; 5 Digest (Repl.) 1111, *8975*.

(2) *Evans* v. *Wills* (1876), 1 C.P.D. 229; 45 L.J.Q.B. 420; 34 L.T. 679; 40 J.P. 552; 24 W.R. 883; 5 Digest (Repl.) 1116, *9014*. B

(3) *Montgomery & Co.* v. *De Bulmes*, [1898] 2 Q.B. 420; 67 L.J.Q.B. 768; 78 L.T. 671; 47 W.R. 22; 42 Sol. Jo. 590, C.A.; 5 Digest (Repl.) 1112, *8979*.

(4) *Woodham Smith* v. *Edwards*, [1908] 2 K.B. 899; 77 L.J.K.B. 1056; 99 L.T. 710; 24 T.L.R. 864; 52 Sol. Jo. 680; 15 Mars. 322, C.A.; 5 Digest (Repl.) 1112, *8980*. C

(5) *Dillon* v. *Cunningham* (1872, L.R. 8 Exch. 23; 42 L.J.Ex. 11; 27 L.T. 830; 5 Digest (Repl.) 1111, *8971*.

(6) *Chard* v. *Jervis* (1882), 9 Q.B.D. 178; 51 L.J.Ch. 429; 51 L.J.Q.B. 442; 30 W.R. 504, C.A.; 5 Digest (Repl.) 1110, *8965*.

Also referred to in argument: D

Elston v. *Rose* (1868), L.R. 4 Q.B. 4; 9 B. & S. 509; 38 L.J.Q.B. 6; 19 L.T. 280; 17 W.R. 52; 13 Digest (Repl.) 388, *163*.

Appeal from ROCHE, J., in chambers, refusing a writ of prohibition directed to a county court judge and a creditor from further proceeding in the matter of the committal of a debtor under s. 5 of the Debtors Act, 1869.

In May, 1918 the creditor, Nesom, recovered a judgment in the High Court E against the debtor, Metcalfe, for the sum of £146. In January, 1920 the judgment being unsatisfied, the creditor took out a judgment summons against the debtor in the County Court at Leyburn, Yorkshire. The summons came before the county court judge on several dates, and after hearing evidence of means, the judge, on July 12, 1920, made an order for the payment of the judgment debt of £146 by F instalments of £10 per month. The question of the debtor's means depended, partly, on whether the debtor was farming a certain farm on his own account, or whether he was working on it as a servant of his father. The debtor said that he worked on it for his father and received no wages except his board and lodging. He said that he had no means at all, but evidence was given that in seeking exemption from military service in 1916 he had stated that the farm and stock were his own, and that he had no one to look after them for him if he had to serve in the Army. G The judge did not believe the debtor's evidence that he had no means, and made the instalment order as stated. No instalments were paid under that order, and on Oct. 8 the creditor took out another judgment summons against the debtor for non-payment of two instalments. This summons was heard by the judge on Nov. 8. According to an affidavit filed on behalf of the debtor, the creditor did not attend H on that date, but was represented by his solicitor. On that occasion no evidence was given on behalf of the creditor with regard to the means of the debtor. The only evidence given on that occasion was that of the debtor, who stated on oath that he had not the means to pay. The judge stated that he was satisfied at the hearing of the previous judgment summons that the debtor could pay. The county court judge referred to the original judgment in the High Court, and said that the only I question he had to answer was whether the debtor had, or had had since the date of the judgment, the means to pay the sum in respect of which he had made default, and had refused or neglected to pay the same, and on the evidence that question must be answered in the affirmative. The judge added that at one of the earlier hearings of the judgment summons the debtor had stated that he was working for his father on the latter's farm for his food and clothes, and no wages. At the final hearing it was stated by the debtor's solicitor that the debtor had married within the past month, and then received 10s. a week from his father. The judge further said

that the debtor could earn in his own district £5 or £6 a week as a farm foreman or steward. He therefore disbelieved the debtor's evidence and made an order committing the debtor to prison for forty-two days. An application was thereafter made in chambers for a writ of prohibition directed to the county court judge and the creditor to prevent them from further proceeding with the matter of the committal of the debtor. The ground of the application was that the judge had no jurisdiction to make the committal order in the absence of evidence that the debtor had on the date of the committal, or had had since the date of the instalment order—namely, July 12,—the means to pay the debt. ROCHE, J., refused the application. The debtor appealed.

By s. 5 of the Debtors Act, 1869:

"Subject to the provisions hereinafter mentioned, . . . any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court: Provided . . . (2) that such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects, to pay the same. Proof of the means of the person making default may be given in such manner as the court thinks just, and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules. . . . For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments. . . ."

Whitmore L. Richards for the debtor.
Harold Morris for the creditor.

ROWLATT, J.—In this case judgment was obtained against the debtor in May, 1918 for £146, and on July 12, 1920, an order was made by the county court judge for the payment of that sum by instalments. On Nov. 8, 1920, a further judgment summons having been taken out against the debtor, who had failed to pay two of the instalments, a committal order was made against him.

It is said on behalf of the debtor that that committal order was made without jurisdiction. The order of committal recites that there was a judgment or order of July 12 for the payment of £146. Nothing is there said about instalments, but it is obviously reciting the instalment order, and the sum of £146 is only mentioned as the aggregate of the instalments. It then continues:

"Whereas the defendant [that is, the debtor] has made default in payment of £20 payable in pursuance of the said judgment or order [that means the instalment order] and whereas a summons was . . . duly issued out of this court [requiring the debtor to appear personally] to be examined on oath touching the means he had then or had had since the date of the said judgment or order to satisfy the sum then due and payable in pursuance of the said judgment or order,"

it then, after reciting that

"Whereas at the hearing of the said summons, it has now been proved to the satisfaction of the court that the [debtor] now has or has had since the date of the said judgment or order, the means to pay the sum due and payable in pursuance of the said judgment or order . . ."

orders the committal of the debtor. That committal order, in reciting "the said judgment or order" clearly is referring to the instalment order of July 12, and it is in the correct form if s. 5 of the Debtors Act, 1869, means that when a man has a

judgment summons against him for not paying an instalment he is not to be committed unless he has had the means to pay since the date of the instalment order. In this case it appears from the judge's notes that the question which he tried, and as a result of which he has committed the debtor, was not whether the debtor had means since the instalment order, but whether he had means since the date of the original judgment. In my opinion, that cannot justify the committal of the debtor. In the circumstances of this case the debtor could be committed only if there was evidence that since the date of the instalment order, he had had the means to satisfy the order.

Counsel for the creditor, argued very acutely that in the second proviso to s. 5 of the Debtors Act, 1869, which says that the jurisdiction to commit to prison

> "shall only be exercised when it is proved to the satisfaction of the court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same,"

the expression "order or judgment" means the original order or judgment, and not the instalment order. I cannot accept that contention. The first part of the section enacts that a person may be committed to prison "who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment." Therefore, an instalment of a debt may be due in pursuance of an "order or judgment." An instalment order is, therefore, within that expression. This is borne out by the authorities. *Evans* v. *Wills* (2) decided that the penalty by way of committal is applicable to each instalment. *Montgomery & Co.* v. *De Bulmes* (3) decided that when an instalment order has been made, and is in force, execution cannot be issued on the original judgment. It was held in *Woodham Smith* v. *Edwards* (4) that in such a case there could be execution outside the Debtors Act for each instalment.

These decisions all point strongly to the conclusion that it is the instalment order that must be regarded for this purpose, not the original judgment. Lastly, in *R.* v. *Brompton County Court Judge* (1), it was said that where there is an instalment order, the committal order must be in respect of the non-payment of an instalment. Lord Coleridge, C.J., there said (18 Q.B.D. at p. 216):

> "The effective order here is that ordering £4 a month. Since that order there has been no inquiry before the county court judge as to whether the debtor had the means of paying the instalment for which this commitment issued."

If an instalment order and a committal order can be made at the same time, and an instalment is not paid, the judge is depriving himself of the power to do what is his duty—namely, to hear the debtor and ascertain whether he has the means to pay the instalment, before committing him. That is in substance what was said by the Lord Chief Justice. In the same case Lord Esher said (ibid. at p. 217), that the court

> "had no jurisdiction to commit in any case unless it was proved that the debtor could have obeyed the order by payment, and that when the order was for payment by instalments, that doctrine would apply to each separate instalment."

Lindley, L.J., said (ibid. at p. 220):

> "It has long been settled law that a judge cannot at the same time make an order for payment by instalments and for committal in default. The reason for this is obvious. The legislature required an investigation of the debtor's means of payment before making an order for his imprisonment."

That means that if imprisonment is ordered for non-payment of an instalment, the judge must inquire why he has not paid that instalment. Lopes, L.J., gave judgment to the same effect.

On the ground, therefore, that there has been no inquiry as to the debtor's means to pay the two instalments in question, I think the appeal must be allowed and the writ must go. The question has been argued whether the evidence before the county

court judge would have justified the committal if the judge had addressed his mind to the proper question, but in my opinion, it is unnecessary to express any opinion on that point.

McCARDIE, J.—ROCHE, J., refused an order for prohibition directed to the creditor in the action and to the county court judge; hence this appeal. [HIS LORDSHIP summarised the facts, and continued:] It is clear that the judge acted on the view that the relevant question for him to decide was whether or not the debtor had means to pay since the date of the judgment in May, 1918, and that, on being satisfied that he had had means since that date, a committal order could be made. The view of the county court judge is to be tested by a consideration of the terms of s. 5 of the Debtors Act, 1869, on which alone the judge's power rests. It must be remembered that s. 5 is a penal section, exposing a debtor to imprisonment for non-payment of debt. I fully appreciate the cogent argument of counsel for the creditor on the wording of the section, and if the matter stood free from authority, the argument might carry conviction to this court, but the section must be construed in the light of the decisions given upon it.

It is clear that the judge could make an order for payment by instalments: see *Dillon* v. *Cunningham* (5). Having made that order, what was its effect? That matter has been considered in several cases. In *Montgomery & Co.* v. *De Bulmes* (3) it was held that after an instalment order has been made execution cannot be issued on the original judgment; and *Woodham Smith* v. *Edwards* (4) decided that after an instalment order is made, execution can only issue for the amount of instalments which have become due and are unpaid. *Evans* v. *Wills* (2) shows that where an instalment order has been made and there has been an omission by the debtor to pay, a committal order may be made on proof of that default. What is the effect of the section considered in the light of these decisions? The effect of these decisions is to make the instalment order the governing order, for the purpose of exercising the power to commit. This view, it will be seen, accords with that taken in *R.* v. *Brompton County Court Judge* (1). Therefore, it is impossible to accede to the argument of counsel for the creditor on the effect of the section. The result of the decisions, particularly *R.* v. *Brompton County Court Judge* (1), is that the question to be determined, where an instalment order has been made, is whether the debtor, at the time of the application to commit him has, or has had since the date of the instalment order, the means to pay the amount he was bound to pay under that order. That is the true principle to apply. It is clear that the county court judge did not apply that principle in this case, and on that ground the prohibition should go.

In my opinion, there is another ground on which the writ should be granted. The county court judge had several hearings before he made the instalment order, but, when he made the committal order on Nov. 8, he had no evidence at all on which he could properly make it. In my opinion, he was not entitled to rely on evidence which had been given in prior proceedings, in the absence of some affirmative evidence of the debtor's means given at the hearing before him on Nov. 8. Such a requirement is, in my opinion, essential if the language of s. 5 is to be observed—namely, that the jurisdiction to commit can be exercised only where it is proved to the satisfaction of the court that the person making default either has or has had the means to pay the sum in respect of which the order was made. That means that evidence of a reasonably direct character is required before this punishment for non-payment of debt can be imposed: see *Chard* v. *Jervis* (6). On both grounds, therefore, I think the writ of prohibition must go.

Appeal allowed.

Solicitors: *J. & C. Dodd*, for *P. F. C. T. Crow*, Sunderland; *Bell, Brodrick & Gray*, for *A. H. Wilkinson*, Leyburn.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re SALOMONS. PUBLIC TRUSTEE *v.* WORTLEY

[CHANCERY DIVISION (EVE, J.), January 22, 1920]

[Reported [1920] 1 Ch. 290; 89 L.J.Ch. 222; 122 L.T. 670; 36 T.L.R. 212; 64 Sol. Jo. 241]

Administration of Estates—Legacy—Appropriation of fund to satisfy—Legacy to infant—Trustee Act, 1893 (56 & 57 *Vict.*, *c.* 53), *s.* 42—*Land Transfer Act*, 1897 (61 & 62 *Vict.*, *c.* 65), *s.* 4 (1).

An appropriation of a fund to satisfy a legacy may only be made with the consent of the legatee and if he is sui juris, unless it can be made under a special power conferred by the will or by statute.

Before 1926 if an executor, desirous of distributing residue, set aside and invested in proper securities an ample sum to secure an infant's legacy, he was, nevertheless, personally liable, and the estate was also liable, for any loss by reason of the investment proving insufficient.

Re Hall, Foster v. *Metcalfe* (1), [1903] 2 Ch. 226, explained.

Re Salaman, De Pass v. *Sonnenthal* (2), [1907] 2 Ch. 46, applied.

Notes. The Trustee Act, 1893, has been replaced by the Trustee Act, 1925, s. 63 of which contains the power to pay an infant's legacy into court formerly contained in s. 42 of the Act of 1893. Section 41 of the Administration of Estates Act, 1925, now gives a personal representative a statutory power of appropriation which provides a means (see s. 42 (1) of the Act) of discharging himself and the estate from liability for a loss such as is referred to in the headnote; and s. 42 (2) of the Act has terminated the personal liability of a pre-1926 personal representative for such a loss.

As to duties of personal representatives with regard to legacies to infants see 16 HALSBURY'S LAWS (3rd Edn.) 324, as to their power to appropriate see, ibid. 372–376, and for cases see 23 DIGEST (Repl.) 456–457. For the Trustee Act, 1925, and the Administration of Estates Act, 1925, see 26 and 9 HALSBURY'S STATUTES (2nd Edn.) pp. 50 and 718 respectively.

Cases referred to:

(1) *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226; 72 L.J.Ch. 554; 88 L.T. 619; 51 W.R. 529; 47 Sol. Jo. 514, C.A.; 23 Digest (Repl.) 407, *4779*.

(2) *Re Salaman, De Pass* v. *Sonnenthal*, [1907] 2 Ch. 46; 76 L.J.Ch. 419; 96 L.T. 809; on appeal [1908] 1 Ch. 4, C.A.; 23 Digest (Repl.) 456, *5259*.

Also referred to in argument:

Hutcheson v. *Hammond* (1790), 3 Bro. C.C. 128; 29 E.R. 449, L.C.; 37 Digest 521, *1120*.

Green v. *Pigot* (1781), 1 Bro. C.C. 103; 2 Dick 585; 28 E.R. 1013, L.C.; 24 Digest (Repl.) 648, *6392*.

Lee v. *Brown* (1798), 4 Ves. 362; 31 E.R. 184; 28 Digest (Repl.) 603, *1133*.

Whopham v. *Winfield* (1799), 4 Ves. 630.

Baker v. *Farmer* (1868), 3 Ch. App. 537; 37 L.J.Ch. 820; 16 W.R. 923, L.JJ.; 24 Digest (Repl.) 650, *6412*.

Rimell v. *Simpson* (1848), 18 L.J.Ch. 55; 23 Digest (Repl.) 456, *5254*.

Re Waters, Preston v. *Waters*, [1889] W.N. 39; 24 Digest (Repl.) 649, *6404*.

Re Oswald, Oswald v. *Oswald*, [1920] W.N. 22; 64 Sol. Jo. 242; 43 Digest 763, *2066*.

Adjourned Summons.

The testator, Leopold Salomons, by his will dated Dec. 5, 1913, appointed the Public Trustee to be sole executor and trustee, and bequeathed divers pecuniary legacies (including a legacy of £1,000 to the defendant, Joan Wortley), and devised and bequeathed all the residue of his real and personal estate unto his executor

and trustee upon trust for sale and to divide the proceeds as to one-fourth among charitable institutions in the City of London or the counties of London and Surrey as should be agreed upon by his wife, Annie Martin Salomons, Alfred Aston, Charles John Stewart and George Cave or the survivors or survivor of them, and the remaining three-fourths part of his residuary estate to then existing charitable institutions in the said city and counties as should be agreed upon by the four above-named persons. The testator died on Sept. 23, 1915, and his will, with two codicils not material to be stated, was duly proved by the Public Trustee. The testator left real and personal estate the value of which was sworn for probate at £323,470 11s. 9d. The Public Trustee had, out of the proceeds of parts of the estate, paid all the funeral and testamentary expenses and debts of the testator, invested sums to provide for certain annuities bequeathed by the will, and paid all the pecuniary legacies bequeathed by the will (other than legacies bequeathed to legatees who were still infants), and had also divided part of the residue of such proceeds in accordance with the trusts of the will. Joan Wortley was born on May 27, 1901, and by a master's order of Nov. 10, 1919, the Official Solicitor of the Supreme Court was assigned her guardian to appear and defend this action to which His Majesty's Attorney-General was the second defendant. The originating summons issued on the application of the Public Trustee, the sole executor and trustee of the testator's will, asked that it might be determined (i) whether the plaintiff, as executor of the will, had power to appropriate a sum of £1,000 cash to answer the legacy bequeathed to Joan Wortley and to invest such sum of cash with interest thereon at the rate of 4 per cent. per annum from Sept. 23, 1916, until the date of investment for the benefit of Joan Wortley in the name of the plaintiff at his discretion in any investment in which cash under the control or subject to the order of the court might for the time being be invested; (ii) whether, upon such appropriation being made (a) the plaintiff might properly distribute the residuary real and personal estate of the testator without regard to the legacy; (b) the residuary real and personal estate of the testator would be released from all liability in respect of the legacy.

Edward Clayton, K.C., and *Stafford Crossman* for the plaintiff, the Public Trustee.

H. O. Danckwerts (*Austen-Cartmell* with him) for the charities interested in the testator's residue.

Courthope Wilson, K.C., and *E. M. Winterbotham* for the infant.

EVE, J.—I do not think there is any authority, statutory or otherwise, which would justify me in answering the questions propounded by this summons in the affirmative. Those who argue in support of the affirmative answer contend that the reasoning on which the decision in *Re Hall* (1) is founded leads to this conclusion, that in the case of a vested legacy payable immediately, but which, either owing to the absence of the legatee beyond the seas or owing to his being an infant, cannot in fact be paid, it is competent for the executor to set aside the legacy; and that, if he so does, and invests it in the same manner in which it would be invested if it were subject to the control of the court, he not only frees himself from any personal liability to the legatee, but is thereupon enabled to distribute the residue without the recipients thereof being liable to make good to the legatee any deficiency if the investments in which the sum so set aside is laid out happen to depreciate before the date at which the legacy is actually payable. I do not think that either of these results follows from anything that was said in *Re Hall* (1). I do not read the judgment of ROMER, L.J., as it has been suggested that it ought to be read—namely, as drawing a distinction between investing a vested legacy and setting aside a sufficient sum to secure a contingent legacy. In both cases he is, I think, referring to the appropriation of a sum of money sufficient to secure the legacy; not to the setting aside of the legacy itself, but to the setting aside and investment of a sum reasonably anticipated to be sufficient, as he puts it, "to answer" the legacy. When he speaks about appropriating a sum sufficient

to answer the legacy and investing a fund to answer the legacy, he means, I think, the same thing as when he speaks, in a later part of his judgment, of a fund set apart to answer "or secure" the legacy. I do not think he intended to convey the meaning that the setting aside of a sum exactly equivalent to the legacy would be sufficient in either case, but, even if he did mean that, the only result is that, if in the view of the court the executor has done that which is reasonable before distributing the residue, the court will in all probability hold him free from any personal liability to the legatee. The lord justice does not anywhere suggest, nor do I think that it can reasonably be gathered from anything he said, that the setting aside or appropriation of such a sum, whether it be the exact amount of the legacy or a larger amount, will free the residue and discharge the residuary legatees from all liability. The object of this application is to obtain a decision by which the executor will not only be protected from personal liability on setting aside and investing as proposed the amount of the legacy, but by which also the residue will be cleared and the residuary legatees be discharged from all further liability to the pecuniary legatee.

In my opinion, the only way in which those results can be brought about is by payment of the legacy into court under s. 42 of the Trustee Act, 1893. *Re Salaman* (2), which followed *Re Hall* (1) and was determined by the learned judge whose decision in *Re Hall* (1) was reversed, is an authority for this conclusion. Two other methods by which the same result might be brought about are there indicated, the one by the consent of a legatee competent to give such consent, and the other by an order of the court approving a particular appropriation in an administration action. Neither of these methods is available here; there is not a legatee competent to give the necessary consent and there is no administration order made or asked for, and in this position of affairs I am of opinion, as I have already said, that the only way in which the executor can escape any possible liability and free the residue is by payment into court of the amount of the legacy under s. 42 of the Act of 1893. In so saying, I have anticipated the answer to two further arguments which were addressed to me and with which I must deal. By the first it was suggested that by virtue of the combined effect of ss. 1 and 50 of the Trustee Act the executor as a trustee within the meaning of the Act could treat the amount of the legacy as moneys held in his hands on trust, and then invest them in accordance with the provisions of s. 1. That is an ingenious argument, but, in considering whether it is well founded, it must be borne in mind that s. 42 of the same Act has been held to replace s. 32 of the Legacy Duty Act of 1796, a section framed over a century and a quarter ago to meet this very difficulty, and if in fact the difficulty can be surmounted so readily by the combined effect of two other sections in the Act the interpretation of s. 42 as one intended to deal with the same state of things as was dealt with by the earlier Act, seems a little superfluous. The real point is how can the executor get a discharge for the moneys, and where the statute indicates a means for obtaining such discharge, I do not think one is justified in straining the language of other sections for the purpose of finding out whether the same result can be brought about by means of the combined effect of two other sections of the same statute. Then it is said that if the results arrived at cannot be arrived at by these means they may possibly be reached under s. 4 of the Land Transfer Act, 1897. In this particular case that is impracticable, because here the guardian of the infant is not prepared to give the consent without which the section cannot be put into operation in the case of an infant legatee; but, inasmuch as this is in the nature of a test case, I should not wish to dispose of this argument on that ground alone. It does not appear that the section has ever been put into operation as regards personalty, at any rate; there are no rules prescribing the mode of making the valuation provided for, nor has any time within which interested parties may apply to the court been fixed. In these circumstances and at this distance of time, nearly twenty-three years after the Act was passed, I should in any case feel some difficulty in imposing on the section

the construction contended for, but I think the real answer to the argument is that what is contemplated being done in this and similar cases—the investment of the legacy in securities and then the appropriation of these securities in satisfaction of the legacy—is not strictly the appropriation of any part of the residuary estate of the deceased in satisfaction of the legacy and is not therefore a transaction of the nature contemplated by this section, nor do I think it could be held that setting aside and investing the sum of money representing the legacy was an appropriation contemplated by the section. In my opinion the section has no application to such cases as are now under consideration.

I fully appreciate that it is the desire to avoid expense which has prompted this application, and that many wish that effect shall be given to it if possible; but it must be borne in mind that, although when the amount of a legacy has been paid into court the legatee will ultimately have to incur the expense of getting it out, he has had in the meantime the security which the fact of the moneys being in court gives him. He has the advantage, an advantage and security, it is true, which is possibly no greater than the advantage and security which he would have if the money remained in the hands of the Public Trustee, but all estates are not yet being administered by the Public Trustee, and there have been, I am sorry to say, many instances where it would have been far better for a legatee, and not infrequently a legatee of a very small amount, if the executor had recognised the propriety of paying the legacy into court, so freeing himself and the estate from any liability in respect thereof, and securing to the legatee the ultimate payment of that which the testator intended him to have.

Solicitors: *Watson, Sons & Room; Treasury Solicitor; Official Solicitor.*

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

STOKES *v.* WHICHER

[Chancery Division (Russell, J.), January 29, 30, February 3, 4, 5, 1920]

[Reported [1920] 1 Ch. 411; 89 L.J.Ch. 198; 123 L.T. 23; 64 Sol. Jo. 292]

Sale of Land—Memorandum—Deficiency in memorandum supplied by second document—Omission of name of purchaser—Connecting memorandum with cheque signed by purchaser and with original document of which memorandum a copy—Oral evidence.

Negotiations for the purchase of land by S. took place between S. and C., the agent for W., the owner. A typewritten document was prepared by C., headed "Contract" and in the following form: "I agree to purchase [the land, which was described] for the sum of £2,000. I will pay £50 deposit and will complete within three months, but, should I not be able to complete at the end of the third month, I agree to pay five per cent. per annum on the balance of the purchase money. . . . The vendor must show a good marketable title." A carbon duplicate of this document was taken. The typewritten document was signed by S. and the duplicate by C. as "agent for W., vendor," S. gave to C. a cheque signed by him for the deposit (and a further amount in respect of articles bought from C.), and C. signed on the duplicate a receipt for the £50. W. refused to carry out the contract, and pleaded that the duplicate on which S. sued was not a sufficient memorandum to satisfy the Statute of Frauds as it did not contain S.'s name as purchaser.

Held: the requirements of the Statute of Frauds were satisfied because (a) the duplicate of the documents could be read with the cheque signed by S. so as to identify the purchaser; and (b) the duplicate indicated the existence of the original document which could be read with the duplicate, thus identifying

the purchaser; and (c) oral evidence was admissible to show that the £50 deposit referred to in the duplicate was paid by S.

Long v. *Millar* (1) (1879), 4 C.P.D. 450, and *Carr* v. *Lynch* (2), [1900] 1 Ch. 613, applied.

Notes. The Statute of Frauds, 1677, s. 4, was replaced so far as it relates to land by the Law of Property Act, 1925, s. 40.

Considered: *Burgess* v. *Cox*, [1950] 2 All E.R. 1212; *Turner, Ltd.* v. *Hatton (Bradford), Ltd.*, [1952] 1 All E.R. 1286; *Timmins* v. *Moreland St. Property Co.*, [1957] 3 All E.R. 265. Referred to: *Hill* v. *Hill*, [1947] 1 All E.R. 54; *Fowler* v. *Bratt*, [1950] 1 All E.R. 662.

As to memorandum of contract for the sale of land, see 8 HALSBURY'S LAWS (3rd Edn.) 93 et seq.; and for cases, see 40 DIGEST (Repl.) 21 et seq.

Cases referred to:

(1) *Long* v. *Millar* (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 27 W.R. 720, C.A.; 40 Digest (Repl.) 25, *113*.

(2) *Carr* v. *Lynch*, [1900] 1 Ch. 613; 69 L.J.Ch. 345; 82 L.T. 381; 48 W.R. 616; 12 Digest (Repl.) 166, *1075*.

(3) *Allen* v. *Bennet* (1810), 3 Taunt. 169; 128 E.R. 67; 12 Digest (Repl.) 156, *998*.

(4) *Baumann* v. *James* (1868), 3 Ch. App. 508; 18 L.T. 424; 32 J.P. 643; 16 W.R. 877, L.JJ.; 12 Digest (Repl.) 157, *1006*.

(5) *Pearce* v. *Gardner*, [1897] 1 Q.B. 688; 66 L.J.Q.B. 457; 76 L.T. 441; 45 W.R. 518; 13 T.L.R. 349, C.A.; 40 Digest (Repl.) 25, *111*.

(6) *Oliver* v. *Hunting* (1890), 44 Ch.D. 205; 59 L.J.Ch. 255; 62 L.T. 108; 38 W.R. 618; 12 Digest (Repl.) 181, *1223*.

(7) *Sheers* v. *Thimbleby & Son* (1897), 76 L.T. 709; 13 T.L.R. 451; 41 Sol. Jo. 558, C.A.; 12 Digest (Repl.) 157, *1004*.

(8) *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4; 43 L.J.Ch. 472; 22 W.R. 585; 40 Digest (Repl.) 27, *121*.

(9) *Sale* v. *Lambert* (1874), L.R. 18 Eq. 1; 43 L.J.Ch. 470; 22 W.R. 478; 40 Digest (Repl.) 29, *134*.

(10) *Plant* v. *Bourne*, [1897] 2 Ch. 281; 66 L.J.Ch. 643; 76 L.T. 820; 46 W.R. 59; 13 T.L.R. 470; 41 Sol. Jo. 606, C.A.; 17 Digest (Repl.) 295, *997*.

Also referred to in argument:

Last v. *Hucklesby* (1914), 58 Sol. Jo. 431, C.A.; 40 Digest (Repl.) 25, *112*.

Wylson v. *Dunn* (1887), 34 Ch.D. 569; 56 L.J.Ch. 855; 56 L.T. 192; 51 J.P. 452; 35 W.R. 405; 40 Digest (Repl.) 25, *110*.

Taylor v. *Smith*, [1893] 2 Q.B. 65; 61 L.J.Q.B. 331; 67 L.T. 39; 40 W.R. 486; 36 Sol. Jo. 306, C.A.; 12 Digest (Repl.) 152, *969*.

Coombs v. *Wilkes*, [1891] 3 Ch. 77; 61 L.J.Ch. 42; 65 L.T. 56; 40 W.R. 77; 7 T.L.R. 592; 40 Digest (Repl.) 27, *122*.

Ogilvie v. *Foljambe* (1817), 3 Mer. 53; 36 E.R. 21; 40 Digest (Repl.) 36, *198*.

Lobb v. *Stanley* (1844), 5 Q.B. 574; 114 E.R. 1366; 12 Digest (Repl.) 174, *1142*.

Action.

In November, 1918, Ernest George Whicher was the owner of an old freehold brewery known as the Kingston Brewery at Kingston Cross, Portsmouth, which he proposed to sell, and on Nov. 18 he put an advertisement in a local paper as to the property in which he referred intending buyers to Messrs. Cross and Cross, under which name Conyngham Peter Cross carried on the business of a house agent and furniture dealer in the neighbourhood of the brewery. Whicher saw Cross and gave him particulars of the premises and said that he wished to obtain £3,000, but would take £2,500. No offers followed this advertisement, which was repeated on subsequent occasions, and Whicher subsequently told Cross that he would accept £2,000, if a better price could not be obtained. In February, 1919, Richard William Grant Stokes, a local builder, applied to Cross and offered £1,700 for the property.

Negotiations ensued and Stokes eventually agreed to pay £2,000 and offered to pay £50 as deposit. These terms were submitted to Cross by Whicher, who desired that if possible he should obtain a deposit of £100. On Feb. 24 Stokes came to Cross' shop and made a purchase of furniture to the value of £12. Cross then dictated to his typist a document in the following words.

> Contract.—February 24, 1919.—I agree to purchase the Kingston Brewery premises and land adjoining together with the shop and cottage which cover the part of the plan coloured pink for the sum of two thousand pounds (£2,000). I will pay fifty pounds (£50) deposit, and will complete within three months, but, should I not be able to complete at the end of the third month, I agree to pay five per cent. per annum on the balance of the purchase-money, but in any case I will settle at or before the end of six months from this date. The vendor must show a good and marketable title.

The alteration in the document arose from the fact that Cross put the sum of £100 in it hoping to get Stokes to pay that amount of deposit, but he refused to do so and the alteration was made before signature. The typist at the same time took a carbon duplicate. This document was signed by Stokes, and Cross at the same time signed the duplicate in the following way :

> CONYNGHAM PETER CROSS (CROSS and CROSS),
> Agent for E. G. WHICHER, Esq., Vendor.
> And he also wrote on the duplicate a receipt in these terms :
> The above-mentioned fifty pounds (£50) received with thanks.
>
> C. P. | 1½d. stamp | CROSS.

Stokes gave Cross a cheque for £62 drawn by himself, to include the £50 and the £12 for the furniture which he had purchased. The original signed by Stokes was kept by Cross, and Stokes took away the duplicate signed by Cross with the receipt upon it. Cross informed Whicher by telephone that the contract had been signed, and Whicher came to Cross' office a day or two later and took away a copy of the contract. There was some conflict of evidence between Cross and Whicher, but RUSSELL, J., held that Cross' statement was to be accepted as above set out. A few days afterwards Whicher had an offer through other house agents of £2,500 for the premises which he accepted, and refused to carry out the Stokes' contract.

Stokes then brought an action for specific performance, and Whicher by his defence denied that Cross had authority to sell at the price he did or to accept £50 deposit, and also contended that the document signed did not contain any agreement by him to sell, and that the duplicate on which Stokes sued was not a sufficient memorandum within the Statute of Frauds as it did not contain the name of the purchaser. Stokes contended that the original signed by him and the cheque he had given to Cross could be connected with the duplicate to form a complete memorandum. A number of witnesses were called partly as to the authority of Cross to contract, and as to the circumstances under which the documents were executed.

Clauson, K.C., and *W. M. Hunt*, for the plaintiff, the purchaser.
Maugham, K.C., and *Dighton Pollock*, for the defendant, the vendor.

RUSSELL, J., reviewed the evidence given by the plaintiff and his witnesses, and by the defendant and considered the documents, and decided that Cross had authority as agent for the defendant to bind him by a contract, and that the document signed by Cross as such agent contained an agreement by the defendant to sell the property. HIS LORDSHIP continued : That leads me to the remaining point. It is said that, assume it to be so, yet there is not a sufficient memorandum signed by Whicher or his agent within the Statute of Frauds, because the document

does not say who the purchaser is, but only says "I." First, the question is whether I can ascertain, either from the document itself, or with the assistance of properly admissible evidence, or from some other document sufficiently connected with it to be read with it, who is meant by "I." Various authorities have been referred to. I will not refer to all of them. The most important is *Long* v. *Millar* (1). This was an action by a purchaser against the alleged vendor. The purchaser had signed a document containing all the terms of the purchase; the only document signed by the defendant was a receipt for the deposit. It was in the following terms: "Received of Mr. George Long the sum of £31 as a deposit for the purchase of three plots of land at Hammersmith." That document, although it contained the purchaser's name, and some description of the land sold, contained nothing from which the price could be ascertained. The £31 might be any percentage of the purchase money, and it was argued that there was no sufficient memorandum there within the statute. But the court held that there could be got out of the document, though not on the actual face of it, a reference to some other document or transaction. The lords justices read the receipt as a reference to a deposit on an agreement to purchase, and then said: We are at liberty to inquire what that agreement is, and we find it to be a document in writing; it is an agreement, therefore, referred to in the receipt, and the two can be read together. That is what the case decided. BRAMWELL, L.J., puts it in this way (4 C.P.D. at p. 454):

> "But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt is put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word 'purchase,' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence."

BAGGALLAY, L.J., agrees with him (ibid. at p. 455):

> "The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that writing may be identified by verbal evidence. I think that in the present case by the words, 'purchase of three plots of land,' the receipt sufficiently refers to the document signed by the plaintiff."

THESIGER, L.J., puts it on the same ground (ibid. at p. 456):

> "This document is somewhat informal, and does not contain such language as we should expect a lawyer to use; nevertheless it contains all the terms necessary to create a valid contract except the name of the vendor; and the receipt contains the word 'purchase,' which must refer to the purchase of the plots of land mentioned in the document signed by the plaintiff. If we read the two instruments together, we shall not be unduly straining the law by holding that the two, taken together, form a complete contract; our decision will not go beyond the decisions in *Allen* v. *Bennet* (3) and in *Baumann* v. *James* (4). If the two documents can be connected together, the objection fails that no vendor is named. These documents were meant to be exchanged between the parties; the one was drawn up with the intention that it should operate as a complete agreement, the other contained an acknowledgment of the payment of the deposit; they were respectively signed by the parties, both of whom, it must be taken on the findings of the jury, intended to bind themselves personally."

Long v. *Millar* (1) comes to this, that, if you can spell out of the document a reference in it to some other document, you are at liberty to give evidence as to what that other document is, and, if that other document contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together. *Pearce* v. *Gardner* (5) was another case referred to. There the Court of Appeal held that you could unite and read together two documents which

A were physically separate, viz., a letter and the envelope in which it had been contained. The principle seems to be that the existence of a letter sent by post presupposes the existence of an envelope containing it; therefore, the two can be read together, because there is an inferential reference in the letter to the envelope. *Carr* v. *Lynch* (2), before FARWELL, J., which I will refer to later on another point, belongs to a rather different class of cases.

B Counsel for the purchaser has put his case on a higher platform, and has said that, even if there is no reference, either inferential or otherwise, in the second, the defective, document to the first, the authorities go to show that if, placing the two documents side by side, viz., on an inspection of them, one finds such a physical state of affairs that it is obvious that they were produced at the same time, and that they originally, to that extent, formed a single document, one C can take them and read them together, even though one document does not, by inference or in terms contain a reference to the other. There is some colour for that proposition in *Oliver* v. *Hunting* (6), before KEKEWICH, J., and more still in the later case of *Sheers* v. *Thimbleby & Son* (7). However that may be, I only propose to decide this case on the broad ground, because I have come to the conclusion that, on this document as it stands, I can find in it a sufficient reference D to another document which contains the necessary terms.

The difficulty caused by the Statute of Frauds in this case can be overcome in two or three ways. First, I think this is a document which shows on its face a payment on the same date, Feb. 24, 1919, of £50, part of the purchase money of £2,000, as a deposit to the vendor. There has been produced a cheque for £62, signed by the plaintiff in favour of Messrs. Cross and Cross, and bearing the same date, E and that cheque has been proved to include the £50. I am of opinion that I am at liberty to connect these two documents, and I read them together, and so ascertain the purchaser's name, and thus I get what, in my view, is a sufficient memorandum under the statute.

Another way in which the difficulties of the statute can be answered, in my opinion, is this: the document is, as is quite obvious to the eye, a carbon duplicate F of another document. It is called a contract. The parties to the contract are the vendor, who signs that particular document, and some one else who is there mentioned as "I." That involves that "I" has contracted, for otherwise there would be no contract. "I" must have bound himself, otherwise the document could not be called, on its face, a contract. Therefore, in the document itself, I think, I get a reference to some agreement or transaction binding "I." That being G so, a document is produced before me bearing the same date, in the same words, with the same alterations in the body of it, also called a contract. It is obviously the original of which the other document is the duplicate. The verbal evidence in the case proves that to be so, and that they were executed and exchanged at the same time; but apart from that evidence, I am of opinion, finding as I do a reference in the document to some other transaction which is binding on "I," H that I am at liberty to inquire what that transaction was, and I find that was a transaction evidence in a written document which contains all the terms, and includes the name of the purchaser; and so, in my opinion, I may connect those two documents and read them together as one. So, again, I find a sufficient memorandum within the Statute of Frauds.

I There is another way in which the same result may follow. This document, as I have construed it, is complete, and a sufficient memorandum under the statute except in one particular, viz., that it does not contain the purchaser's name. To be a memorandum within the statute a document need not contain the purchaser's name; it is sufficient—for that there is abundant authority—if the purchaser is identified or capable of identification. Does this document sufficiently identify "I"? I think it does. Taking the document as a whole, it shows that "I" is the person who has undertaken and discharged the obligation to pay £50, and it has been proved that the person who paid the £50, was Stokes; so I am entitled,

I think, to take that verbal evidence and so identify the person who is described as "I," described and capable of being identified as the person who has undertaken and discharged that obligation. I am justified in doing that on the authority of *Carr* v. *Lynch* (2). That was a case of a letter written and signed by the proposed vendor—it was really a case of granting or renewing an extension of a lease, but I call him the vendor, beginning "Dear Sir," and there was no envelope to assist us, because it was apparently handed across a table. It was in these terms:

> "In consideration of you having this day paid me the sum of £50 (fifty pounds), I hereby agree and undertake to grant you or your assigns a further lease of 24 years (twenty-four) *W. L.* of the premises known as the Warden Arms, 27 Warden Road, Kentish Town, London, N.W., to run immediately after the term granted by the now existing lease dated the 24th day of June, 1883, and made between William Lynch and Charles Smith of the premises, such new lease to be subject to the same rental, £50 (fifty pounds), and to contain similar covenants and conditions as are contained in the now existing lease. (Signed) William Lynch."

Then there followed these words, "Witness, Arthur Frederick Reeves Jayne." Jayne was the proposed purchaser or lessee. Two or three points arose, or might have arisen; one, whether the proposed lessee or purchaser was named. It was argued that the document was sufficient because the memorandum identified the purchaser, and on that FARWELL, J., decided the case. He said ([1900] 1 Ch. at p. 615):

> "I should be sorry if I had to allow the defendant's plea of the Statute of Frauds to prevail in this case. According to the rule as stated in *Potter* v. *Duffield* (8), the statute is satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. In this case it is plain on the memorandum that the lease is to be granted to the person who paid the £50. This is quite as good a description as the word 'proprietor,' which was held sufficient in *Sale* v. *Lambert* (9), and it is admitted in the defence that this person was Jayne. If further authority is wanted, there is the recent case of *Plant* v. *Bourne* (10). Id certum est quod certum reddi poest."

I think, following that, and applying it to the case before me, I am at liberty to ascertain the identity of "I" by seeing who it is who fills the description of "I" in this document, viz., as being the person who has undertaken to discharge the liability to pay £50. *Carr* v. *Lynch* (2) is a little interesting, too, on another aspect of the case before me, in this regard. I have decided on the construction of the document that the signature of the vendor was his signature as a party to be bound. In *Carr* v. *Lynch* (2) the document was signed by the purchaser Jayne, and had on the face of the document the purchaser's name, though not in the capacity of purchaser; he was described as a witness; and the report states (ibid. at p. 614):

> "The plaintiff was prepared if necessary to call evidence to prove that Jayne was intended to sign as a party to be bound, and that the word 'witness' was left in by mistake, the memorandum having been drawn on the assumption that a witness was necessary."

The defendant admitted the receipt of £50, and FARWELL, J., in his judgment, says (ibid. at p. 615): "The alleged mistake as to the word 'witness' might also have been relied on if it had been necessary to hear the evidence." So, apparently, FARWELL, J., was prepared, if necessary, to hear evidence explaining how it was that Arthur Frederick Reeves Jayne came to be a witness, and to show that that was a mistake; he had not really signed as witness, but had signed as a party, intending to be bound. On all these grounds I think that the defendant fails, and there must be a decree for specific performance.

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